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Evaluating the law in practice

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# Terrorist Precursor Offences: Evaluating the Law in Practice

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**Abstract:** The Terrorism Acts of 2000 and 2006 created a suite of new precursor offences related to terrorism. This article critically evaluates these provisions in light of how they have been interpreted and applied in practice. It focuses on three especially important offences: preparing acts of terrorism, disseminating terrorist publications, and collecting information of a kind likely to be useful to a terrorist. All three offences, it is concluded, have proved to be problematically broad in their scope, and to some extent avoidably so. Notable problems include the offences' extension to conduct that carries little to no real risk of contributing to future terrorist attacks, their implications for innocent or even positively valuable conduct, and their likely consequent chilling effects on suspect communities. Suggestions are considered as to how these concerns might be addressed, while still respecting the offences' underlying purpose and arguable principled core.

## 1. Introduction

In the Terrorism Acts of 2000 and 2006, Parliament created a suite of new criminal offences related to terrorism. The aim of this legislation was not to criminalise terrorist attacks themselves – which were, obviously, already caught by the existing law – but rather to pre-empt them more effectively. Its strategy was to create a range of new precursor offences, which extend criminal liability to even earlier points in potential terrorist plots than do the traditional inchoate offences. The new offences include expansive provisions related to terrorist organisations,<sup>1</sup> financing of terrorism,<sup>2</sup> the preparation and encouragement of terrorism,<sup>3</sup> possession of terrorism-related

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<sup>1</sup> Terrorism Act 2000, ss. 11-13.

<sup>2</sup> Terrorism Act 2000, ss. 15-18.

<sup>3</sup> Terrorism Act 2006, ss. 1, 2 and 5.

materials,<sup>4</sup> and failure to provide information about suspected terrorist activity.<sup>5</sup> All are serious offences, carrying sentences of years, decades, or even life imprisonment.

These developments have attracted the attention of legal theorists, who regard them as emblematic of a broader “preventive turn” in contemporary criminal law.<sup>6</sup> Yet they have still attracted surprisingly little broader public and scholarly scrutiny. In particular, even after two decades of experience, almost nothing has been said about their implementation in practice,<sup>7</sup> or the extent to which this has reflected their apparent theoretical problems. How have prosecutors used the expansive powers that these offences afford them, and how have courts interpreted their often sweeping terms? Given their implementation, are they a justifiable use of the criminal law? And if not, what could be done to address this? To date, these questions have not been examined systematically. This article aims to fill this gap, by critically evaluating the terrorism offences in light of how they have been interpreted and applied.

To facilitate depth of analysis, we will focus on three case studies: the offences of preparing acts of terrorism, disseminating terrorist publications, and collecting information of a kind likely to be useful to a terrorist. The analysis below is based on an examination of all reported cases relating to these offences. They are apt case studies because they are central to the United Kingdom’s current counter-terrorism strategy,<sup>8</sup>

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<sup>4</sup> Terrorism Act 2000, ss. 57 and 58.

<sup>5</sup> Terrorism Act 2000, ss. 19, 38B and 39.

<sup>6</sup> See e.g. A Ashworth and L Zedner, *Preventive Justice* (Oxford University Press 2014) 98–101; H Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press 2017) 156–165; RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 322–327; N Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016) 147–154; P Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) 142–152; V Tadros, ‘Justice and Terrorism’ (2007) 10 *New Criminal Law Review* 658. For a recent, related analysis, characterising the offences as an example of a trend towards “counter-law”, see P Edwards, ‘Counter-Terrorism and Counter-Law: An Archetypal Critique’ (2018) 38 *Legal Studies* 279.

<sup>7</sup> Clive Walker’s work is notable among research on terrorism legislation for its attention to the law in practice. Even Walker, however, has said comparatively little about the substantive criminal law. For his observations on the provisions examined here, see C Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (3rd edn, Oxford University Press 2014) 221–228.

<sup>8</sup> This is evident from successive annual reports of Independent Reviewers of Terrorism Legislation: see e.g. the remarks in M Hill, *The Terrorism Acts in 2016* (2018) 68–69. Also, as we shall see, two of the offences examined here were only recently re-defined, and their maximum penalties increased: Counter-Terrorism and Border Security Act 2019, ss. 3 and 5.

and are thus among the most frequently prosecuted terrorism offences.<sup>9</sup> They are also examples of types of precursor offence that have attracted broader critical attention. Recent theoretical work has developed sophisticated frameworks for evaluating these offences. Social scientific research on terrorism has also developed significantly since their enactment. Insights from both bodies of work are drawn upon in evaluating the offences below.

The three offences are examined in turn in sections 2 to 4, before section 5 draws some broader conclusions. What emerges is the role of the courts in failing to address – and sometimes even exacerbating – the problems with these offences. In some cases, these problems are an inevitable result of the offences’ drafting. But in others, they are due to courts’ interpretive choices, and to prosecutors’ pursuit of at least some cases on the offences’ outer reaches. The problems are not necessarily ones of principle. Although some would argue that the offences are objectionable at this level, these arguments are neither universally accepted nor clearly decisive. The clearer problem is rather that the offences’ costs outweigh their benefits at their margins. All catch conduct that carries little to no real risk of contributing to future terrorist attacks. All affect conduct that is innocent or even positively valuable, and create significant risks of chilling effects for suspect communities. Even if they are to be retained in approximately their current form, any future reform should thus aim to narrow their scope.

## **2. Preparing Acts of Terrorism**

The centrepiece of the UK regime of terrorism offences is the offence of preparing acts of terrorism.<sup>10</sup> One commits this offence if one intends either to commit or to assist acts of terrorism, and one “engages in any conduct in preparation for giving effect to [this]

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<sup>9</sup> In fact, they are the three most frequently prosecuted offences that are still in consistent use, and that do not form part of a more complex regime (e.g. those relating to terrorist financing or proscribed organisations): see Home Office, *Operation of Police Powers under the Terrorism Act 2000: Year to 31 March 2019: Annual Data Tables* (2019), table A.05a. Note that the offence of possession for terrorist purposes, under s. 57 of the Terrorism Act 2000, has effectively been supplanted by the offence of preparing acts of terrorism.

<sup>10</sup> Terrorism Act 2006, s. 5.

intention". The required *mens rea* for the offence is an intention to commit or assist one or more acts of terrorism, in a general sense; one need not intend to commit or assist any particular such act.<sup>11</sup> The *actus reus* can then be satisfied by any conduct whatsoever that is preparatory to such an intention. The offence carries a maximum sentence of imprisonment for life.<sup>12</sup>

The most remarkable feature of this offence is its sheer breadth. Since it catches any preparatory conduct, it can be applied at any stage of terrorist plots between conception and completion. At one extreme, it catches preparation so advanced that it would also constitute an attempted terrorist act (driving a van into a pedestrian area; putting a bomb on a bus). At the other, it catches preparation at such an early stage that it would appear outwardly to be entirely innocent (researching van hire prices; downloading a bus timetable from the internet). In practice, both these extremes have so far been avoided. The most serious cases falling within the offence have typically been prosecuted as conspiracies.<sup>13</sup> And the least serious cases, where no concrete progress has been made towards a terrorist goal, have not led to prosecutions. Between these extremes, however, the offence has been used to prosecute a wide variety of conduct. The case law is striking for the variety in both the type of conduct targeted and the level of its culpability.<sup>14</sup>

The offence has been used for both direct preparation of terrorist acts and what one might call the "preparation of preparation". Thus, prosecutions have often involved such conduct as running or undertaking terrorist training,<sup>15</sup> or obtaining or providing supplies,

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<sup>11</sup> Terrorism Act 2006, s. 5(2).

<sup>12</sup> Terrorism Act 2006, s. 5(3).

<sup>13</sup> For example, conspiracy to murder or to cause explosions: see *R v Kahar* [2016] EWCA Crim 568, [2016] 1 WLR 3156 at [30]–[31]. There are no tactical advantages to using conspiracy charges in these cases, rather than charges under the 2006 Act; the practice may simply reflect a view about appropriate labelling.

<sup>14</sup> This is reflected in the sentencing guidelines for the offence: see Sentencing Council, *Terrorism Offences: Definitive Guideline* (2018) <[www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-offences-definitive-guideline-Web.pdf)> accessed 14 February 2020, 5–10. Level of preparation is the main factor affecting culpability under the guideline, and ranges from "very limited" in the lowest category to "complete" or close to complete in the highest.

<sup>15</sup> See e.g. *Re Coney's Application for Bail* [2012] NIQB 110; *R v Sarwar* [2015] EWCA Crim 1886, [2016]

such as weapons, military equipment, and explosive materials.<sup>16</sup> But they have also involved, for example, organising travel abroad with a view to receiving training,<sup>17</sup> or downloading information about supplies from the internet.<sup>18</sup> They have even involved merely discussing these things with others, or contacting others for the purpose of discussing them. This has occurred most often in the context of terrorist groups with many participants, who are involved in a plot to varying degrees: prosecutors will charge all participants with preparation, even those whose involvement extends only to discussion of the plan.<sup>19</sup> But occasionally, contacting others with a terrorist purpose has been the object of prosecution by itself. In the case of *Ulhaq*, for example, contacting an Islamic State fighter sufficed for a preparation conviction, even though the defendant never joined that group or became involved in its plans.<sup>20</sup>

Are such broad-ranging preparation offences a legitimate use of the criminal law? At the level of principle, commentators disagree. For some, such as Alexander and Ferzan, the criminalisation of preparatory conduct is inherently illegitimate. Preparatory actors, they point out, have not yet caused or unleashed any risk of harm, and they can avoid doing so simply by changing their minds. Therefore, we should not punish preparatory actors<sup>21</sup> – or at least, we should avoid intervening until the last possible moment at which we can thwart their plans.<sup>22</sup> Others argue, by contrast, that preparatory conduct

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1 Cr App R (S) 54.

<sup>16</sup> See e.g. *R v Tabbakh* [2009] EWCA Crim 464, [2010] Crim LR 79; *R v Roddis* [2009] EWCA Crim 585; *R v Khan (Parviz)* [2009] EWCA Crim 1085, [2010] 1 Cr App R (S) 35; *R v Khan* [2013] EWCA Crim 468.

<sup>17</sup> See e.g. *R v Dart* [2014] EWCA Crim 2158.

<sup>18</sup> See e.g. *R v Iqbal* [2014] EWCA Crim 2158.

<sup>19</sup> This was explicitly affirmed in *Iqbal* (ibid). The Court of Appeal emphasised that both more and less serious involvement can suffice for an offence under section 5; it did not matter that, in the case of some of the defendants, their involvement had never progressed beyond discussion.

<sup>20</sup> *R v Ulhaq* [2016] EWCA Crim 2209.

<sup>21</sup> L Alexander and KK Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009) ch. 6; L Alexander and KK Ferzan, 'Danger: The Ethics of Preemptive Action' (2012) 9 Ohio State Journal of Criminal Law 637; L Alexander and KK Ferzan, 'Risk and Inchoate Crimes: Retribution or Prevention?' in GR Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012).

<sup>22</sup> S Wallerstein, 'Criminalising Remote Harm and the Case of Anti-Democratic Activity' (2007) 28 Cardozo Law Review 2697. For other arguments for similar results, see e.g. P Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in RA Duff and others (eds), *The Structures of Criminal Law* (Oxford University Press 2011) 214–220; P Asp, 'Preventionism and Criminalization of Nonconsummate Offences' in A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 35–45.

can sometimes be justly punished. Acting on an intention to cause wrongful harm, these commentators claim, is arguably wrong in itself.<sup>23</sup> Alternatively, it is wrong to the extent that, by taking steps towards that intention, one makes it more likely that the harm will be caused.<sup>24</sup> On these views, offences of preparation are not inherently illegitimate – although as we shall see, we should still be cautious about criminalising preparation at early stages.

Which of these views we should adopt cannot, of course, be settled by examining current practice. However, many people's instinct is that preparatory conduct is sometimes legitimately punishable, and cases at the more serious end of the terrorist preparation offence illustrate why. Consider the 2013 case of *Khan*, which involved a large network of prospective terrorists from across the country.<sup>25</sup> Over several months, this group developed plans for attacks, including one on the London Stock Exchange. They had made plans for recruitment, obtaining supplies, and setting up training camps, and had begun arranging the details of particular possible attacks. Some of them had got as far as building a bomb before they were arrested. Although this conduct falls short of being a criminal attempt, many would have felt discomfort about the group escaping any form of criminal liability. Such outcomes force enforcement authorities to choose between stopping terrorist plots and securing conviction of the plotters. But that, one might think, is too stark a choice.<sup>26</sup> This feeling suggests sympathy for the view that

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<sup>23</sup> See e.g. RA Duff, 'Risks, Culpability and Criminal Liability' in GR Sullivan and I Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012); V Tadros, *Wrongs and Crimes* (Oxford University Press 2016) ch. 16. A variation on this view holds that, while acting on an intention to do wrong can sometimes be wrongful, some types of conduct remain inherently innocent: AP Simester, 'Prophylactic Crimes' in GR Sullivan and I Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012) 73–76.

<sup>24</sup> D Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (2007) 20 *Canadian Journal of Law and Jurisprudence* 113, 117–126; S Bock and F Stark, 'Preparatory Offences' in K Ambos and others (eds), *Core Concepts in Criminal Law and Criminal Justice: Volume I* (Cambridge University Press 2020). Note that these two views of the wrongness of preparatory conduct are potentially consistent with one another.

<sup>25</sup> [2013] EWCA Crim 468.

<sup>26</sup> The Law Commission took this consideration to be decisive in favour of retaining some criminal liability for preparation: see Law Commission, *Conspiracy and Attempts* (Consultation Paper no 183, 2007), parts 14 and 15. For the opposing view – on which preventive restrictions of liberty are sufficient, and there is no need to convict preparatory actors – see KK Ferzan, 'Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible' (2011) 96 *Minnesota Law Review* 141.

preparatory conduct can legitimately be punished in some cases.

Even if preparatory offences can be legitimate in principle, however, the criminalisation of early-stage preparation remains problematic. Generally, it is more difficult to justify criminalising the earlier than the later stages of criminal preparation, for two reasons. First, we generally have weaker reason to criminalise early-stage preparation than we do late-stage preparation. For both the dangerousness and the culpability of such conduct tend to vary depending on how far the plan has progressed. At early stages, conduct may do little or nothing to make the plan more likely to succeed. The actor's intentions may also remain vague and conditional, and may not reflect deep commitment to the planned crime. The marginal benefits of criminalising such conduct thus tend to be relatively low – in terms of both facilitating its prevention and ensuring that it is met with a censuring and punitive response.<sup>27</sup>

These generalisations hold for at least some of the conduct against which the terrorist preparation offence has been used. Admittedly, the seriousness of the planned offence must be taken into account here, and in the context of terrorism, this can of course be very high.<sup>28</sup> However, it does not follow that our reasons to criminalise terrorist preparation are especially strong. For one thing, acts of terrorism, as defined in the legislation, extend far beyond the bombings and mass murders that the label typically evokes. They also include, for example, serious damage to property and interference with electronic systems, as well as mere threats or single acts of violence.<sup>29</sup>

For another, seriousness is anyway not the sole decisive factor: it does not

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<sup>27</sup> Ohana (n 24) 117–131.

<sup>28</sup> Hence the not-unreasonable view that “defending further up the field” provides a compelling justification for special counter-terrorism powers: see David Anderson, ‘Shielding the Compass: How to Fight Terrorism without Defeating the Law’ [2013] *European Human Rights Law Review* 233, 237–240.

<sup>29</sup> These all constitute acts of terrorism if they are “designed to influence the government... or to intimidate the public”, with “the purpose of advancing a political, religious, racial or ideological cause”: Terrorism Act 2000, s. 1. An arguable problem with all the offences examined here is that their scope depends on this broad definition: see J Simon and L Zedner, ‘Countering Terrorism at the Limits of Criminal Liability in England and Wales’ in M Dyson and B Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2018) 409–411.

automatically justify criminalising conduct that is of little or no significance to the success of a potential terrorist act.<sup>30</sup> Surprisingly little research has examined which types of preparatory conduct are the best predictors of such acts. But some researchers have begun to generalise about the planning cycles through which terrorists go.<sup>31</sup> Based on their findings, we have relatively strong reason to criminalise acquiring weapons, building bombs, or final recruitment for attacks. But we have only weak reason to criminalise meetings, communications, or research into methods or targets. Even participation in terrorist training might not indicate that an attack is imminent. We should therefore question the strength of our reasons for defining and using this offence in such a broad-ranging way.

The second ground for caution about criminalising early-stage preparation is that we have *stronger* reason *against* criminalising this conduct than we do for late-stage preparation. For at early stages, criminal intention can be difficult to identify: it can be difficult to distinguish from fantasy or obsession.<sup>32</sup> Criminalising early-stage preparation therefore carries several risks. Most importantly, it carries a greater risk of unjustly convicting those who do not really intend to cause harm. But it also carries risks even for those who are not eventually convicted. Gathering evidence of intention requires intrusive investigative methods. This, in turn, risks creating chilling effects: to avoid contact with the criminal justice system, one must avoid even innocent conduct that might be regarded as suspicious. These effects will be especially severe for members of the communities on whom authorities focus, and whose security from criminal justice intervention is already relatively low.<sup>33</sup> Again, experience with the terrorist preparation offence suggests that these risks are real in this context.

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<sup>30</sup> Ohana (n 24) 139–140.

<sup>31</sup> See generally BL Smith, P Roberts and KR Damphousse, 'The Terrorists' Planning Cycle: Patterns of Pre-Incident Behaviour' in G LaFree and JD Freilich (eds), *The Handbook of the Criminology of Terrorism* (Wiley Blackwell 2017); N Bouhana and others, 'Lone Actor Terrorism: Radicalisation, Attack Planning and Execution' in A Silke (ed), *Routledge Handbook of Terrorism and Counterterrorism* (Routledge 2019) 116–120.

<sup>32</sup> See e.g. Alexander and Ferzan, 'Risk and Inchoate Crimes' (n 21) 111.

<sup>33</sup> An important point about over-breadth in terrorism legislation is that its effects will be felt primarily by these communities. This raises concerns about distributive justice, alongside the other concerns raised here: see Tadros (n 6) 679–688.

The risks arise partly from the substantive law. As we have noted, intention to commit any specific act of terrorism is not required; intention to commit “acts of terrorism” in general will suffice. Thus, in the case of *Farooqi*, the defendant was convicted of this offence and imprisoned for life, even though a lengthy undercover police operation had failed to find evidence of his involvement in any particular plot.<sup>34</sup> Moreover, as per the usual rule, intention here must include conditional intention.<sup>35</sup> That is, it will suffice that the defendant intended to commit acts of terrorism, provided that certain conditions obtain. At the early stages of criminal plans, these conditions may be numerous, and the chance of their obtaining very low.<sup>36</sup> Therefore, not only may one be convicted of this offence without being involved in a specific plot; one need not even have been likely to become involved in one. Such general and conditional intentions are more easily confused with fantasy than are firm intentions to commit a specific offence.

More importantly, risks also arise from what courts accept as evidence of terrorist intention. In early-stage preparation cases, this evidence tends to be primarily circumstantial: there may be no credible statement of terrorist intention, and this cannot be inferred from the alleged preparatory conduct itself. Key sources of such evidence have been defendants’ associations with known terrorists, and terrorism-related materials found in their possession. The latter have included such items as weapons and bomb-making ingredients, but also instructional and propaganda materials.<sup>37</sup> Contrast this with cases of later-stage preparation. In these cases, there is typically direct and unambiguous evidence of terrorist intention, and defendants therefore plead guilty.<sup>38</sup> In early-stage cases, on the other hand, intention is typically the main issue

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<sup>34</sup> *R v Farooqi* [2013] EWCA Crim 1649, [2014] 1 Cr App R 8.

<sup>35</sup> See AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (6th edn, Hart 2016) 147. It should be noted that this point has not been explicitly addressed in the case law on this offence.

<sup>36</sup> See Alexander and Ferzan, ‘Risk and Inchoate Crimes’ (n 21) 111–115.

<sup>37</sup> See e.g. *Tabbakh* [2009] EWCA Crim 464; *Roddis* [2009] EWCA Crim 585; *R v Iqbal* [2010] EWCA Crim 3215; *Coney* [2012] NIQB 110; *Ulhaq* [2016] EWCA Crim 2209.

<sup>38</sup> The evidence is often derived from covert surveillance: see e.g. *Khan* [2009] EWCA Crim 1085; *Khan* [2013] EWCA Crim 468; *Dart* [2014] EWCA Crim 2158. In *Sarwar* [2015] EWCA Crim 1886, a police investigation uncovered similar evidence after the defendant was reported missing.

contested at trial. The admissibility of circumstantial evidence as proof of terrorist intention is therefore a crucial question.

To date, the Court of Appeal has considered this question in just one short judgment, in the 2009 case of *Roddis*.<sup>39</sup> The charges in this case related to the defendant's acquisition of instructions and ingredients for making a bomb. The issue was whether this was action on a terrorist intention, or whether, as he claimed, he had acted out of fascination and morbid curiosity. Some of his conduct was arguably consistent with his being an attention-seeker with an unhealthy obsession.<sup>40</sup> However, the prosecution pointed to extremist videos found in his possession, including several videos of beheadings that were shown to the jury in edited form. The appellate court found that this evidence was both relevant and not unfairly prejudicial. A careful warning to the jury was sufficient to address its potential prejudicial effects.<sup>41</sup> And on its relevance, the court held:

The possession and content of as many as 19 beheading videos was, as it seems to us, relevant... It was inevitably part of the relevance of the material how powerful and distressing it was, because the case against the appellant was not simply that he had seen it but that he kept it and had a total of 19 similar videos. There was evidence that such videos might to an extent "do the rounds" among young people who had no terrorist intent. That was a legitimate and relevant argument available to the defence... It does not however mean that it was irrelevant to the jury to see what it was the defendant had chosen to keep.<sup>42</sup>

While the sentiment behind this decision is understandable, it is not careful enough. As always with such evidence, the key question is whether it really renders the defendant's guilt more likely, or whether it remains consistent with other hypotheses (in this case,

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<sup>39</sup> [2009] EWCA Crim 585.

<sup>40</sup> For example, he was initially arrested after having boarded a bus with a hoax bomb, wearing what were described as "an obviously false beard and glasses": [2009] EWCA Crim 585 at [2].

<sup>41</sup> [2009] EWCA Crim 585 at [14]–[15].

<sup>42</sup> [2009] EWCA Crim 585 at [13].

morbid curiosity). In this light, the admission that such videos are in more general circulation should have been seen to significantly damage the prosecution case. For combined with the extreme rarity of prospective terrorists among the general population, it implies that the probative value of such evidence is relatively low.<sup>43</sup>

This view is supported by consistent research findings both within and outwith the context of terrorism. These findings suggest that interest in extremist materials – and even actually holding extremist beliefs – are only weakly correlated with extremist behaviour.<sup>44</sup> Further research suggests that these materials are likely to have a prejudicial effect on jurors: they are likely to cause strong emotional reactions associated with a higher propensity to convict.<sup>45</sup> Shocking images such as beheading videos are especially likely to have this effect – which may not be remedied, and might even be exacerbated, by judicial warnings.<sup>46</sup> This is not to argue against any use of circumstantial evidence in proving terrorist intention. Perhaps other such evidence, such as association with known terrorists, does not carry the risks that extremist materials do. The point is rather that we should take seriously research addressing the relevance and prejudicial effects of such evidence, which might cast doubt on the admissibility of some of its types.

This point is important, because *Roddis*, while the only appeal on the point, is not an isolated case. For example, in the case of *Tabbakh*, the evidence of intention consisted *entirely* of videos and propaganda materials found in the defendant's possession, and

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<sup>43</sup> This claim would be countered to an extent if genuine prospective terrorists were very likely to possess such videos. However, the court did not argue that this was the case, and the other cases considered in this section do not suggest that it is.

<sup>44</sup> For summaries and further references, see e.g. JP Sawyer and J Hienz, 'What Makes Them Do It? Individual-Level Indicators of Extremist Outcomes' in G LaFree and JD Freilich (eds), *The Handbook of the Criminology of Terrorism* (Wiley Blackwell 2017) 49; J Monahan, 'The Individual Risk Assessment of Terrorism: Recent Developments' in G LaFree and JD Freilich (eds), *The Handbook of the Criminology of Terrorism* (Wiley Blackwell 2017) 522–523.

<sup>45</sup> J Goodman-Delahunty, 'Assessing Unfair Prejudice from Extremist Images in Terrorism Trials' in D Tait and J Goodman-Delahunty (eds), *Juries, Science and Popular Culture in the Age of Terror* (Palgrave Macmillan 2017).

<sup>46</sup> *Ibid* 114–116.

his failure to give evidence to explain these away.<sup>47</sup> Again, this was an early-stage preparation case, in which the conduct itself did not indicate a high risk of a terrorist attack. The conviction therefore turned entirely on the jury's acceptance of this evidence. If we are to be sure of avoiding unsafe convictions in such cases, greater caution is required.

Taken together, the above points also have wider implications for liberty interests. These implications are somewhat concerning even in more serious cases, given the reliance in these cases on covert surveillance. But again, they are more concerning in less serious cases. To avoid falling under suspicion, one must now avoid any conduct that authorities might take to suggest a general terrorist intention. As just noted, this might include an interest in extremist materials or contact with other suspected terrorists. For those most likely to be suspected, the offence has thus affected freedom of association and the freedom to explore controversial views. These chilling effects yield cause for concern, even if we agree that preparatory conduct might in principle be legitimately punished.

Overall, the offence of preparing acts of terrorism has proved only somewhat less broad in practice than it appears on paper. Perhaps inevitably, it has therefore been used in both more and less problematic ways. On the one hand, cases at its more serious end – involving advanced preparation for specific terrorist attacks – seem relatively unproblematic. Although some oppose offences like this in principle, others will take such cases to illustrate their justifiability. On the other hand, cases at its less serious end – involving the earliest of concrete steps towards a general and still conditional terrorist intention – demonstrate its problems. We have only relatively weak reasons to criminalise such conduct, and there are risks to prosecutions that rest primarily upon the defendant's interest in or association with extremism. This suggests that, even if we might legitimately criminalise some terrorist preparation, an offence catching any such conduct is too broad.

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<sup>47</sup> *Tabbakh* [2009] EWCA Crim 464.

Could courts do anything to address this concern? Probably not much: the scope of the preparation offence may be broad, but it is entirely clear. A future Court of Appeal should take more seriously the arguments made in *Roddis*: courts ought to question the probative value of different types of circumstantial evidence, and to consider whether warnings to juries suffice to address their prejudicial effects. But beyond this, judicial intervention is limited by the clear terms of the statute. Intention to commit any specific act of terrorism is explicitly not required. And it is likewise explicit that any preparatory action will suffice for the *actus reus*. Problematic though these elements of the offence may be, Parliament would thus need to take responsibility for any meaningful reform.<sup>48</sup>

### 3. Disseminating Terrorist Publications

The Terrorism Act 2006 created new offences related to the assistance, encouragement, and “glorification” of terrorism. The most frequently prosecuted is the offence of disseminating terrorist publications, under section 2.<sup>49</sup> The *actus reus* of this offence has two elements. First, the defendant must have disseminated a publication in a specified way. These include offering the publication for sale, posting it on the internet, and possessing it “with a view to” disseminating it, as well as actually giving, selling, lending, or otherwise distributing it to others.<sup>50</sup>

Second, what is disseminated must be a terrorist publication. These come in two varieties: publications that assist and publications that encourage terrorism.<sup>51</sup> Since the

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<sup>48</sup> Cf. R Kelly, ‘The Right to a Fair Trial and the Problem of Pre-inchoate Offences’ [2017] European Human Rights Law Review 596.

<sup>49</sup> This offence has been used much more frequently than the companion offence of encouraging terrorism, under s. 1 of the 2006 Act: see Home Office, *Operation of Police Powers under the Terrorism Act 2000: Year to 31 March 2019: Annual Data Tables* (2019), table A.05a. The two offences share many elements in common, so most of the observations below could also be applied *mutatis mutandis* to the s. 1 offence.

<sup>50</sup> Terrorism Act 2006, s. 2(2). This element of the offence has proved unproblematic, although it is worth noting that its breadth has been fully utilised: for example, some prosecutions have related to mere possession with a view to dissemination. See e.g. *R v Rahman* [2008] EWCA Crim 1465; [2008] 4 All ER 661.

<sup>51</sup> Terrorism Act 2006, s. 2(3).

offence is used mostly for publications in the latter “encouragement” category, these will be our focus here.<sup>52</sup> Publications fall into this category if they are likely “to be understood by a reasonable person as a direct or indirect encouragement or other inducement... to the commission, preparation or instigation of acts of terrorism”. These include publications that glorify terrorism, and from which “a person could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by him in existing circumstances”.<sup>53</sup> It is irrelevant, however, whether the publication in fact encourages anyone to commit or prepare terrorist acts.<sup>54</sup>

The required *mens rea* is either intention to assist or encourage terrorism by disseminating the publication, or recklessness as to these effects.<sup>55</sup> In cases of merely reckless encouragement, a defence is available: the publication “neither expressed [the defendant’s] views nor had his endorsement”, and it was “clear, in all the circumstances” that this was the case.<sup>56</sup> The maximum sentence for the offence was recently increased from seven to 15 years’ imprisonment.<sup>57</sup>

The most significant question raised by these provisions is what publications fall within the “encouragement” category – especially under the heading of “indirect encouragement”. Can a publication reasonably be understood as encouragement of terrorism simply because it might have encouraging effects? Or must its meaning or message be inherently encouraging in some way? Remarkably, these questions have almost never been considered at the appellate level – despite the lack of guidance on

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<sup>52</sup> This pattern may be due partly to the overlap between the “assistance” limb of the offence and the offence of collecting terrorist information, considered in the next section. Until recently, the latter offence carried a longer maximum sentence, so prosecutors had reason to prefer it in cases of overlap. Indeed, the only two reported appeals relating to the assistance limb also involved collection of information charges: *R v Iqbal* [2010] EWCA Crim 3215; *R v Brown (Terence Roy)* [2011] EWCA Crim 2751, [2012] 2 Cr App R (S) 10. In neither case did the court discuss the relationship between the two offences, or clarify which charges related to which materials.

<sup>53</sup> Terrorism Act 2006, s. 2(4).

<sup>54</sup> Terrorism Act 2006, s. 2(8).

<sup>55</sup> Terrorism Act 2006, s. 2(1).

<sup>56</sup> Terrorism Act 2006, s. 2(9)–(10).

<sup>57</sup> Terrorism Act 2006, s. 2(11).

them in the legislation and the controversy that they attracted during its passage.<sup>58</sup> Seemingly, however, the answer is that potential encouraging effects will themselves suffice: an inherently encouraging meaning or message is not required.

The best illustration of this point is the frequent use of this offence to prosecute the dissemination of mere depictions or descriptions of terrorism. These cases suggest that, when terrorism is the subject, a publication can easily be “understood as indirect encouragement” – even where such encouragement is neither expressed nor necessarily implied. For example, several prosecutions have related to videos of terrorist acts, or of terrorist techniques and training. Apparently, these can constitute terrorist publications even when they do not include any explicit encouraging or glorifying message.<sup>59</sup> Similar examples include historical and biographical materials, such as interviews with known terrorists;<sup>60</sup> a letter from the defendants’ friend that described his experiences of fighting in Pakistan;<sup>61</sup> and a photo that the defendant had taken of herself in what appeared to be a suicide vest.<sup>62</sup> Presumably, these constitute indirect encouragement because they tend to normalise terrorism, or to cast it in a positive or sympathetic light – although again, since courts have not been explicit about this, it is hard to be sure.

Although the dissemination offence is broad on its face, such extensive use was not inevitable. The offence was created partly to implement international obligations, which required the criminalisation of intentional but indirect forms of terrorist incitement.<sup>63</sup> The

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<sup>58</sup> See the discussions in A Hunt, ‘Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism’ [2007] *Criminal Law Review* 441, 448–449; T Choudhury, ‘The Terrorism Act 2006: Discouraging Terrorism’ in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009) 468–470. This lack of guidance also creates concerns about fair warning: Simon and Zedner (n 29) 418.

<sup>59</sup> See e.g. *R v Mohammed* [2008] EWCA Crim 1465, [2008] 4 All ER 661; *Iqbal* [2010] EWCA Crim 3215; *R v Ali* [2018] EWCA Crim 547, [2018] 1 WLR 6105. Note that videos of terrorist techniques and training might also be covered by the “assistance” limb of the offence.

<sup>60</sup> See e.g. *R v Faraz* [2012] EWCA Crim 2820; [2013] 1 WLR 2615.

<sup>61</sup> *Rahman* [2008] EWCA Crim 1465.

<sup>62</sup> *R v Khan* [2015] EWCA Crim 1341; [2015] 2 Cr App R (S) 76.

<sup>63</sup> In particular, the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196, 2005), Art. 5. A similar obligation was later included in EU Directive 2017/541, Art. 5. As has been widely noted, the offence is significantly broader than it needs to be in order to fulfil these obligations: see e.g. Hunt (n

then-Government also wanted to criminalise generalised forms of incitement: for example, justification of or apology for terrorism, and the explicitly-included glorification of terrorism.<sup>64</sup> Thus, the offence was always going to catch, for example, a pamphlet called “44 Ways to Support Jihad”,<sup>65</sup> or YouTube videos of insurgent attacks with commentary explicitly praising them.<sup>66</sup> Beyond such cases, however, Government and commentators alike assumed that the offence would be interpreted narrowly.<sup>67</sup> In fact, prosecutors have taken advantage of the interpretive latitude that the legislation affords, and this has not yet been limited by appellate courts.

Commentators disagree about the legitimacy in principle of such broad offences of encouraging crime. On one popular view, advocated most influentially by Simester and von Hirsch, they are illegitimate almost by definition. This view begins with the assumption that, ordinarily, we are responsible only for our own actions, and not those of others. Just because your actions increase the probability that I will do something wrong, it does not follow that your actions are also wrong.<sup>68</sup> Perhaps you can be held responsible if you directly and intentionally incited my actions. But you should not be held responsible merely because you expressed support for an ideology that might encourage terrorism, or because you published a portrayal of terrorist activity that others might imitate.<sup>69</sup> On this view, the dissemination offence – even to the extent that it catches glorification of or apology for terrorism – is difficult to defend.

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58) 442; Choudhury (n 58) 470–472; A Petzsche, ‘The Penalization of Public Provocation to Commit a Terrorist Offence’ (2017) 7 *European Criminal Law Review* 241, 248.

<sup>64</sup> See HL Deb 5 December 2005, vol. 676, col. 455; HC Deb 15 February 2006, vol. 442, col. 1437.

<sup>65</sup> *Khan v Chief Constable of West Midlands* [2017] EWHC 2185.

<sup>66</sup> *R v Gul* [2013] UKSC 64; [2014] AC 1260.

<sup>67</sup> See Hunt (n 58) 452–457.

<sup>68</sup> See e.g. AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) 79–81; Ashworth and Zedner (n 6) 111–113; Bock and Stark (n 24) 71–75.

<sup>69</sup> See e.g. Wallerstein (n 22) 2727–2728; Simester and von Hirsch (ibid) 82–83; Lord Carlile and S Macdonald, ‘The Criminalisation of Terrorists’ Online Preparatory Acts’ in TM Chen, L Jarvis and S Macdonald (eds), *Cyberterrorism: Understanding, Assessment, and Response* (Springer 2014) 165–166; A Petzsche and M Cancio Meliá, ‘Speaking of Terrorism and Terrorist Speech: Defining the Limits of Terrorist Speech Offences’ in G Lennon, C King and C McCartney (eds), *Counter-terrorism, Constitutionalism and Miscarriages of Justice: a Festschrift for Professor Clive Walker* (Hart 2018) 164–165.

On a competing view, we cannot draw simple conclusions about the legitimacy of such offences. This view begins with the opposite assumption to the previous one: you cannot deny responsibility for risks that you create, simply because they take the form of harms that I will ultimately cause. If your actions might contribute to my committing a crime, then you must count this risk against them, to at least some extent.<sup>70</sup> Even on this view, however, we should be cautious about the creation of encouragement offences. The risk of encouragement involved may be small or illusory, and the social value of the conduct constituting the encouragement may be great. Criminalising such conduct might also create further chilling effects on political and religious speech.<sup>71</sup> Thus, there may be room in theory for an offence extending beyond direct incitement of terrorism, but we must carefully weigh its benefits against its costs.

Experience raises concerns that the costs of the dissemination offence may outweigh its benefits. First, it catches conduct that creates little real risk of encouraging terrorism. In this respect, the offence has proved to be as broad in practice as it appears on paper: a publication can be a terrorist publication even if no-one is in fact encouraged by it. In the 2015 case of *Khan*, for example, the defendant was prosecuted in relation to four messages that she had posted on Facebook.<sup>72</sup> One count related to the following post: “Dear sisters if you love your sons, your husbands and your brothers prove it by sending them to fight for the sake of Allah. Don't you want them to enter Jannah [paradise] without reckoning?”<sup>73</sup> These messages reached only the defendant's 241 Facebook friends, none of whom was encouraged by them. But as the legislation makes clear, this was irrelevant to her conviction, and her total sentence of five years and three months' imprisonment was upheld on appeal.

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<sup>70</sup> See e.g. J Feinberg, *Harm to Others* (Oxford University Press 1984) 232–237; A Cornford, ‘Indirect Crimes’ (2013) 32 *Law and Philosophy* 485, 489–494; L Alexander and KK Ferzan, *Reflections on Crime and Culpability: Problems and Puzzles* (Cambridge University Press 2018) 18–26. Others argue for a middle ground view: while we doubtless have some obligations to avoid contributing to others' potential wrongdoing, there is no simple answer as to which such obligations we have. See e.g. RA Duff, ‘Criminalizing Endangerment’ in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 62–64; Duff (n 23) 137–138.

<sup>71</sup> Feinberg (ibid) 238–240; Cornford (ibid) 497–502.

<sup>72</sup> *Khan* [2015] EWCA Crim 1341.

<sup>73</sup> [2015] EWCA Crim 1341 at [7].

This concern is strengthened by research on radicalisation – which, although still in its infancy, has developed since the passage of the 2006 Act. This suggests that, while terrorist propaganda materials often play a role in radicalisation, exposure to them is not itself a risk factor. Other factors are more important: especially, social ties to extremists who can indoctrinate one into violent ideologies, and grievance-based motivations that render one receptive to these ideologies.<sup>74</sup> Moreover, as we have already noted, extremist interests and beliefs are not themselves predictors of extremist behaviour. This casts doubt on the assumptions that seem to underlie the dissemination offence.

Second, this offence has had a significant impact on liberty interests. This is due partly to the range of publications that it catches. Since it apparently requires only a potential encouraging effect, it curtails a range of freedoms: most obviously, the freedoms to discuss controversial topics openly, and to share moral, political, and religious opinions. Arguably, there is value simply in being free to engage in such expression, unrestricted by others' potential wrongdoing.<sup>75</sup> But more significantly, such expression can itself be valuable. The potential value of depictions or accounts of terrorism is obvious: not least of all, in understanding and thus combating terrorism itself. And even glorification and justification of terrorism should not automatically be assumed to be worthless. Again, we must bear in mind here the statutory definition of terrorism:<sup>76</sup> this encompasses politically-motivated violence against any government of any kind. Encouraging terrorism thus includes encouraging justified freedom-fighting against illegitimate regimes.<sup>77</sup>

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<sup>74</sup> For summaries of the literature, see e.g. Sawyer and Hienz (n 44); D Webber and AW Kruglanski, 'Psychological Factors in Radicalization: A "3 N" Approach' in G LaFree and JD Freilich (eds), *The Handbook of the Criminology of Terrorism* (Wiley Blackwell 2017); Monahan (n 44); Z Reeve, 'Terrorist Psychology and Radicalisation' in A Silke (ed), *Routledge Handbook of Terrorism and Counterterrorism* (Routledge 2019). It must be noted that the research remains limited, for an obvious reason: it is difficult, if not impossible, to obtain access to primary data sources.

<sup>75</sup> Plausibly, this has some effect on the justifiability of conduct that risks encouraging others to cause to harm – especially where that risk is very low. See Alexander and Ferzan (n 70) 24–26.

<sup>76</sup> Terrorism Act 2000, s. 1.

<sup>77</sup> *Gul* [2013] UKSC 64. Although especially significant in the context of this offence, the point is a more general one: for the purposes of the terrorism offences, "noble cause terrorism" is no less a form of terrorism. See also *R v F* [2007] EWCA Crim 243, [2007] QB 960; *Sarwar* [2015] EWCA Crim 1886.

The range of publications caught is especially problematic when combined with the offence's permissive *mens rea* element. As we have seen, the offence criminalises reckless as well as intentional encouragement. Recklessness as to encouragement of terrorism means awareness of an unreasonable risk that one's conduct would encourage terrorism.<sup>78</sup> The offence therefore catches encouragement that is an unwelcome side-effect of some other purpose, such as the dissemination of knowledge about terrorism, or the expression of political or religious opinion. Again, this breadth has been reflected in practice, with cases of purely reckless, admittedly unintentional encouragement leading to convictions.<sup>79</sup>

Still more concerningly, the requirement for recklessness as to encouragement has proved undemanding in practice. In fact, in at least one case, the defendant seems to have been convicted despite having not been reckless: according to a pre-sentence report, which the trial judge seemingly accepted, the defendant did not believe that the publications he sold were dangerous or that they would interest genuine terrorists.<sup>80</sup> Even when courts have acknowledged the requirement, they have found it to be met fairly readily. In particular, they have focused on the "awareness" element of recklessness, rather than the "unreasonableness" element: if defendants were aware of a risk that their conduct would encourage terrorism, then the court will likely assume that risk to be unreasonable.<sup>81</sup> Although this tendency is not unique to this context,<sup>82</sup> it is particularly notable here. Again, the materials concerned may have some positive value, and they may carry little risk of encouragement, so the justifiability of these risks is especially important to the justifiability of their criminalisation.

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<sup>78</sup> See the brief remarks in *Mohammed* [2008] EWCA Crim 1465 at [34] and [36]; and, more generally, *R v G* [2003] UKHL 50, [2004] 1 AC 1034.

<sup>79</sup> See e.g. *Mohammed* [2008] EWCA Crim 1465; *Brown* [2011] EWCA Crim 2751.

<sup>80</sup> *Brown* [2011] EWCA Crim 2751.

<sup>81</sup> See e.g. *Mohammed* [2008] EWCA Crim 1465 at [36].

<sup>82</sup> Indeed, the question has almost never been addressed of when a risk is unreasonable for the purpose of finding recklessness. This is perhaps because this question is deemed to be, quintessentially, one for the jury: see F Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press 2016) 11.

A powerful illustration of all these points is the case of *Mohammed*.<sup>83</sup> The defendant in this case was a convert to Islam who sold Islamic literature at book stalls. Although most of this literature was not caught by the dissemination offence, some of it included “recordings of terrorist training, extracts from the lives of terrorists and glorification of terrorist activities and those who committed them”.<sup>84</sup> The prosecution accepted that he had no intention to encourage terrorism, and that his conduct was not especially dangerous: many of the materials concerned were easily accessible online anyway. However, he could nevertheless be convicted, because his actions were reckless: for all he knew, the material might have fallen into the hands of people whom it would encourage. In assessing his appeal against sentence, the Court of Appeal recognised some mitigating factors: he was openly carrying on a business that was entirely legal until the 2006 Act came into force, and the line between legal and illegal material was not entirely clear (!). Nevertheless, they still thought it necessary to impose a significant custodial sentence, and they reduced his term of imprisonment only from three to two years.

These points also suggest a risk of chilling effects.<sup>85</sup> For those who want even to explore or discuss controversial views about terrorism – for example, those in a line of work like Mohammed’s – it is now difficult to be sure of avoiding suspicion. Freedom of expression is no defence; nor are good intentions, nor that the risk of encouragement was small. Nor could one rely on the requirement that the risk of encouragement be unreasonable: based on cases like *Mohammed*, one might get the impression that awareness of some such risk suffices for liability. Widely-reported incidents show that these fears have had a real impact. For example, the British Library declined for this reason to curate the Taliban Sources Project: a collection of thousands of primary materials translated into English, designed to shed light on the Taliban and its operations.<sup>86</sup> But again, the invisible likely impact on suspect communities is arguably

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<sup>83</sup> [2008] EWCA Crim 1465.

<sup>84</sup> [2008] EWCA Crim 1465 at [35].

<sup>85</sup> Cf. Simon and Zedner (n 29) 417–419.

<sup>86</sup> See “British Library statement regarding the Taliban Sources Project” <[www.bl.uk/press-releases/2015/august/british-library-statement-on-taliban-sources-project](http://www.bl.uk/press-releases/2015/august/british-library-statement-on-taliban-sources-project)> accessed 14 February 2020.

more concerning. For members of these communities, a risk of contact with the criminal justice system is now the price of some forms of expression.<sup>87</sup>

Are these concerns addressed by the defence for reckless encouragement cases: that the defendant clearly did not endorse the encouraging content of the publication? Seemingly not: this defence is nowhere to be seen in the case law, including in cases in which one would expect it to have been used, such as *Mohammed*.<sup>88</sup> This suggests that the defence is more difficult to use than it first appears to be. It requires not only that one did not endorse the encouraging content, but also that this was clear in the circumstances. The burden of proving this might also lie on the defendant.<sup>89</sup> Convincing a jury that one clearly did not endorse the encouraging content of a publication that one disseminated is perhaps seen as too difficult a task.

Even if the defence were easier to use, however, it would not completely address the concerns raised here. Suppose that the legislation were re-drafted, such that endorsement of the publication's encouraging content became a required element of the offence. That encouragement might still be very indirect, and the dissemination of the publication might carry little to no real risk of contributing to terrorism. The justifiability of these risks – including the potential value of the publication – would not be assessed any more robustly. Innocent and valuable forms of expression would thus still be restricted. Avoiding suspicion might correspondingly remain difficult for those who sell certain types of material, or who hold certain controversial views. In short, the lack of an endorsement requirement is not the only problem with an offence extending so far beyond direct incitement of terrorism. Even if there is a principled case for such an offence, its costs seem likely to outweigh its benefits at its margins.

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<sup>87</sup> See further Choudhury (n 58) 472–473, 481–486.

<sup>88</sup> Cf. *Brown*, a case brought under the assistance limb of the offence, in which the defendant explicitly disclaimed any unlawful use of the materials that he sold: [2011] EWCA Crim 2751 at [16].

<sup>89</sup> Given the seriousness of the offence, higher courts would probably read down the provision to impose an evidential burden only: see *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264. However, this is not certain. In the context of the terrorism offences, Parliament has specified that some defences create only evidential burdens, and the dissemination offence is not among these: Terrorism Act 2000, s. 118.

Fortunately, and unlike with the preparation offence, courts could yet help to address these concerns – although again, Parliament would have to act to remedy the worst of them. Consider first the *mens rea* of the offence. Recklessness should not suffice for this: Parliament should consider requiring intention to encourage, in accordance with the relevant international obligations.<sup>90</sup> But until it makes this change, courts could improve their handling of cases of unintentional encouragement. First and foremost, they should be sure to require proof of recklessness in these cases. Second, they could develop the non-endorsement defence: for example, by holding that it imposes only an evidential burden. Thus, the prosecution would normally have to prove beyond reasonable doubt that the defendant actually endorsed the encouraging content of the publication – or at least, that their non-endorsement was not made clear.

Third, courts could be invited to develop directions on what constitutes an unreasonable risk of encouragement. Such a direction might highlight several factors, based on the discussion above. On the one hand, juries should consider the seriousness of the risk of encouragement. Relevant considerations here include the seriousness and extent of the harm encouraged, as well as the probability of the audience's being encouraged. Mere exposure to propaganda, it might also be noted, does not necessarily create such a risk. On the other hand, juries should consider whether the defendant had good reasons for disseminating the publication. These might include the potential social value of both the publication itself and the freedom to express controversial opinions openly. While the balance between these competing factors must ultimately remain a question for the jury, such a direction would at least help to focus their deliberations correctly.

More fundamentally, courts could yet provide a narrowing interpretation of “indirect encouragement”. One such interpretation – which the Court of Appeal approved in the case of *Faraz* – is that if encouragement is not expressed by the publication, then it must be necessarily implied.<sup>91</sup> On this interpretation, the offence would still catch glorification and justification of terrorism. But it would not catch mere depictions or

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<sup>90</sup> See n 63 above.

<sup>91</sup> *Faraz* [2012] EWCA Crim 2820 at [52]–[54].

discussions of terrorism, simply on the basis that these might have encouraging effects. As we have seen, this interpretation would be consistent with both the wording and the purpose of the 2006 Act. Combined with an affirmation that clear non-endorsement is a defence, it would help to mitigate the offence's impact on freedom of expression. Unfortunately, in the more recent case of *Ali*, the Court of Appeal refused to require a direction in these terms. In fact, they doubted whether any elaboration should be given of "indirect encouragement".<sup>92</sup> The Court might still be invited to prefer its approach in *Faraz*, however, should the issue arise again.

A final reason for courts to develop the law in these ways is their duty to read down legislation to ensure compatibility with the European Convention on Human Rights<sup>93</sup> – specifically, the right to freedom of expression under Article 10. To date, courts have rejected any such reading of the dissemination offence. According to two early cases, acts that are intended to encourage or are reckless as encouraging terrorism are not protected by Article 10 simply because they express a political or religious view.<sup>94</sup> In *Ali*, the Court of Appeal rightly accepted that such acts are protected by Article 10. However, they were equally quick to hold that the infringement is justified, given the offence's definition: the prohibition of intentional or reckless encouragement, they held, is "clearly lawful, proportionate and necessary".<sup>95</sup>

These decisions are not decisive against a reading down of the dissemination offence. For they were reached largely without argument, and without reference to the Strasbourg jurisprudence. This suggests that, while the offence pursues a legitimate aim in infringing freedom of expression, it might do so disproportionately in some cases. In determining the proportionality of prohibitions on political speech, crucial considerations have been whether there was intentional incitement of violence, and

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<sup>92</sup> *Ali* [2018] EWCA Crim 547 at [22].

<sup>93</sup> Human Rights Act 1998, s. 3.

<sup>94</sup> *Brown* [2011] EWCA Crim 2751 at [20]–[21]; *Faraz* [2012] EWCA Crim 2820 at [49]–[57]. Notably, the *Faraz* court relied on the narrowing interpretation of "indirect encouragement" mentioned above in rejecting the Article 10 argument. As we have seen, however, this interpretation is clearly not generally relied upon in dissemination cases.

<sup>95</sup> *Ali* [2018] EWCA Crim 547 at [17].

whether an actual danger of violence was created.<sup>96</sup> Clearly, these criteria cast doubt on the compatibility with Article 10 of some of the convictions discussed above. While English courts have so far been dismissive about the relevance of the Convention in this context, it could thus provide further justification for a narrowing interpretation of the offence.

#### 4. Collecting, Possessing, or Viewing Terrorist Information

Collection of terrorist information was criminalised by section 58 of the Terrorism Act 2000. The *actus reus* of the offence is collecting, recording, possessing, or viewing via the internet information “of a kind likely to be useful to a person committing or preparing an act of terrorism”.<sup>97</sup> The “viewing online” mode of commission was added in 2019. The required *mens rea* is knowledge of the nature of the information.<sup>98</sup> It is a defence that the defendant had a “reasonable excuse” for his or her collection, possession, or viewing of the information.<sup>99</sup> No further definition of this defence is provided, although the 2019 reforms specified that academic research and work as a journalist constitute reasonable excuses.<sup>100</sup> The maximum sentence was also increased from 10 to 15 years’ imprisonment.<sup>101</sup>

Courts have faced two difficult questions in interpreting this offence. First, what information satisfies the *actus reus*? What counts, that is, as information “likely to be

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<sup>96</sup> These principles were mostly developed in cases involving measures targeting Kurdish separatists in Turkey: e.g. *Ceylan v Turkey* (2000) 30 EHRR 73; *Baskaya and Okçuoglu v Turkey* (2001) 31 EHRR 10; *Erdogdu v Turkey* (2002) 34 EHRR 50. See further the analyses in Hunt (n 58) 450–452, 456–457; SA Marchand, ‘An Ambiguous Response to a Real Threat: Criminalizing the Glorification of Terrorism in Britain’ (2010) 42 *George Washington International Law Review* 123, 152–155; Petzsche (n 63) 254–256.

<sup>97</sup> Terrorism Act 2000, s. 58(1).

<sup>98</sup> Courts have read this *mens rea* into the offence: see *R v G* [2009] UKHL 13, [2010] 1 AC 43 at [47]. However, this is now in doubt, following the 2019 reform. This inserted a new s. 58(3A)(a), according to which it is a defence that the defendant “did not know, and had no reason to believe” that the information was of the requisite character. This “reasonable belief” standard is more restrictive than the *mens rea* read in by the courts – suggesting that this is now an offence of strict liability, with reasonable lack of knowledge available as a defence.

<sup>99</sup> Terrorism Act 2000, s. 58(3).

<sup>100</sup> Terrorism Act 2000, s. 58(3A)(b).

<sup>101</sup> Terrorism Act 2000, s. 58(4).

useful to” a prospective terrorist? Second, what counts as a “reasonable excuse” for possessing such information? Following a series of cases in the Court of Appeal,<sup>102</sup> the House of Lords was required to settle both questions in the 2009 case of *R v G*.<sup>103</sup> The most important point to emerge from this case is that terrorist intention, or lack thereof, is entirely irrelevant to this offence: the targeted mischief is the mere possession of certain types of information, so it is no defence simply that the information was possessed for a non-terrorist purpose.<sup>104</sup> This case is now the starting point for any further interpretation of the offence, so it is worth examining its holdings, and their subsequent impact, in detail.

Taking first the *actus reus* of the offence, the House of Lords held that the information must be of use to terrorists, *rather than ordinary people*. On a literal reading, much everyday information falls within the *actus reus*, since information that is useful to ordinary people might also be useful to prospective terrorists: for example, maps of cities or timetables for public transport. Assuming that Parliament could not have intended this absurd result,<sup>105</sup> the court held that the offence was meant

...to catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population. So, to fall within the section, the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism... Of course, it is not necessary that the information should be useful only to a person committing etc an act of terrorism. For instance, information on where to obtain explosives is capable of falling within section 58(1), even though an ordinary crook planning a bank robbery might also find it useful.<sup>106</sup>

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<sup>102</sup> Culminating in the case of *R v K* [2008] EWCA Crim 185; [2008] QB 827.

<sup>103</sup> [2009] UKHL 13.

<sup>104</sup> For an analysis of the decision focusing on this point, see J Hodgson and V Tadros, ‘How to Make a Terrorist out of Nothing’ (2009) 72 *Modern Law Review* 984.

<sup>105</sup> [2009] UKHL 13 at [42].

<sup>106</sup> [2009] UKHL 13 at [43].

These remarks have failed to clarify the scope of the *actus reus*. By focusing on the practical utility of the information to prospective terrorists specifically, the court did somewhat narrow the scope of the offence.<sup>107</sup> However, the passage above is ambiguous between two readings. The first relates to how the relevant information might be used: it must “typically be of use to terrorists, as opposed to ordinary members of the population”. The second relates to the purposes for which the information was designed: it must “be designed to provide practical assistance to” prospective terrorists. As subsequent cases show, there is continuing confusion between these two readings, and neither does much to clarify or narrow the offence’s scope.

An example of the first reading, focusing on potential use, is the case of *Muhammed*.<sup>108</sup> The appeal in this case related to a file named “Draft ideas”, which contained a bullet-point list of practical advice. This advice mainly concerned how to avoid detection by the authorities, and could have been useful to ordinary criminals, as well as prospective terrorists. Relying on *G*, the Court of Appeal found that this document fell within the scope of the offence. The *actus reus* requires only that the information is useful to prospective terrorists, and that it is *not* “in every day use by ordinary members of the public”.<sup>109</sup> It is therefore irrelevant that the information has other uses besides terrorist uses, or even that it would be of limited use in the commission or preparation of a terrorist attack.

An example of the second reading, focusing on the purpose for which the information was designed, is the case of *Amjad*.<sup>110</sup> This appeal related to a list of physical exercises headed “Mujahid minimum training”. Again, the Court of Appeal relied on *G* in finding that this hand-written fitness regime satisfied the *actus reus*. Despite some confused

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<sup>107</sup> Consider, for example, the earlier case of *R v Malik* [2008] EWCA Crim 1450. Some of the charges in this case related to poems that the defendant had written under the pen name “the lyrical terrorist”. Even if such materials were once encompassed by the collection of information offence, they are decisively excluded following *G*.

<sup>108</sup> *R v Muhammed* [2010] EWCA Crim 227, [2010] 3 All ER 759.

<sup>109</sup> [2010] EWCA Crim 227 at [47].

<sup>110</sup> *R v Amjad* [2016] EWCA Crim 1618, [2017] 1 Cr App R 22.

remarks on the point,<sup>111</sup> the court's decision was ultimately premised on the information's having been designed by and for prospective terrorists. Hence, the prosecution was allowed to lead evidence that the fitness regime was very similar to a document found on the internet, which was "derived from sources associated with the terrorist cause".<sup>112</sup> The result would have been different on the first reading: fitness regimes, even ones with the word "Mujahid" at the top of them, are presumably useful to ordinary people. On this reading, however, it was sufficient for the *actus reus* that the document had a terrorist source.

On either reading, the *actus reus* of the offence remains both broad and vague. To illustrate, consider an earlier case, in which a court sentenced an offender to six years' imprisonment for possessing the address of a serving soldier.<sup>113</sup> How should this case be treated now? Courts have suggested that, for example, a list of cabinet ministers' names and addresses would fall within the *actus reus*.<sup>114</sup> But should the address of a single soldier be treated differently? Adopting the first reading, is this information more likely to be considered "in everyday use by ordinary people"? Or, adopting the second, would it make a difference if the address had been written down by a known terrorist, or circulated by them as the address of a potential target? It is difficult to know how to answer these questions, or even which is the correct one to ask. This illustrates once again the role that courts have played in aggravating the problems with terrorism offences.

Turning next to the reasonable excuse defence, the House of Lords held in *G* that this requires an "objectively reasonable" explanation for collecting or possessing the information.<sup>115</sup> They left unclear, however, which explanations might count as such.

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<sup>111</sup> For example: "Designed" need not import the maker of the document having in mind practical assistance. It is sufficient that by its nature the information is designed to provide it": [2016] EWCA Crim 1618, at [27]. Answers on a postcard as to how something can be designed to provide assistance without anyone having designed it for that purpose.

<sup>112</sup> [2016] EWCA Crim 1618 at [35].

<sup>113</sup> *R v Mansha* [2006] EWCA Crim 2051; [2007] 1 Cr App R (S) 70.

<sup>114</sup> *Muhammed* [2010] EWCA Crim 227 at [48].

<sup>115</sup> [2009] UKHL 13 at [79].

Instead, whether an explanation is reasonable is left to the jury as a question of fact, which will turn on “the particular facts and circumstances of the individual case”.<sup>116</sup> Accordingly, an explanation will fall outwith the defence as a matter of law only if no jury could regard it as reasonable. As the Court of Appeal has since clarified, explaining one’s possession of information will mean explaining the purpose behind that possession. Defendants, that is, must offer evidence that they had *good reason* for their possession of the information; whether those reasons are indeed good ones is then for the jury to decide.<sup>117</sup>

This approach is a double-edged sword for defendants. On the one hand, it allows them to offer a wide range of reasons for possession in their defence. Some explanations cannot provide good reasons for possessing terrorist information, as a matter of law: for example, mental illness, or a criminal purpose other than a terrorist purpose.<sup>118</sup> But beyond these few cases, judges must leave juries to decide whether the defendant’s reasons were good ones. Thus, in the case of *Brown*, freedom of expression was correctly left to the jury as a potential reasonable excuse.<sup>119</sup> And in *Y*, a purpose of self-defence against invading or occupying forces – effectively, as the appellate court acknowledged, a purpose of supporting one side in a civil war – was also so left.<sup>120</sup> Even if juries are unlikely to accept such purposes as reasonable, defendants at least have the chance to convince them otherwise.

On the other hand, this approach leaves uncertain which reasons for possession juries

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<sup>116</sup> [2009] UKHL 13 at [81].

<sup>117</sup> *R v Y* [2010] EWCA Crim 762; [2010] 1 WLR 2644. The G court had been somewhat less clear on this point, saying that relevant circumstances might include “the defendant’s age, his background, his associates, his way of life, the precise circumstances in which he collected or recorded the information, and the length of time for which he possessed it”: [2009] UKHL 13 at [81]. It is hard to see how, for example, age or background could provide objectively good reasons for possessing information of the relevant kind.

<sup>118</sup> *G* [2009] UKHL 13 at [79] and [88]. Thus, in *G* itself, the defendant’s paranoid schizophrenia, which had contributed to his behaviour, did not constitute a reasonable excuse. Cf. also *Mansha* [2006] EWCA Crim 2051: the defendant in this case was in the bottom two per cent of the population for intelligence, and fell within the range of intellectual disability, but this was not even raised other than in mitigation.

<sup>119</sup> *Brown* [2011] EWCA Crim 2751.

<sup>120</sup> *Y* [2010] EWCA Crim 227. This defence is remarkably close to that of terrorism in a noble cause, which cannot constitute a reasonable excuse: see *R v F* [2007] EWCA Crim 243, [2007] QB 960.

will and should regard as “objectively reasonable”. This is especially striking in relation to innocent reasons for possession. The absence of a terrorist purpose, in and of itself, is not a reasonable excuse; rather, juries must evaluate non-terrorist purposes on a case-by-case basis. Again, Parliament has recently provided welcome clarification that academic and journalistic work count as reasonable excuses. But it remains uncertain whether the defence includes such reasons for possession as personal interest or simple curiosity.<sup>121</sup> While juries must certainly be allowed to consider these as potential reasonable excuses, they lack guidance on whether and when they should accept them as such.

The fundamental problem with the collection of information offence is thus that it remains unclear – indeed, the case law has made it even *less* clear – what mischief the offence targets. The *G* court made clear that the mischief lies in the nature of the information possessed, rather than the purpose behind its possession. But exactly what information is targeted, and why, remains mysterious. This lack of clarity creates practical problems. It makes it hard to know whom we ought to prosecute for possessing what, and what reasons for possession we ought to accept in their defence. But it is also problematic in principle. We need to know how we can justify convicting people and sending them to prison for possessing – or now, even merely looking at – information of certain types.

To be fair to the courts, this lack of clarity is not entirely their fault. For many argue that offences of mere possession are unjustifiable in principle: no satisfactory account can be given of the mischief that they target. Conviction and punishment, this argument goes, might sometimes be warranted for those who possess dangerous items. For example, possessors might intend to use the item as part of their own criminal plans, or create an unreasonable risk that others will use it harmfully. But as Ashworth and Husak point out, mere possession of the item does not entail such risks. Therefore, they claim,

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<sup>121</sup> Indeed, it was explicitly affirmed in *G* that these do not necessarily constitute reasonable excuses: [2009] UKHL 13 at [83] and [84].

possession offences should not be created without further restrictions on their scope.<sup>122</sup> This argument is most often made in relation to offences of weapon possession, but it might be applied equally to this offence – again, perhaps even more forcefully so, now that it extends to mere viewing of information.

Once again, however, others disagree with this restrictive view. Criminal law may act, as Horder puts it, in an “anticipatory” or preventive way, as well as a purely responsive one.<sup>123</sup> Even if conduct is innocent in itself, we might be justified in prohibiting it, if doing so will prevent harm to which the conduct might contribute. And if the prohibition is just – if it strikes a fair balance between liberty and security interests – then breaching it might warrant conviction and punishment.<sup>124</sup> This view might not fully address the critics’ concerns: even breach of a just prohibition will likely remain innocent in some cases. Advocates of this view disagree among themselves about how best to respond to this worry.<sup>125</sup> For the sake of argument, however, let us assume that it can be addressed. Might this view provide a convincing rationalisation of the collection of information offence?

Prohibiting the collection of information that is useful to terrorists might surely have some preventive benefits. Perhaps the possession of such information is innocent in itself; however, by prohibiting this, we restrict the availability of the information, and thereby make it more difficult for prospective terrorists to prepare terrorist attacks. This

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<sup>122</sup> DN Husak, ‘Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction’ (2004) 23 *Law and Philosophy* 437; A Ashworth, ‘The Unfairness of Risk-Based Possession Offences’ (2011) 5 *Criminal Law and Philosophy* 237. Cf. M Dubber, ‘The Possession Paradigm: the Special Part and the Police Power Model of the Criminal Process’ in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005); Tadros (n 23) ch. 17.

<sup>123</sup> J Horder, ‘Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation’ in GR Sullivan and I Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012).

<sup>124</sup> See e.g. V Tadros, ‘Crimes and Security’ (2008) 71 *Modern Law Review* 940, 943–947; A Cornford, ‘Preventive Criminalization’ (2015) 18 *New Criminal Law Review* 1; RA Duff and SE Marshall, ‘“Abstract Endangerment”, Two Harm Principles, and Two Routes to Criminalisation’ (2015) 3 *Bergen Journal of Criminal Law and Criminal Justice* 132; Duff (n 6) 327–332.

<sup>125</sup> Some argue that apparently innocent breach of a just regulation is nevertheless wrongful: see e.g. Simester and von Hirsch (n 68) 25–29. Others argue that such breaches might sometimes legitimately be criminalised, even when they are not wrongful: see e.g. Tadros (n 23) ch. 17; A Cornford, ‘Rethinking the Wrongness Constraint on Criminalisation’ (2017) 36 *Law and Philosophy* 615, 639–648. Combining elements of both views, see Duff (n 6) 313–321.

rationalisation perhaps tells against the second, purpose-based reading of the *actus reus*: the purpose for which information was designed does not imply anything about its practical utility. But it supports the first reading, based on the potential uses of the information. If information is useful to terrorists but not to ordinary people, then by definition, its restriction will impede prospective terrorists without restricting most people's liberties.

Nevertheless, we should doubt that the collection of information offence is justifiable on this basis, for two reasons. First, its marginal preventive benefits are modest. As we have seen, it is irrelevant that the information concerned was widely available from other sources, or even that its practical utility to terrorists was limited. Besides the cases already mentioned, an illustrative recent example is a 2015 case, which related to two documents found, among thousands of innocuous ones, on the defendant's laptop.<sup>126</sup> Again, these documents were conceded to be readily available elsewhere, and of limited practical use; indeed, both were in a language that the defendant himself could not read, and he had not accessed them in years. However, since their content related to violence and assassination, they fell within the offence. It is hard to see what preventive purpose is served by the facilitation of prosecutions like this one.

Second, the offence has a serious impact on liberty interests. Again, this is due partly to the breadth of its *actus reus*: although information that is useful to ordinary people falls outwith the scope of the offence, much information that is useful for non-terrorist purposes might still fall within it. If a list of cabinet ministers' addresses falls within the offence, then it is hard to see why, say, detailed plans of the London Underground tunnel network would not do so. This concern is exacerbated by the uncertain scope of the reasonable excuse defence. Since innocent purposes might or might not fall within this, an obsession with metro systems might or might not excuse the possession of such plans. Ultimately, then, we have not progressed far from the absurd reading of the offence that the G court wanted to avoid.

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<sup>126</sup> *Attorney-General's Reference (no 123 of 2015)* [2016] EWCA Crim 28, [2016] 1 Cr App R (S) 64.

One might object that, in practice, prosecutors and juries will not be rushing to condemn train enthusiasts. But in a way, that is precisely the point: whether one ends up in prison for possessing innocuous information now depends on a jury's evaluation, or expected evaluation, of one's reasons for doing so. The risk, of course, is that the fanatical interests of young Muslim men are not excused so readily.<sup>127</sup> The prospect of their receiving lengthy custodial sentences for innocuous conduct, engaged in for innocent purposes, seems disturbingly real.

In summary, the practical implementation of the collection of information offence raises serious concerns. The law suffers from a lack of doctrinal clarity: it is hard to say for sure either what information the offence catches, or what counts as a reasonable excuse for collecting, possessing, or viewing it. But this reflects a lack of principled clarity. The only available explanation for why we would create such an offence is to restrict the availability of certain types of information to prospective terrorists. But this explanation cannot justify the law as it stands. Too much innocent conduct is restricted, and too few realistic preventive benefits achieved, to justify the offence at its margins. Overall, the collection of information offence is difficult to accept as a legitimate use of the criminal law.

The House of Lords, through its decision in *G*, must take some responsibility for these problems. In making this decision, the court overruled the previous leading authority: the Court of Appeal case of *K*. According to the *K* court, the mischief targeted by the offence was not information of a specific type, but rather the early stages of terrorist preparation.<sup>128</sup> Hence, the *actus reus* required information that, by its nature, raised suspicion that it was to be used for a terrorist purpose; correspondingly, lack of such a

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<sup>127</sup> See further Tadros (n 124) 969.

<sup>128</sup> Indeed, some commentators continue to assume that the true aim of the offence is to tackle those who are actually suspected to be in the early stages of terrorist preparation: see e.g. Hodgson and Tadros (n 104) 989; Ramsay (n 6) 147–148. As the discussion in this section has shown, however, this is not true at the level of doctrine, and prosecutions have not uniformly reflected this rationale.

purpose constituted a reasonable excuse.<sup>129</sup> Compared to the interpretation in *G*, this interpretation was both narrower and arguably more faithful to Parliament's intention.<sup>130</sup> However, reverting to it would require the Supreme Court to overrule *G*. It is uncertain whether it would or should do this, simply on the basis that the earlier approach has proved preferable.<sup>131</sup>

Indeed, courts are probably now unable to effect significant reform to the collection of information offence. The Court of Appeal could make some modest improvements: for example, preferring the "of use to terrorists" approach to the *actus reus* to the confused "designed for terrorists" approach. But these will not solve the most serious problems with the offence. Fundamentally, there is no credible definition of "information likely to be useful to a terrorist" that does not also catch material that is useful to non-terrorists.<sup>132</sup> Challenges on human rights grounds are also unlikely to succeed. Although key elements of the offence remain hugely vague, the Strasbourg court has found the post-*G* law compatible with the minimal standard of certainty required by the European Convention.<sup>133</sup> Rather, any reform addressing these problems would have to come from Parliament. Unfortunately, the offence is clearly meant to continue playing a central role – to the extent Parliament only recently *expanded* its scope and increased its maximum penalty. Such reform therefore seems unlikely to be forthcoming.

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<sup>129</sup> [2008] EWCA Crim 185 at [14].

<sup>130</sup> In truth, there are few clues available as to exactly what Parliament meant this offence to achieve. But in both the report and the consultation paper that preceded the 2000 Act, the offence was suggested to be a means of disrupting the early stages of terrorist plots, by criminalising the possession of targeting lists and similar information: see Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism* (Vol. 1, Cm 3420, 1996) para 14.8; *Legislation against Terrorism: a Consultation Paper* (Cm 4178, 1998) para 12.14.

<sup>131</sup> On the Supreme Court's approach so far to its own past decisions, and to decisions of the House of Lords, see J Lee, 'Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court' (2015) 21 *European Journal of Current Legal Issues*.

<sup>132</sup> Hodgson and Tadros suggest two criteria that might help to address this concern: whether the information has uses other than terrorist uses, and how difficult it is to obtain: see Hodgson and Tadros (n 104) 989. As we have seen, however, the Court of Appeal's subsequent reading of *G* rules out reliance on either criterion.

<sup>133</sup> *Jobe v United Kingdom* (2011) 53 EHRR SE17.

## 5. Concluding Reflections

What broader conclusions emerge from these case studies? Three points can be mentioned in closing, all related to the offences' remarkable breadth. First, their apparent breadth on paper has largely been reflected in practice. This was, to an extent, inevitable: some of the most problematic elements of the offences are either clear from or made explicit in the statute. But some other elements are problematic because of interpretive choices that courts have made, or so far failed to confront. Notably, courts have avoided construing the offences narrowly where this would have been possible. In the one instance where a narrowing construction was unavoidable, in the *G* case, the court chose a construction that remained conspicuously and unnecessarily broad. Likewise, while prosecutors have shown some restraint in pursuing cases on the margins of the offences, they have also pursued some cases of the most problematic types that the offences catch.

Second, and relatedly, the offences show signs of “mission creep”. Again, this was to an extent inevitable from the legislation: all three offences are drafted more broadly than their ostensible purpose demands. But the exercises of prosecutorial and judicial discretion just mentioned have also contributed to this result. Particularly in relation to the dissemination and collection of information offences, they have either failed to limit or even further extended the scope of the offences, relative to their original purpose. This is ironic, given that the potential exercise of discretion has been used as a justification for defining these offences in over-inclusive ways.<sup>134</sup> It is also a point of broader importance, since analogous justifications are often also used outside of the terrorism context.<sup>135</sup>

Finally, all three offences seem not only unnecessary but also unjustifiable in their

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<sup>134</sup> See e.g. the remarks of the court in *G* [2009] UKHL 13 at [80].

<sup>135</sup> Assisting suicide and sexual activity between older children are two further well-known contexts in which the effective scope of the criminal law has deliberately been left to discretion: L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019) 217–218.

breadth. This is not to say that they are objectionable in principle, even as presently drafted and interpreted: although some would argue this, others would argue that a principled case for each offence could potentially be made. Rather, it is to say that they strike a questionable balance between liberty and security at their margins. All three offences have been used for conduct that contributes little or nothing to the risk of terrorist attacks. All either catch or risk catching conduct that is innocent or positively valuable. And while chilling effects are difficult to prove, the risk of them in all three cases seems real and significant. Overall, both the courts and Parliament ought to consider how the scope of these offences might in future be narrowed. Unfortunately, both the capacity of the former and the willingness of the latter to do so seem now to be limited.