CRIMINALISING PRE-INCHOATE TERRORISM-RELATED OFFENCES:

REDEFINING THE LIMITS OF THE CRIMINAL LAW?

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Abstract

A large theoretical debate has developed about the extent to which preventive offences are consistent with the fundamental principles of the criminal law. Less has been said about the emergence in the UK of a more problematic category of offences- namely pre-inchoate terrorism-related offences, which impose liability for actions earlier in time even than preparatory offences. As one 'moves back in time' to impose inchoate liability and pre-inchoate liability, one reaches a point where it is difficult to fit pre-inchoate offences into a traditional framework of criminal responsibility for wrongful conduct done. Whereas once there was no liability for 'mere preparation' in criminal law, the proliferation of terrorism-related offences has not only criminalised 'any conduction in preparation for' giving effect to an intention to commit or assist another to commit acts of terrorism but also extended criminal liability to merely viewing on a single occasion material likely to be useful to a person committing or preparing an act of terrorism. The thesis enquires whether these terrorism-related offences are justified as the punishment of culpable wrongs, or whether terrorism-related offences like these fall outside the legitimate limits of the criminal law. By examining the move towards the criminalisation of pre-inchoate terrorism-related conduct, it contributes towards a more systematic and comprehensive understanding of the scope of preventive criminalisation. This allows for a reassessment of the constraints suggested by the current literature and case law in light of the existing approaches to the use of far-ranging terrorism-related offences as an arm of the preventive state. This thesis furthers an understanding of this important but under-researched area of the law to set out the legitimate limits of the criminalisation of pre-preparatory acts. This thesis contributes to the discussion as to how a fair balance between individual freedom and security can be reached.

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I. Why Consider Pre-Inchoate Terrorism-Related Offences?

A significant theoretical debate has developed about the extent to which preparatory offences are consistent with the fundamental principles of criminal law.[1] Less has been said about the emergence of a different and even more problematic category of offences- namely 'pre-inchoate' terrorism-related offences, which can be defined as offences that impose liability for actions *further* back in time than preparatory offences.

As the criminal law moves back in time to impose inchoate and pre-inchoate liability, we reach a point where it is difficult to fit 'pre-inchoate' offences into a traditional framework of criminal responsibility. Whereas once there was no liability for 'mere preparation' in criminal law under the requirement that attempts must be more than 'merely' preparatory, the proliferation of terrorism-related offences has not only criminalised 'any conduction in preparation for' giving effect to an intention to commit or assist another to commit acts of terrorism but also extended criminal liability to merely viewing on a single occasion material likely to be useful to a person committing or preparing an act of terrorism.[2] The further back in time we go, the more we see a diffusion of responsibility by which some offences escape pre-existing definitions. These offences are not merely 'prophylactic' offences or 'pre-crimes' as they do more than prevent harm but also play a part in widening the criminal law to capture a 'network' of offending by

[1] Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State' in A P Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andrew von Hirsch* (Bloomsbury Publishing 2014), 3; Petter Asp, 'Preventionism and Criminalization of Nonconsummate Offences' in Andrew Ashworth, Lucia Zedner & Patrick Tomlin (ed), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013); Antony Duff, *Criminal Attempts* (Clarendon Press 2004); Stuart P Green, 'Vice Crimes and Preventive Justice' (2015) 9 Criminal Law and Philosophy 561; Jeremy Horder, 'Harmless wrongdoing and the anticipatory perspective on criminalisation' (2012) in G. R. Sullivan and Ian Dennis (eds) Seeking Security: Pre-Empting the Commission of Criminal Harms (Oxford: Hart Publishing, 2012); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2015).

[2] Section 5 of the Terrorism Act 2006 and Section 58 of the Terrorism Act 2000.

creating associative offences that make more actors liable for their participation. The overextension of the criminal law relating to terrorism is a relatively under-explored area of the law, an oversight that this thesis seeks to redress.

The thesis enquires whether these terrorism-related offences are justified as the punishment of culpable wrongs, or whether they fall outside this traditional understanding of the criminal law. Few scholars have focused on pre-inchoate terrorism-related offences that criminalise conduct that occurs even earlier than preparatory acts.[3] Fewer still have focused on offences that criminalise acts that merely lead to an increased risk of terrorist activity.[4] Preparatory liability and pre-inchoate liability are inextricably linked. Yet, there are some fundamental differences that demand further exploration. For example, are there differences in the underlying wrongs punished by these offences? What constraints limit pre-inchoate offences as opposed to preparatory acts more generally? How are these constraints strengthened or weakened by the need to prevent terrorist attacks from coming to fruition?

[3] See, for example, Daniel Ohana, 'Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?' (2006) 25 Criminal Justice Ethics 23; Findlay Stark and Stefanie Bock, 'Preparatory Offences' (2018) University of Cambridge Faculty of Law Research Paper .

[4] Although this area is under-researched, there has been scholarship published in the wake of the Terrorism Offences guideline and new cases relating to pre-inchoate offences, for example: Kajsa E. Dinesson, 'Preventing Harm: the "Collection of Information" Offence in Commentary, Case Law and Data' (2022) Criminal Law Review 469; Kajsa E. Dinesson, '(Un)reasonable Excuses – On R v Dunleavy, R v Copeland, and Section 58' (2022) 85 The Modern Law Review 1550; Lucia Zedner, 'Countering Terrorism or Criminalizing Curiosity? The Troubled History of UK Responses to Right-Wing and Other Extremism' (2021) 50 Common Law World Review 57; Florence Lee, 'Sentencing Cases of Preparation of Terrorist Acts (Terrorism Act 2006 s.5): a Call for Proportionality' (2018) Sentencing News 8; Florence Lee and Clive Walker, 'The "Counter-Terrorism and Sentencing Act 2021" and the Advance of Intensified Terrorism Punishment' (2022) Criminal Law Review 864; Andrew Cornford and Anneke Petzsche, 'Terrorism Offences' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds), *Core Concepts in Criminal Law and Criminal Justice: Volume I*, vol 1 (Cambridge University Press 2020).

1. Backdrop: The 'Preventive State'

Although prevention has long been a core function of the state,[5] the modern 'preventive turn'[6] is characterised by a rise in inchoate and pre-inchoate criminal liability, preventive detention, 'preventive' laws, and policing initiatives, as well as a rise in counter-terrorism and immigration controls.[7] While Steiker argued in 1998 that 'the preventive state is all the rage these days',[8] Carvalho demonstrates that the preventive turn is not as new a phenomenon as others believe.[9] He argues that the concept of criminal responsibility is situated in a socio-legal context whereby responsibility necessarily entails an account of a 'criminal subject' and a 'law-abiding person'- 'the reconstruction of the normal law-abiding subject as a vulnerable potential victim is the counterpart of the reconstruction of the criminal subject as a dangerous threat'.[10]

Carvalho observes that recent scholarly attention to the preventive state has led to calls for a 'preventive jurisprudence' of restraint.[11] Ashworth and Zedner note that the preventive state has been the subject of criminological inquiries concerning the 'underlying drivers of risk, public protection, and security as well as the form and function of preventive measures…whereas questions of justifications, individual liberties, risks of overreach and the

[5] Ashworth and Zedner write that preventive justice is not as new of a phenomenon as it seems and has historical antecedents. See Ashworth and Zedner (n 1).
[6] Henrique Carvalho, 'Book Review: Andrew Ashworth, Lucia Zedner, Preventive Justice (Oxford: Oxford University Press)' (2014) The Modern Law Review 306.
[7] Carol S Steiker, 'The Limits of the Preventive State' (1997) 88 J Crim L & Criminology 771; Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State' (2007) 9 Punishment & Society 301; Eric S Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 Criminal Law Bulletin 576.
[8] Steiker (n 7).
[9] Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press 2017).
[10] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012).
[11] Carvalho (n 6).

need for limits have been addressed more often by criminal lawyers'.[12] Legal scholars have mapped out the significant developments in the growth of the preventive state, including the expanding scope of criminal liability, the rise of preventive policing, extended preventive sentences, and other civil-criminal measures designed to increase the state's coercive power.[13]

2. The Rise Of Pre-Inchoate Terrorism-Related Offences

Analysing vague and broad pre-inchoate terrorism-related offences is a good case study in evaluating the rightful limits of criminal law. Over the past two decades, scholars have studied the increased preventive focus of counter-terrorism law and policy, noting how this has eroded traditional criminal law frameworks.[14] This thesis draws attention to the sheer breadth of pre-inchoate terrorism-related offences enacted under the rubric of prevention and security, as Lord Anderson QC suggests, for the UK to 'defend further up the field'.[15] The rise of preventive criminal law was brought into sharper focus after the September 11 terrorist attacks on America in 2001. Ashworth and Zedner identified seven types of coercive preventive measures of which two are most relevant to this thesis. The first of these are 'preventive criminal offences', which include inchoate offences, substantive offences defined in an inchoate mode, preparatory pre-inchoate offences, and offences of risk-creation.[16] These offences deviate from conventional

[12] Lucia Zedner and Andrew Ashworth, 'The Rise and Restraint of the Preventive State' (2019) 2 Annual Review of Criminology 22 4.

[13] Benjamin Goold, *CCTV and Policing: Public Area Surveillance and Police Practices in Britain* (Oxford University Press on Demand 2004); Tamara Tulich, 'Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom' (2012) 12 Oxford University Commonwealth Law Journal 341.

[14] Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-TerrorismImagining Future Crime in the 'War on Terror'' (2009) 49 The British Journal of Criminology 628; Kent Roach, *The 9/11 Effect: Comparative counter-terrorism* (Cambridge University Press 2011); Richard Rosenfeld, 'Terrorism and Criminology' (2004) 5 Terrorism and Counter-terrorism: Criminological perspectives 19; Barry Vaughan and Shane Kilcommins, *Terrorism, Rights and the Rule of Law* (Routledge 2013); Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8 Criminal Law and Philosophy 99.

[15] David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013). Available at SSRN 2292950.

[16] Ashworth and Zedner (n 1).

criminal law doctrine in that they exist solely to capture actions that may not be harmful *per se* as the ultimate harm has not yet materialised and, importantly, may never do so.

The second category is 'preventive counter-terrorism measures', which includes specific terrorism offences of preparation, possession, dissemination of information, collection of information and association with terrorist organizations.[17] This thesis contributes to the literature on preventive terrorist offences by focusing on an area that has not received sustained attention, namely the small class of preventive 'pre-inchoate' offences. It situates and conceptualises these offences within doctrinal analyses that set out the history, limits, and justifications for such offences, why they need to be limited, and what constraining principles should apply to them. Examples of the eclectic mix of offences which this thesis focuses on include s.57 of the Terrorism Act 2000, which criminalises the 'possession of an article in circumstances which give rise to a reasonable suspicion that the article is possessed for a purpose connected with the commission, preparation, or instigation of an act of terrorism'; and s.58 of the Terrorism Act 2000, which criminalises collecting, recording, possessing or viewing/accessing by way of the internet, of 'information of a kind likely to be useful to a person committing or preparing an act of terrorism'.[18] Chapter 3 discusses how and why these offences were chosen.

This thesis argues that the offences it examines share a broad characteristic: they involve a *directional* (horizontal, vertical or diagonal) expansion of criminal responsibility based on a risk-prevention rationale. If preventive offences can be put on a spectrum from 'inchoate

[17] Section 5 Terrorism Act 2006 (preparation); section 1/2 Terrorism Act 2006 (dissemination); section 58 Terrorism Act 2000 (collection of information); section 11 Terrorism Act 2000 (belonging to or professing to belong to a proscribed organisation).
[18] Section 58 TA 2000 is amended by section 3 CT & Border Security Act 2019

offences' at one end- which represents the closest 'last act' before the ultimate harm is committed – and pre-inchoate offences at another end- then this thesis explores what goes on *backwards* in time (a horizontal expansion), and also *vertically* (across multiple actors and agents relating to a harmful act) and *diagonally* across a community (which encompasses a relational element- of how the wrongdoer's actions may impact others in society). As Hunt notes, these offences are an 'eclectic mix whose pervasiveness ought to give us a pause for caution if we are minded to style them as isolated exceptions from the general rule'. [19] If one moves along this spectrum, the more diffuse and broader these offences become.

As one 'moves back in time' to consider inchoate liability and pre-inchoate liability, one reaches a point where there are these 'pre-inchoate' offences that do not fit into a traditional framework of criminal responsibility. The further back in time we go, the more we see a *diffusion* of responsibility which allows some offences to escape pre-existing definitions of wrongdoing, culpability, harm, and remoteness. They infringe on fundamental human rights such as the freedom of assembly and freedom of expression. They are not merely 'prophylactic' offences or 'pre-crimes', rather they seem to be doing *more* than just preventing harm but also play a part in widening the criminal law to capture a 'network' of offending that envelops more actors who may be held criminally liable for very remote acts.

The thesis aims to map this novel diffusion of criminal liability by examining several vague and broad terrorism-related pre-inchoate offences, evaluating their boundaries and suggesting principled limits. Ultimately, this thesis asks: is it possible to uphold the most important liberal principles of criminal law given the development of pre-inchoate terrorism-related offences?

[19]Adrian Hunt, 'Counter-Terrorism Preparatory Offences: Special Cases or the New Normal?' (Assize Seminar, CCRC, Birmingham, 17 May 2019).

How should constraining principles and rights play a role as a necessary part of preventive justice? This thesis is also timely as it analyses the UK government's tendency to enact new and more punitive terrorism-related offences.

3. Structure Of This Thesis

This thesis is structured in two parts. The first part provides an overview of the phenomena behind the expansion of the criminal law into the new temporal and vertical space of pre-inchoate liability. Here concepts such as enemy criminal law, preventive justice, risk-based criminal law and their relationship to individual autonomy come into focus. It develops a theoretical framework focusing on the possible constraining principles that ought to limit specific categories of pre-inchoate offences. This thesis sets out the constraints used in later chapters and outlines the UK's contemporary terrorism legislation. The opening chapters of the thesis focus on counter-terrorism offences in the UK, as the unprecedented rise of global terrorism has prompted a rapid expansion of domestic criminal law to prevent remote risks, a development that provokes questions about the normative limits of the criminal law.

The second part of the thesis builds upon the existing theoretical literature on the scope of the criminalisation of preparatory acts analysed in part one. It offers a doctrinal analysis of the criminalisation of three categories of pre-inchoate offences across England and Wales. These are possession, encouragement and dissemination, and associative offences of terrorism. I analyse each category of offence in turn and examine the case law on these offences. By undertaking doctrinal research on these categories of pre-inchoate offences, these chapters identify changes in the boundaries of criminalisation. This qualitative approach enables the

thesis to analyse specific categories of offences in a more detailed manner that may offer more insight into the coherence, justifiability, and efficacy of the criminal law.

Chapter 2 sets out and critically analyses the current research in the field of preventive terrorism offences, and situates the thesis within the wider academic field. It identifies what theoretical research has already been done in the field and why some frameworks are more relevant than others to my analysis of pre-inchoate offences. The theories analysed include classical liberal theories of criminal law, the justifications and limits on remoteness for the expansion of the criminal law backwards in time, preventive justice, and theoretical literature on inchoate offences and pre-inchoate offences.

Chapter 3 provides a detailed survey and analysis of the main UK laws on terrorism-related offences. It offers an overview of the effects, extent and scope of the legislation, along with critical analysis of important legislative provisions which contain the offences discussed in Chapters 5 to 7, including the Terrorism Act 2000, Terrorism Act 2006, Anti-Terrorism, Crime and Security Act 2001, the Counter-Terrorism Act 2008, the Terrorism Prevention and Investigations Measures Act 2001 and Counter-Terrorism and Sentencing Act 2021.

Chapter 4 evaluates the constraining principles that ought to limit the reach of pre-inchoate offences. It considers whether certain constraints ought to carry more weight than others, depending on the category of offence. This chapter develops a theoretical framework for analysing different categories of pre-inchoate liability based on the unique characteristics of these offences. Topics to be explored include the "wrongs" inherent in the offence, the "harms" that they are trying to prevent, the rights implicated by the offence, the justifications for

infringing rights relating to the offence and what constraints ought to be applied to limit its reach.

Chapter 5 focuses on possession-based terrorism offences. It applies the framework developed in Chapter 4 to analyse possession offences. First, it describes and examines the legislative background of these offences and explores the *actus reus, mens rea* and defences to these possession offences. It critically analyses some of the recent case law. This chapter discusses the justification of possession offences by first dissecting the wrongs inherent in them. It explores the rights implicated in possession offences and their connection to culpability issues within these offences. Following this analysis, the chapter discusses the problems surrounding the lack of a clear *mens rea* amongst the possession offences and critiques surrounding an offence of strict liability.

Chapter 6 focuses on the encouragement of terrorism and dissemination of terrorist-related material offences and their constraints. It argues that encouragement and dissemination offences may be remote from the commission of an ultimate terrorist harm as they criminalise acts that might lead to third parties being radicalised to commit acts of terrorism. The chapter analyses the problem around the process of radicalisation and its complicated relationship with the perpetration of terrorist harm.

Chapter 7 focuses on the proscription of terrorist organisations and the criminalisation of support, membership, and wearing of uniforms of proscribed organisations. It argues that proscription creates a dangerously wide set of executive powers to proscribe terrorist organisations and establishes offences related to terrorism associations, which are problematic in both principle and practice. Deproscription is also difficult to achieve. The

chapter analyses the proscription regime alongside the problems arising in respect of specific offences, focusing particularly on the challenge of attributing culpability and wrongdoing.

Chapter 8 reflects on the constraints identified in Chapter 4 and examines how far the theoretical framework applies in light of the analyses in Chapters 5-7. It addresses the question of what constraints are appropriate for different categories of pre-inchoate offences and re-evaluates these constraints in light of the doctrinal analysis conducted in the previous chapters.

Chapter 9 draws together the conclusions of earlier chapters to synthesise the findings of the thesis. It will draw out the implications and significance of this research for criminal law theory more generally.

II: Conceptualising Pre-Inchoate Terrorism-Related Offences

1. Liberal Theories Of Criminal Law And The State's Duty To Provide Security

To engage with doctrinal and theoretical debates about the nature of pre-inchoate offences requires consideration of the traditions within which they are understood. The starting point is a discussion of classical liberal theories of criminal law upon which the theory of punishment and criminal justice is founded.[1]

1.1 Classical Liberalism And Individual Autonomy

Various scholars have explored the right of the state to *punish* criminal behaviour, and Thorburn has defended the state's exclusive right to criminalise and use force.[2] However, the role of the state in enacting preventive offences is more complicated because understanding what enables the state to pursue prevention requires an exploration of questions concerning the role of the state, the relationship between the state and individuals, and the obligations of its citizens.[3]

Classical liberalism is premised upon a concept of the individual as 'an abstract, universal subject endowed with *rational action, autonomy* and *self-determination'*.[4] This concept, as Norrie notes, rests on the notion that the individual is a 'unified, centred being who acts as the basis for legitimating the state, law and punishment. He gives *consent* to the state or recognises its rational necessity. He participates in its law as a *rational legal subject*. Punishment unifies

[1] Alan Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' (1996) 59 Mod L Rev 540.
[2] Malcolm Thorburn, 'Reinventing the Night-Watchman State?' (2010) 60 University of Toronto Law Journal 425
[3] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2015) 7.
[4] Norrie (n 1).

political legitimacy and legal sanction. The rational subject receives 'just deserts' from the state through law'.[5] Therefore, in respect of the relationship between the citizen and the state, classical liberal concepts focus on the mutual, consensual and interrelated 'obligations owed to the state by citizens and to citizens by the state'.[6] A citizen obeys the laws set by the state because he consents to give up some of his freedom in return for the protection offered by the state's enforcement of the law or else risk a return to a Hobbesian state of nature, therefore that citizen *autonomously* submits to state coercion through the criminal law in return for a promise of security and freedom from harm from others.[7]

1.2 Disentangling The Relationships Between The State And Its Citizens

Under classical liberal theory of criminal law, prevention is a core function of the state, and therefore it has a responsibility to enact legislation to provide security for its citizens.[8] Farmer notes that the criminal law is central to the establishment of the state's institutions because it helped 'secure social order and because it provided a legitimate framework for the exercise of state power'.[9] In this sense, the rise of preventive offences is a consequential phenomenon, which reflects the state's reaction to certain (new) problems in society. Prevention is thus not a *new* phenomenon at all but a traditional function of the state, which is achieved through its criminal laws, although the thesis will later argue that the scale of certain threats has changed.

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[5] Ibid 543.

[6] Ashworth and Zedner (n 3) 7.

[7] Thomas Hobbes, *Leviathan* (Baltimore: Penguin Books, 1968).

[8] Whether the public has a right to security and whether the state has a correlative duty to protect is a contested issue: Ashworth and Zedner (n 3) 8; Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (Oxford University Press, 2014) 1-21.

[9] Lindsay Farmer, 'Response 2: Criminal law As A Security Project' (2014) 14 Criminology & Criminal Justice 399.

Citizens owe a duty to the state and other citizens to be law-abiding and accept state coercion as a necessary precondition to peace and order.[10] Duff has written extensively about the relationship between the duties owed by citizens to the state and fellow citizens.[11] In terms of the relationship between the state and its citizens, the idea of 'autonomy' under liberalism discussed above implies that human beings *choose* to obey the laws enacted by the state to protect their well-being. An influential account of autonomy is defended by Raz, who argues that citizens living under the state should be treated as 'authors of their own lives' in which criminal liability may only be imposed for conduct that is harmful.[12] Individuals have a capacity for rational decision-making, which is a precondition of their ability to make choices. The citizen is treated as an autonomous subject who can distinguish between right and wrong, having the 'ability to control his actions, formulate criminal plans and to understand the nature of his wrongdoing'.[13] Therefore, it can be said that a crime is a violation of the norms and codes of conduct set by the state because individuals have the capacity for choice, and ought to be held responsible for their decisions.[14]

[10] Hobbes (n 7); Ashworth and Zedner (n 3) 8.

[11] R.A. Duff, 'Responsibility, Citizenship and Criminal Law' in R.A. Duff & S.P. Green (eds), The Philosophical Foundations of the Criminal Law. Oxford: Oxford University Press; R Anthony Duff, 'A Criminal Law for Citizens' (2010) 14 Theoretical Criminology 293; R.A. Duff, 'Dangerousness and Citizenship: Essays in Honour of Andrew von Hirsch' in Andrew Ashworth and Martin Wasik (Eds.), Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch (Oxford University Press 1998) 141-163; R. A. Duff, 'Inclusion and Exclusion: Citizens, Subjects and Outlaws' (1998) 51 Current Legal Problems 241.

[12] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008) 40; John Stuart Mill, 'On Liberty' in JM Robson (ed), Essays on Politics and Society, Collected Works of John Stuart Mill, vol XVIII (University of Toronto Press 1977) 215.

[13] Mohammed Saif-Alden Wattad, 'Is Terrorism a Crime or an Aggravating Factor in Sentencing?' (2006) 4 Journal of International Criminal Justice 1017.

[14] The paternalistic state has a duty to protect citizens' security and may impose positive obligations on citizens which are policed through the criminal law. See Andrew Ashworth, *Positive Obligations in Criminal Law* (Bloomsbury Publishing 2013).

Citizens also owe responsibilities towards others. While legal-philosophical theorists such as HLA Hart and Michael Moore approach criminal liability from a legal-moralistic viewpoint,[15] Lacey proposes that 'criminal responsibility…is an idea which is located within a social practice of criminalization, which itself is necessarily located within an institutional framework' and that 'legal ideas about responsibility are the product of a much broader set of ideas about the self and about relations between the self and society…hence they need to be contextualised within intellectual and social history'.[16] Criminal responsibility is therefore tied to different forms of civic relationships and *forms of membership* in society in which citizens have a particular relationship with each other. The main three schools of the idea of a criminal law within a community- liberalism, republicanism, and communitarianism- will be explored later in more detail.

1.3 Criminal Responsibility And Autonomy – Where Do Pre-Inchoate Offences Fit?

Lacey identifies four categories of criminal responsibility: 'capacity responsibility', 'character responsibility', 'outcome-responsibility' and 'risk-responsibility'. She demonstrates how these different categories have shifted in importance throughout different periods, and she argues that 'patterns of responsibility-attribution based on character, risk and outcome are gaining ground' as opposed to 'capacity responsibility', which is based upon principled punishment under constraints such as conduct, fault and autonomy.[17] This point is important, because the

[15] For example, H.L.A. Hart places voluntary choice at the heart of his account of criminal responsibility. Michael Moore views criminal responsibility from a legal moralistic viewpoint, emphasizing that states should punish individuals for morally 'bad' actions. See H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 1968); Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press UK 2010).

[16] Nicola Lacey, 'Comparative Criminal Justice: an Institutional Approach' (2013) 24 Duke J Comp & Int'l L 501.

[17] Andrew Ashworth, 'The Diffusion of Criminal Responsibility: A Cause for Concern' (2017) Queensland Legal Yearbook; Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016) 1.

rise in the use of preventive criminal law- particularly the increase in inchoate and pre-inchoate offences- is a form of 'risk-responsibility' that involves penalising risk creation.[18] An offence such as engaging in the preparation of a terrorist act may require proof of culpability or 'capacity responsibility', but this cannot be said for many risk-based offences such as possession or membership which fail to fit any category of criminal responsibility.[19] Therefore, Lacey's account is very useful towards developing an understanding of what responsibilities citizens owe to each other as it describes the type of criminal responsibility that preventive offences target and enhances understanding of *why* states penalize conduct that has yet to cause harm but poses a risk to society. Understanding the nature of 'risk-responsibility' may help us develop a series of substantial principles which set out the boundaries of such offences.

Brudner's three concepts of autonomy are also important to this thesis. These include 1) formal agency, 2) real autonomy and 3) communal belonging.[20] Formal agency is the ability to 'choose differently than he did'; one is free if he is not forced to act in a certain way by others and if he can choose his own path as long as there is no coercion involved.[21] On the other hand, autonomy is the capacity to make a 'self-determined choice' and must be 'generated from the agent's own purposiveness'. This means that citizens are liable to be punished if they adversely interfere with others' capacity to make self-determined choices, and so the state imposes an obligation on citizens to reassure others that they will not harm another or make them feel fear or insecurity.[22] Communal belonging refers to the idea that citizens are 'free' to the extent that their actions meet the moral standards of their political community.

[18] Lacey (n 17) 4.
[19] Ashworth (n 17) 5.
[20] Alan Brudner, *Punishment and Freedom* (Oxford University Press 2009) 5.
[21] Ibid 5.
[22] Ibid 5.

The second concept of 'real autonomy' is probably the most accurate way to conceptualise the rise of pre-inchoate offences and supports the argument that such offences do not infringe the core nature of liberalism. In other words, as Ronnakorn persuasively argue, under such pre-inchoate legal regimes then:

> 'The preparatory offences are therefore based on incompetence and failure, in terms of protecting liberalism and autonomy, of ordinary criminal law. In this sense, the preparatory offences offer a better protection of liberalism because they prohibit the harms of insecurity which are a part of autonomy'.[23]

While it is argued that security is a precondition to the enjoyment of rights, the pursuit of security cannot be unlimited in scope. Adopting Dworkin's rights theory, it can be argued that the criminal law should only be used in circumstances where the cost to society of not taking action would be substantial enough to justify the loss of rights for other citizens. Although this raises the difficult question of what would be 'substantial' enough, which will not be discussed here.[24] Classical liberal theories do not offer an answer to how far the state should go to protect autonomy, but the idea that citizens' actions have consequences on others does offer some theoretical support for delimiting the expansion of the criminal law through constraining principles as we discuss later.

[23] Bunmee Ronnakorn, 'Preparatory Offences: a Challenge to Criminal Law Boundaries, Democracy and Human Rights Principles' (2016) 2 Social Science Asia 14.

[24] Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (1st edn, Hart Publishing 2009) 21.

2. Liberal And Utilitarian Views Of The Criminal Law

2.1 Liberalism, Utilitarianism And The Pursuit Of Security

Liberal and utilitarian conceptions of the criminal law produce different views of how the state ought to intervene in its citizens' private spheres. It is important to distinguish between them, for each sets a different starting point for the role that criminal law ought to play in the pursuit of security. A liberal criminal law emphasises that the autonomy exercised by one individual cannot be allowed to invade the personal autonomy enjoyed by another individual. It follows that our individual sphere of autonomy is necessarily bounded by that of others and that everyone is entitled to justificatory equality and punished only with reasons.[25] Other characteristics of liberalism in criminal law include the justification of the exercise of state power,[26] requiring that punishment satisfies constraints and a commitment to give reasons for punishment.[27]A liberal concern for limiting state power entails, as Tadros argues, 'a theory of what it means for an individual to be both responsible for committing a crime and to have the appropriate kind and degree of fault to be held responsible for that crime'.[28] Shahav notes that liberalism entails weighing opposing values and giving different weights to principles 'in accordance with the spirit and purpose of the law, relevant in the specific state and social reality in question, as well as the overall value of the society'.[29]

[25] Rafael Rodrigues Pereira, 'Liberals, Communitarians, Republicans and the Intervention of the State in the Private Sphere' (2014) 4 Philosophy Study.
[26] Nathan Hanna, 'Liberalism and the general justifiability of punishment' (2009) 145 Philosophical Studies 325, 4.
[27] Ibid 4.
[28] Victor Tadros, 'Justice and Terrorism' (2007) 10 New Criminal Law Review 658, 659.
[29] Sigal Shahav, 'Anti-Terrorism Criminal Law: Where Emergency Regime Meets the Investigative Agenda' (2023) 56 Israel Law Review 225, 231.

As discussed previously, due to the unique nature of the risk of terrorism, terrorism-related legislation challenges some liberal principles and common law principles in criminal procedure, such as the principle of adjudicating the *criminal conduct* rather than the offender, which means punishment for acts done and not for characteristics or associations of the offender.[30] Terrorism offences in the UK often reflect a utilitarian approach in theory and practice, as will be shown in Chapters 5-7. Utilitarians argue that punishment is necessary to obtain important goods as a 'means to an end', and that criminal law can sometimes inflict pain and suffering for the good of the society to deter, incapacitate or rehabilitate wrongdoers.[31] Utilitarianism and liberal retributivist theories conflict with each other. Although scholars may agree on particular scenarios, a criminal system that seeks to prevent future offending is different from one that seeks to punish retrospectively. This tension is particularly troubling for the pre-inchoate terrorism offences explored in this thesis, as the severe punishment favoured by the offences examined in Chapters 5-7 is a prominent example of a conflict between the two philosophies. It is difficult to justify the imposition of long terrorism sentences on grounds of just desert for pre-inchoate conduct. Scholars critique the potential expansion of criminal law under a utilitarian rationale, where imposing harsher sentences and broader offences is justified on grounds of prevention and risk.[32]

In Chapters 5-7, I observe that pre-inchoate terrorism statutes are premised on utilitarianism. However, this thesis takes the view that the state should not adopt a utilitarian framework of punishment without considering liberal restraints that should be applied to terrorism-related laws.[33] Without doing so, there is a risk that terrorism laws become individualised rather than

[30] Ibid 232.
[31] Paul Butler, 'Foreword: Terrorism and Utilitarianism: Lessons From, and For, Criminal Law' (2002) 93 J Crim L & Criminology 1, 16.
[32] Tadros (n 28).
[33] Ibid 685.

applying equally to everyone. The state has a dual role: it must protect individual security while also ensuring that it does not compromise individual liberties by enacting overly broad laws driven by social or political factors.[34] Nonetheless, Tadros acknowledges that the unique qualities of terrorism may mean that utilitarian laws are sometimes necessary, though the benefits of an expanded criminal law must outweigh the costs in terms of different interference with liberties.[35]

Utilitarian considerations often affect and influence liberal principles and restraints.[36] For example, Rich argues that although liberalists criticise utilitarianism as it allows for punishment of innocent people if the social benefit (such as deterrence, rehabilitation or other goods) outweighs the harm it causes, punishment must still be based on a finding that the individual committed a wrong and this is necessary for the imposition of suffering.[37] In contrast, liberalism fails to explain why prevention can be pursued as a means of security since 'there is no past offense and no moral desert to provide the threshold justification for the intrusion on liberty'.[38] Proportionality is a penal constraint for utilitarians and retributivists, as it limits what can be done to an offender at the expense of an end goal, whether that be the pursuit of social good or moral just deserts.[39] This thesis takes the stance that liberal constraints and rights ought to frame the boundaries of the pre-inchoate offences explored in Chapters 5-7 and that the primary rationale behind terrorism legislation should be a form of retributivism. But I acknowledge the difficulty in attempting to fit liberal principles into an analysis of phenomena that is grounded in utilitarian thinking. Hanna rightly notes that considering the interaction

[34] Ibid 686.
[35] Ibid 686.
[36] Hanna (n 26) 3.
[37] Michael L Rich, 'Limits on the Perfect Preventive State' (2013) 46 Conn L Rev 883, 900.
[38] Ibid 901.
[39] Jesper Ryberg, 'Retributivism and the Proportionality Dilemma' (2021) 34 Ratio 158; Michael Tonry, *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press 2019).

between both liberalism and utilitarianism 'may bear on the reliability and relevance of retributive considerations. If, say, retributive considerations garner some support from implicit consequentialist assumptions (e.g., that only punishment can secure crucial goods), showing that those assumptions are mistaken could weaken the retributivist case. This bears directly on traditional debates over punishment.[40]

3. The Temporal Expansion Of The Criminal Law

The temporal expansion of the criminal law allows the interception of threats before they are carried out, or in the case of encouragement offences, conceived.[41] To begin, it is essential to revisit Lacey's principles of criminal responsibility and relate them to this thesis.

3.1 'Capacity Responsibility', 'Risk Responsibility' And A Diffusion Of Responsibility

Lacey notes that 'capacity responsibility' is the key cornerstone for criminal liability, in that the standard criminal offence punishes a 'conduct' that is caused because of 'fault'.[42] Significantly, the concept of capacity responsibility stems from the principle of individual autonomy: an individual is responsible for what he chooses to do. This relates to the principle of causation that treats adults as responsible individuals who may justly be held liable for their choices and the consequences of their actions provided there is a sufficient causal link between their actions and the resulting harm, and the chain of causation is not broken. Although criminal law includes many strict liability offences, particularly in regulatory contexts, the position

[40] Hanna (n 26) 3.
[41] Christos Boukalas, 'UK Counterterrorism Law, Pre-Emption, and Politics: Toward "Authoritarian Legality"?' (2017) 20 New Criminal Law Review 355.
[42] Lacey (n 17).

remains that more serious offences should ordinarily be grounded in fault.[43] Although this theory has been subject to criticism, I will argue that these concepts underlie much of the criminal law in the UK, although not all criminal liability serves to punish conduct that causes a harm with fault.[44]

Lacey's last category of criminal responsibility- 'risk-responsibility'- is highly significant. Lacey asserts that offences of risk-creation penalise the fact that individuals create 'risk' towards themselves and others in their communities.[45] Inchoate offences, for example, differ from consummated offences in that the former targets the *risk* of an ultimate harm while the latter targets the ultimate harm itself.[46] The proliferation of preventive offences in recent years has led to what Ashworth calls the 'diffusion of criminal responsibility', whereby there is a 'deepening of criminal liability by creating new forms of responsibility or extending old forms of liability'.[47] This idea is important because it touches upon the question of whether the creation of new substantial *pre-inchoate* offences may be regarded as a horizontal, vertical or even diagonal expansion of the criminal law, which expands criminal liability even further than before.[48] Offences aimed at reducing the risk of harm are undeniably characterised by 'outcome-responsibility' and 'risk-responsibility' rather than capacity responsibility.

[43] Ashworth (n 17).
[44] Grant Lamond, 'What is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609.
[45] Lacey (n 17) 126.
[46] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).
[47] Ashworth (n 17).
[48] Ibid.

3.2 Duff's Taxonomy Of Risk Prevention Offences

Of great significance to the analysis of pre-inchoate liability is Duff's taxonomy of risk prevention offences. In describing what he calls 'crimes of endangerment', Duff observes that risk prevention offences may be consummate, non-consummate, general, specific, direct, indirect, explicit or implicit. Offences of risk prevention are consummate when they require the commission or actualization of a risk. Non-consummate offences, on the other hand, do not require actualization of a risk.[49] As Husak observes, an offence can be general or specific 'as to the interest that is threatened or as to the way in which it is threatened'.[50]

Husak describes offences as direct 'if the relevant harm would ensue from the criminalised conduct without any intervening wrongful human action' and indirect 'if the harm would ensue only given further, wrongful actions by the agent or by others'.[51] Detonating a bomb that endangers lives is an example of a direct risk preventive offence, whereas facilitating someone else to commit a terrorism-related offence is indirect because the harm would only occur if the perpetrator were to commit the act. Offences of risk prevention are explicit 'when their commission requires the actual creation of the relevant risk- a risk specified in the offence definition'; they are implicit 'if their definition does not specify the relevant risk (the risk that grounds their criminalization), so that they can be committed without creating the risk'.[52] One example of this is possessing information of a kind likely to be useful to a person committing or preparing an act of terrorism.[53] This offence is pre-inchoate because a person can (and usually does) commit it without harming another person- including himself. However, he may

[49] One example of a consummate offence given by Husak is causing death by dangerous driving, whereas dangerous driving itself is a non-consummate offence; see Husak (n 46) 34.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Section 58(1) of the Terrorism Act 2000.

be creating a 'risk' of indoctrinating himself or others by merely possessing such information, or no risk at all. I will refer back to these distinctions when analysing principles to limit the reach of pre-inchoate offences.

3.3 Inchoate Offences And Their Problems

The enactment of inchoate offences has contributed to the significant expansion of the criminal law. They are the epitome of the preventive element in the criminal law in that they criminalise people before they have committed the prohibited harm. This is because, as Husak rightly observes, 'the state has long proscribed just about every possible means of directly causing harms- even if it resorts to *re*criminalization- but there is virtually no limit to *how far* the state might go in protecting persons from *novel ways* that harm might be risked'.[54] Offences of prevention or 'endangerment', as Ashworth puts it, are examples of inchoate offences that include offences of attempts, encouragement, conspiracy and incitement that enable the criminal law to defend further up in the field by capturing liability at the early stages of criminal offending.[55]

Inchoate offences are distinct from accessory or 'derivative' liability in which an offender's wrongfulness stems from his relationship to the principal offender who commits the offence.[56] These offences target what Child calls an ulterior *mens rea*, which 'provides unique opportunities for framing offences that are able to take account of [a person's] wrongful state

[54] Husak (n 46) 32.
[55] Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 New Criminal Law Review: An International and Interdisciplinary Journal 542; David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013). Available at SSRN 2292950.
[56] Ian D Leader-Elliott, 'Framing Preparatory Inchoate Offences in the Criminal Code: The Identity Crime Debacle' (2011) 35 Criminal Law Journal 80.

of mind where it has not yet (or not yet fully) been actioned externally'.[57] Ulterior *mens rea* 'enables the creation of offences designed for early intervention within a criminal enterprise and, even where D's actions are complete or have already caused some lesser harm, more accurate labelling and punishment that takes account of D's more seriously wrongful state of mind'.[58] Ulterior *mens rea* therefore justifies the creation of offences designed for early intervention within a chain of offending 'even where an individual's actions are complete or have already caused some lesser harm, more accurate labelling and punishment that takes account of D's more seriously wrongful state of mind'.[59] As such, pre-inchoate offences can be seemingly innocuous and involve lesser harm but can be said to be inherently wrongful since the offender has internally committed themselves to the wrongfulness of the eventual crime.

Many jurisdictions enact a variety of inchoate offences that extend beyond the well-known categories of attempt, conspiracy and encouragement.[60] Husak rightly notes that 'virtually all commentators agree that many of these offences are justified'.[61] However, it is clear that allowing preventive offences into the criminal law creates the potential to expand the scope of state power significantly.[62] Some scholars have questioned the state's authority to criminalise certain behaviours it considers harmful to citizens, such as making dropping out of high school a crime because it increases the likelihood of a young person entering the criminal justice system.[63] Furthermore, inchoate offences tend to circumvent traditional criminal law principles,

[57] JJ Child, 'The Structure, Coherence and Limits of Inchoate Liability: the New Ulterior Element' (2014) 34 Legal Studies 537.
[58] Ibid 1.
[59] Ibid 1.
[60] Inchoate terrorism offences are found in the criminal law of other jurisdictions such as the Spanish Penal Code (Article 18.1 criminalizes provocation to commit any criminal offense and by extension apologia for criminal offences), Australian (e.g. Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] (Cth)) and the US Model Penal Code (e.g. § 2339B of title 18- providing material support or resources to designated foreign terrorist organizations).
[61] Husak (n 46) 121.
[62] Ibid 162.
[63] Mill's famous harm principle permits state interference only to prevent harm to others.

including the rule of law and proportionality by radically extending the boundaries of criminal responsibility to cover acts of abstract endangerment.[64]

Leader-Elliott further identifies several problems with inchoate offences that also apply in an analysis of pre-inchoate and pre-inchoate offences. First, an ulterior intention has to be proved to convict for offences such as conspiracy, although 'intention' is often difficult for the prosecution to prove and therefore objectively construed by reference to overt acts that are 'sufficient in themselves to declare and proclaim the guilty purpose by which they are done'.[65] Academics debate whether an 'objectivist' or 'subjectivist' approach to intention is more justified, though the UK has moved away from objectivist tests for *mens rea* (e.g. recklessness) to restore a subjective test of what the offender himself thought.[66] Secondly, how should one draw the line between an attempt and a fully-fledged offence, say, in offences such as conspiracy where there is no agreement and it is unclear where involvement should be deemed to reach a tipping point for criminal liability. Many jurisdictions, including the UK, require the offender to take a substantive step or act which is more than merely preparatory with a specific intent or recklessness to commit the substantive offence which must be proven by the prosecution.[67] Third, conviction for inchoate offences tends to carry similar penalties for the target offence, which has been critiqued for being disproportionate under a retributivist sentencing rationale.[68] The aim of this thesis is not to restate the debates around inchoate

[64] In the UK, impossibility is not a barrier to conviction for inchoate offences. Finkelstein considers the "risk of a harm" to constitute sufficient harm to justify criminalisation- see Claire Finkelstein, 'Is Risk A Harm?' (2002) 151 U Pa L Rev 963).
[65] Margaret Briggs, 'The Conduct Requirement in the Law of Attempt:A New Zealand Perspective' (2015) 44 Common Law World Review 145.
[66] Ibid.
[67] Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (Oxford University Press, USA 2014).
[68] Zoe Scanlon, 'Punishing proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom' (2014) 25 Current Issues in Criminal Justice 763; Florence Lee, 'Sentencing Cases of Preparation of Terrorist Acts (Terrorism Act 2006 s.5): a Call for Proportionality' (2018) Sentencing News 8.

offences. However, offences of 'implicit risk prevention' draw attention to issues inherent in seeking to impose responsibility for crimes that punish acts before the ultimate harm has been committed.[69]

3.4 Pre-Inchoate Offences And Their Problems

Recently, academics have focused more on *pre-inchoate* offences and the problems they entail. Prevention may sometimes involve criminalising *preparatory* steps that form part of a course of action that leads to the commission of the substantive harm. For some of these acts, criminalisation is unlikely to be problematic- such as where an attempt to commit a serious crime is obstructed by police intervention. Other forms of liability, however, may be more controversial. Should the offender be criminally liable for punishment when they purchase equipment? Should they be liable for merely viewing or accessing information of a kind likely to be useful to a person committing or preparing an act of terrorism?[70] Furthermore, does the answer depend on the type of conduct for which the offender is preparing?

Conventionally, these questions have been addressed using the principles governing inchoate attempt liability.[71] However, a variety of offences that *explicitly* criminalise preparatory conduct have been enacted in recent years. As Husak notes, the threat of terrorism has provided governments around the world with a reason to create new crimes that reduce risks.[72] Therefore, much of the literature surrounding pre-inchoate offences is situated in the context of counter-

[69] Robin Antony Duff and Stuart Green, *Philosophical Foundations of Criminal Law* (OUP Oxford 2013) 308.
[70] Section 58(1) of the Terrorism Act 2000 as amended by section 3 CT & Border Security Act 2019.
[71] Bernadette McSherry, Alan Norrie and Simon Bronitt, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing 2008).
[72] Husak (n 46).

terrorism legislation and case law.[73] These offences range from an offence of 'making articles' for use in fraud to offences that impose liability for preparatory terrorist activity under the Terrorism Act 2006.[74] Pre-inchoate offences must be distinguished from 'doubly-inchoate' offences, which impose inchoate liability on pre-existing inchoate offences such as attempts or conspiracy to commit an act and which are not the focus of this thesis. [75]

Pre-inchoate offences further expand the boundaries of criminal law but have not attracted as much attention as inchoate liability.[76] Pre-inchoate offences are centred around the logic of risk and using the criminal law to reduce risk.[77] The criminalisation of preparatory acts, as Heide and Geenen observe, is based on a 'preventive logic', which is centred around 'pre-crime' discourses such as risk management, risk-detection, precaution and the relationship between risk and law.[78] In this sense, the criminalization of preparatory conduct can be seen as a way of reducing the risk of harm based on the precautionary principle. The rise of pre-inchoate offences is driven by a 'pre-crime' rationale, which is largely based on precaution- offences are enacted to disrupt and incapacitate 'would-be' criminals and prevent the substantive harm from occurring. [79] A precautionary logic entails enacting wide-ranging legislation to reduce the risk that uncertain but catastrophic future harms occur.

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[73] Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt & Sarah Murray (Eds.) *Regulating Preventive Justice: Principle, Policy and Paradox* (1st ed. Routledge 2007); Rory Kelly, 'The Right to a Fair Trial and the Problem of Pre-inchoate Offences' (2017) European Human Rights Law Review 596; Tamara Tulich, 'Prevention and Pre-emption in Australia's domestic anti-terrorism legislation' (2012) 1 International Journal for Crime, Justice and Social Democracy 52; PJ Edwards, 'Counter-terrorism and Counter-law: an Archetypal Critique' (2018) 38 Legal Studies 279.

[74] Section 5 of the Terrorism Act 2006.

[75] Ira P Robbins, 'Double Inchoate Crimes' (1989) 26 Harv J on Legis 1.

[76] Tulich et al (n 73) 117.

[77] Ibid 118.

[78] Liesbeth van der Heide and Jip Geenen, 'Preventing Terrorism in the Courtroom–The Criminalisation of Preparatory Acts of Terrorism in the Netherlands' (2015) 26 Security and Human Rights 162.

[79] Jude McCulloch and Dean Wilson, *Pre-crime: Pre-emption, Precaution and the Future* (Routledge 2015).

The paradigm of risk and prevention creates difficulties of resolving the tensions between the pursuit of risk prevention and safeguarding citizens' liberties. Hudson observes that a 'risk society' involves a shift in the targets of penal strategies and the means by which punishment is achieved.[80] Unlike a backward-looking criminal law, risk-management and risk-reduction are the means through which the goals of security and justice are pursued especially during a time of terror. This new paradigm has four main consequences. First, the threat of risks such as terrorism drives a politics of 'zero risk', which makes pre-inchoate or pre-inchoate offences more attractive to politicians. As terrorism risks are highly uncertain, governments tend to increase the breadth of criminal offences to reduce a small amount of risk. Often, these offences have weak or no *mens rea* requirements and rely on seemingly innocent *actus reus* elements such as viewing a terrorism-related article online[81]. This extension of the criminal law is dangerous, for it becomes increasingly difficult to identify any principled limits and constraints.[82]

Secondly, scholars have debated the legitimacy of pre-inchoate offences. Carvalho and Ramsay, for example, draw attention to the legitimacy of preparatory offences and the authority of the state to use preventive criminal law.[83] As Carvalho notes, 'the growing preventive apparatus of the criminal law gives form to a waning of political authority experienced by the preventive state as it, in employing this apparatus, is openly and fundamentally questioning the force and the validity of its authority'.[84] Even if pre-inchoate offences are legitimate in principle, the

[80] Barbara Hudson and Synnove Ugelvik, *Justice and Security in the 21st century: Risks, Rights and the Rule of Law* (Routledge 2012).
[81] Section 58(1) of the Terrorism Act 2000 as amended by section 3 CT & Border Security Act 2019.
[82] Lee (n 68).
[83] Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press 2017); Peter Ramsay, 'Book Review: Henrique Carvalho, The Preventive Turn in Criminal Law' (2018) 22(4) Theoretical Criminology 603.
[84] Ibid 76.

criminalisation of early acts of preparation remains problematic because the variability of situations in which offenders may be subject to pre-inchoate liability means that legitimacy is more likely to be undermined as individuals connected to it may not believe that it is appropriate or just.[85]

Thirdly, pre-inchoate offences often result in little *actual* harm caused. Rimo notes that the conduct element of these offences is often harmless and 'far from causing harm to a legally-protected interest, and as such represent a 'purely mediate danger' and therefore punish an ulterior intent.[86] Some argue that these offences risk being 'thought crimes' which cannot be justified under criminal law principles.[87] However, Finklestein views pre-inchoate offences differently and argues that the conduct of, say, preparing to commit an offence, creates risks which could be treated as 'harm' under the harm principle.[88] She notes that it is not incoherent for the law to punish 'risk infliction' as a person who intentionally creates a risk to others reduces the 'welfare' of people around them in the sense of subjective security and, therefore, is analogous to removing the chance of them living a risk-free life.[89] This idea is important for later arguments for it accords with both communitarian and republican views of the criminal law as elaborated previously. It also accords with Feinberg's notion that harm is a 'set back to a legitimate interest',[90] which therefore supports the claim that the creation of risk may be the basis of criminal liability because it does damage to citizens' wellbeing in a community. I will

[85] Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283.
[86] Alonso Rimo, 'The Drift of Contemporary Criminal Law Towards a Dystopian Fiction: an Examination from the Perspective of the Criminalisation of Acts Preparatory to an Offence' (2018) 19th International Roundtable for the Semiotics of Law Law and Arts in Crime Settings, Örebro Sweden.
[87] Gabriel S Mendlow, 'Thoughts, Crimes, and Thought Crimes' (2020) 118 Michigan Law Review 841.
[88] Finkelstein (n 64).
[89] Ibid 966.
[90] Ibid 971.

expand on Finkelstein's argument in later chapters, where I develop a theoretical framework for analysing pre-inchoate offences.

Lastly, pre-inchoate offences are often drafted too widely, which leads some commentators to note that they create issues of evidential uncertainty and violate rule of law values such as legal certainty.[91] Other authors have highlighted the risks of overcriminalization created by an expanding criminal law,[92] the phenomenon of 'counter-law' which undermines the rule of law[93], the problems of governing risk through law[94] and the problems with applying a precautionary logic in an attempt to punish, disrupt or undermine individuals that may commit future crimes.[95] Further, some have identified the problem of disproportionate sentencing for terrorism offences in that sentences seem excessively long for acts of preparation that have not involved an act of terrorism capable of harm.[96] Taken together, pre-inchoate offences have attracted much criticism and these issues apply even more strongly to the expansion of the criminal law even *further* back in time and space that we explore in the next section.

[91] Offences such as the preparation of terrorist acts under Section 5 of the Terrorism Act 2006 has been criticised for being too broad in criminalising an intention to commit *any* act of terrorism without referring to specific acts. See Andrew Cornford, 'Terrorist Precursor Offences: Evaluating the Law in Practice' (2020) 8 Criminal Law Review 663.
[92] James Chalmers, ''Frenzied Law Making': Overcriminalization by Numbers' (2014) 67 Current Legal Problems 483.
[93] Edwards (n 73); Richard V Ericson, *Crime In An Insecure World* (Polity 2007).
[94] Liesbeth van der Heide and Jip Geenen, 'Preventing Terrorism in the Courtroom-The Criminalisation of Preparatory Acts of Terrorism in the Netherlands' (2015) 26(2–4) Security and Human Rights 162.
[95] Matthias Borgers and Elies van Sliedregt, 'The meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism' (2009) 2 Erasmus L Rev 171.
[96] Scanlon (n 68).

3.5 Pre-Inchoate Offences – A New Era Of Diffused Offences?

Apart from the 'vertical' expansion of the criminal law in the form of pre-inchoate, 'pre-crime'[97] or 'precursor' offences,[98] the criminal law has undergone a further *horizontal* and even *diagonal* expansion not yet fully explored in the literature. Ashworth once expressed concern about the phenomenon of a 'diffusion of criminal responsibility' in the sense that the state has created offences with 'new forms of responsibility or extending old forms of liability. Whereas criminalization by creating new substantive offences may be regarded as the *horizontal* expansion of the criminal law, criminalization by extending the grounds of responsibility may be seen as a vertical expansion of the criminal law, in effect taking criminal responsibility to a new level'.[99]

It is important to describe Ashworth's argument in full, for it is this very phenomenon that is at the heart of this thesis. Ashworth notes that the horizontal expansion of the criminal law means that new offences have been added to the criminal law whereas vertical expansion refers to the 'layering' of additional levels of criminal responsibility.[100] Ashworth focuses on the vertical expansion to argue that terrorism offences in the UK, such as crimes of possession, risk-based possession offences (which do not require proof of intention to commit a further offence) and crimes of membership can be understood as changing the boundaries of what Lacey calls 'responsibility-attribution in time'.[101] Ashworth's observation is crucial to the

[97] Lucia Zedner, 'Pre-crime and Post-criminology?' (2007) 11 Theoretical Criminology 261.
[98] Lord Carlile QC and Stuart Macdonald, 'The Criminalisation of Terrorists' Online Preparatory Acts' in Thomas M Chen, Lee Jarvis and Stuart Macdonald (eds), *Cyberterrorism: Understanding, Assessment, and Response* (Springer 2014) 155-173.
[99] Ashworth (n 17) 2.
[100] Ibid 17.
[101] Lacey (n 17) 48.

evaluation of pre-inchoate terrorism offences as many preventive terrorism-related offences that have been enacted in recent times support this trend.

4. Justifications And Critiques Of Pre-Inchoate Offences

There are various problems associated with the creation of pre-inchoate crimes, which stretch the temporal space between penal intervention and substantive crime.[102] These have mostly been examined by scholars in the context of pre-inchoate liability and counter-terrorism, and this subsection attempts to apply some of the most important justifications and rationales developed in the literature in relation to pre-inchoate offences.

Traditional justifications for inchoate or pre-inchoate offences are harder to apply in respect of some completed offences. Admittedly, the logic behind pre-inchoate offences is similar to pre-crimes -they 'stretch the temporal boundaries of the criminal law further than what was thought possible or reasonable through the prosecution of pre-crimes'.[103] The dominant rationale for preventive criminalisation- the so-called *harm principl*e was articulated by John Stuart Mill, who stipulated that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[104] Feinberg refines the harm principle as a good reason to support legislation that would *probably* be effective in preventing (eliminating, reducing) harm to persons other than the actor, and there is 'probably no means that is equally effective at no greater cost to other values'.[105] Feinberg also alludes to the 'principle of least restrictive alternative', which requires punishment to be

[102] McCulloch and Wilson (n 79) 136.
[103] Ibid 135.
[104] Mill and Robson (n 12) 223.
[105] Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law*, vol 2 (New York: Oxford University Press 1985), 26.

at a level that is the least restrictive needed to achieve risk prevention without interfering unnecessarily with individual security and rights.[106] Three rationales for criminalisation will be discussed and critiqued.

4.1 The Wrongfulness Of Pre-Inchoate Offences

First, there is a consensus that criminal liability should only be imposed if conduct is wrongful (the wrongfulness principle).[107] Simester and von Hirsch argue that the criminal law is used to communicate the *wrongfulness* of a prohibited act;[108] the 'hard treatment' that follows punishment imposes censure and gives citizens a prudential reason to obey the law.[109] Wrongfulness is thus a necessary but insufficient requirement. It needs to be combined with harmfulness as the criminal law ought to be concerned with actions that affect the 'lives of people'.[110]

The problem when applying these prescriptions to pre-inchoate offences is that the conduct penalised through, for example, possession or publication offences of terrorism are not wrongful *per se*. It is difficult to argue that simply possessing articles useful for terrorism is a *mala in se* (wrong in itself). Many of these offences are *mala prohibitum* in that the acts targeted by the offence is only wrong because the legislation makes it so in the name of prevention.[111] This leaves open the question of what 'wrongs' are being targeted and how wrongfulness can

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[106] Douglas Husak, 'The Criminal Law As Last Resort' (2004) 24 Oxford Journal of Legal Studies 207.
[107] Kimberly Kessler Ferzan, 'Prevention, Wrongdoing, and the Harm Principle's Breaking Point' (2012) 10 Ohio St J Crim L 685; Andrew P Simester and Andrew non Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28 Criminal Justice Ethics 89.
[108] Simester and von Hirsch (n 107).
[109] Ferzan (n 107).
[110] Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Bloomsbury Publishing 2011) 21, 29.
[111] Although strict liability offences constitute a very large percentage of regulatory crimes.

act as a constraining principle to delimit the scope of these offences. Scholars like Husak advocate for the idea of a 'public wrong', but this idea is not without critique.[112] I evaluate the 'bite' of a wrongfulness constraint on pre-inchoate offences further in subsequent chapters, but it suffices to say that it is a problematic constraint, given that pre-inchoate offences often include a broad *actus reus* that is far removed from the targeted wrongdoing.

4.2 The Harm In Pre-Inchoate Offences

More importantly, the harm principle is central to the analysis in debates concerning whether pre-inchoate offences cause harm, which is at the heart of the discussions in later chapters. A narrow subjectivist harm principle was supported by Simester and von Hirsch, who see harm as a utilitarian concept and label it as doing 'morally wrongful conduct' (e.g. lying or fraud).[113] Under this rationale, many pre-inchoate offences with potentially innocuous *actus reus,* such as possession offences, would not satisfy the harm principle as possessing an item (e.g. a map of the subway station in London) is not morally wrong unless coupled with intent to use it for a terrorist act. In contrast, Mill's Harm Principle refers to harms being 'a definite risk of damage, either to an individual or the public'.[114] This principle is *broader* as no actual damage needs to be caused for a risk of harm to arise. As Ashworth and Zedner posit, Mill's principle permits criminalization as soon as an act 'conduces' harm to others and specifies in what circumstances power can be exercised in order to prevent that harm, although he does not stipulate the limits

[112] For example, Tadros criticizes the idea of a public wrong for being vague as the criminal law can also serve an 'expressive' function whereby the main role of the law is to condemn, not to impose suffering on wrongdoers; Moore also argues that there are wrongs that are inherently private. See Victor Tadros, 'The architecture of criminalization' (2009) 28 Criminal Justice Ethics 74; Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, USA 2010).

[113] Simester and von Hirsch (n 110) 22-23.

[114] John Stuart Mill, 'On Liberty' in John M Robson (ed), *John Stuart Mill: A Selection of His Works* (Red Globe Press 1985) 1.

to the exercise of such power.[115] In this sense, a *wider* conception of harm explains what is being punished under pre-inchoate offences of risk prevention.

Rejecting a narrower interpretation of the harm principle means that the idea that 'risk' is itself a harm becomes relevant. Finkelstein's *risk-harm theory* distinguishes between 'risk harm' and 'outcome harm', where the former is a harm independent of an outcome; 'real' harm in other words, is caused even when an individual creates the *risk of a harm* to come into existence, thus threatening the liberties of other individuals.[116] This accords with the 'reverse harm thesis' which permits the criminal law to prevent harms before they occur.[117] The question is, however, what *harm* does a protection against risk prevent? The obvious answer is that criminalizing the risk of harm protects citizens' individual security. Wolfers distinguishes between a subjective and objective account of security, whereby the former is the absence of fear that one's security will be attacked, and the latter is the absence of threats.[118] Waldron argues that the protection of *subjective* security is not a sound basis for the law to penalise conduct, whereas the pursuit of *objective* security is.[119] The view that pre-inchoate offences may protect subjective security over objective security is, in my view, implausible. Subjective fears vary according to the individual, and as Wolfendale rightly notes, 'reducing subjective insecurity at the expense of objective security, particularly in relation to subjective insecurity about statistically

[115] Ashworth and Zedner (n 3) 103-104; but see Jeremy Waldron, 'Mill on Liberty and on the Contagious Diseases Acts' in Nadia Urbinati and Alex Zakaras (eds), J.S. Mill's Political Thought: A Bicentennial Reassessment (Cambridge University Press 2007) 11, where he suggests that the Harm principle carries more weight in limiting legal provisions if liberty is viewed as being able to offer individualised protection on a 'person-to-person' basis instead of liberty on 'aggregate'.

[116] Finkelstein (n 64) 996.

[117] Ashworth and Zedner (n 3) 107; Jeremy Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (2012) in G. R. Sullivan and Ian Dennis (eds) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Oxford: Hart Publishing, 2012).

[118] Arnold Wolfers, '" National Security" as an Ambiguous Symbol' (1952) 67 Political Science Quarterly 481.

[119] Jeremy Waldron, *Torture, Terror, and Trade-offs: Philosophy for the White House* (Oxford University Press 2010); Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 191.

insignificant threats' is not ideal.[120] Both Finkelstein and Waldron's distinct but related concept of harm seem to best describe the harm that pre-inchoate offences ought to try to prevent, though I will argue later that it can serve to *delimit* the reach of certain pre-inchoate offences too.

4.3 Deterrence And Dangerousness

Criminalising the damage caused by being exposed to a risk, which itself creates a risk, and so on, raises a problem: it is unclear where the limits of criminal liability would lie even if no harm is ultimately done.[121] This approach to legislating seems to be driven by deterrence-based rationales, which Finkelstein argues are not justifiable as they allows harm to 'travel across persons' and therefore follow a utilitarian logic rather than 'just deserts' since criminal liability is imposed for reasons other than one's own wrongful conduct. This is the third rationale, and it contradicts the harm principle directly. Deterrence is one of the biggest rationales behind many terrorism-related pre-inchoate offences such as membership offences, facilitation, and encouragement of terrorist acts.[122] These offences are enacted to provide general deterrence- to discourage the public from committing or facilitating in terrorist acts through high maximum sentences and showcasing the consequences of terrorism-related activity- or specific deterrence- targeting individuals or their associates from supporting terrorist organisations, viewing information online that are related to terrorism, as well as doing acts of support or encouragement for terrorism-related activity. By punishing these individuals harshly, the law

[120] Jessica Wolfendale, 'Moral Security' (2017) 25 Journal of Political Philosophy 238.
[121] Finkelstein (n 64).
[122] Section 11 of the Terrorism Act 2000- membership of a proscribed organization; section 1 of the Terrorism Act 2006- encouragement of terrorism; section 6 of the Terrorism Act 2006- training for terrorism.

seeks to demonstrate that continued terrorist behaviour will lead to serious consequences for the offender.

The deterrence rationale for expanding criminal law, especially in the context of terrorism, has implications and consequences for the liberal principles of criminal law discussed above, which argue for a restrained criminal law. Deterrence permits the broadening of the scope of terrorism laws. As Finkelstein and Ashworth both observe, these offences allow liability to 'travel across persons', to punish secondary or even tertiary actors involved long before the ultimate harm is committed.[123] Increased penalties that are disproportionate to the conduct of the offence are used- often effectively due to the severe sentences given- to deter citizens from committing similar acts.[124] To deter terrorism effectively, laws might impose restrictions on freedoms, such as freedom of speech, assembly, and privacy. These restrictions can be justified on grounds of security but may also encroach on individual rights and freedoms, undermining the legitimacy of national security laws. This expansion of the criminal law is problematic and is driven by a deterrent rationale, although this thesis critiques this phenomenon by arguing that liberal restraints matter.

Pre-inchoate terrorism-related offences are problematic because they seem to be driven by the concept of 'dangerousness'. While many scholars have explored the notion of dangerousness and its associated problems, [125] two further points can be made. The first is that dangerousness is a policy term of art, and any assessment of dangerousness can be critiqued for being uncertain

[123] A.P. Simester, 'Prophylactic Crimes' (2012) in G. R. Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Oxford, Hart Publishing), 59-78.
[124] Clive Walker, Mariona Llobet Anglí and Manuel C Meliá, *Precursor Crimes of Terrorism: the Criminalisation of Terrorism Risk in Comparative Perspective* (Edward Elgar Publishing 2022), 32.
[125] Jean Floud, 'Dangerousness and Criminal Justice' (1982) 22 The British Journal of Criminology 213; John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge 2002) 45.

and arbitrary, as it is not based on actual wrongdoing.[126] As Rimo rightly argues, this criticism is more justified where, as seen in some pre-inchoate offences such as possession crimes, individual assessments are overlooked in favour of a *direct* presumption of dangerousness.[127] Secondly, if the criminal law's role is to preserve bonds of trust in society, as discussed previously, then dangerous individuals are seen as criminally *irresponsible* as they have broken society's trust by engaging in conduct that is deemed to create a risk of serious harm.[128] While dangerousness will not be explored in detail due to the limited scope of the chapter, it is relevant in later Chapters as this utilitarian concept will be considered alongside liberal constraints, which ought to limit the pre-inchoate offences explored in Chapters 5-7.

5. Conclusion

This overview of the literature teases out some of the core concepts that underpins my theoretical framework for analysing the novel field of pre-inchoate offences in the subsequent chapters. Pre-inchoate offences do not contradict classical liberal theories of the criminal law given that the state has a rightful duty to prevent harms (and the risk of harm) from occurring. However, they generate new problems set out in this chapter. Drawing upon classical liberalism, communitarianism and republicanism it is clear that principles such as individual freedom, collective security and penal moderation in the pursuit of security are useful in understanding why there is a need to control any arbitrary expansion of the criminal law. I have reviewed the literature around inchoate and pre-inchoate offences which share a structural similarity with the pre-inchoate offences which are the focus of my thesis: they comprise of a seemingly innocent *actus reus* and contain weak *mens rea* requirements, and are often broadly drafted in

[126] Rimo (n 86).
[127] Ibid.
[128] Nigel Walker, 'Harms, Probabilities and Precautions' (1997) 17 Oxford Journal of Legal Studies 611.

order to reduce the risk of a remote harm from occurring. Because of these similarities, debates about the problems and constraints of inchoate and preparatory offences are important in determining how to apply the identified constraints to pre-inchoate offences.

To this end, the following chapters will consider several categories of pre-inchoate offences in turn. I will first provide an overview of current terrorism legislation in the UK and set out the parameters and scope of the substantive pre-inchoate terrorism offences that I will focus on. I will then outline a theoretical framework to better understand these offences and identify, classify, and give weight to different constraining principles that may serve to delimit these offences. It remains to be seen whether these pre-inchoate offences can be classified as a coherent entity or whether their shared characteristics are less salient than their differences. By applying my theoretical framework to these offences, this thesis will generate important new insights into the applicability of constraints to categories of pre-inchoate offences specifically and preventive offences more generally.

III. Overview Of UK Anti-Terrorism Legislation

UK counterterrorism legislation developed primarily in response to the ongoing political conflict in Northern Ireland from the late 1960s until the late 1990s.[1] From 2000 to 2021, the UK Parliament enacted eleven major pieces of legislation concerned with terrorism in addition to those related to Northern Ireland: the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Counter-Terrorism Act 2008, the Terrorist Asset-Freezing etc. Act 2010, the Terrorism Prevention and Investigation Measures Act 2011, the Justice and Security Act 2013, the Counter-terrorism and Security Act 2015, the Counter-Terrorism and Border Security Act 2019, and the Counter-terrorism and Sentencing Act 2021. The timing of each of these laws were affected by the September 11, 2001 attacks and the July 7 London bombings, as well as the global war on terrorism.[2] The Terrorism Act 2000 is the centrepiece that forms the bedrock of the UK's counter-terrorism strategy. The Terrorism Act 2000 'reflected the paramilitary ceasefire in Northern Ireland, which had culminated in the Belfast Agreement signed on Good Friday 1998, with a greater emphasis on international terrorism'.[3]

This Chapter will explain and analyse the main provisions of the legislation relating to the three categories of pre-inchoate terrorism offences- namely possession, encouragement, and associative terrorism-related offences- that will be explored in Chapters 5 to 7 to set the context for what follows. I will explain why I chose these three pre-inchoate terrorism offences and why I have not chosen other offences for doctrinal analysis. The law is correct as of 1st July

[1] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Third Edition, Oxford University Press 2014).
[2] Ibid.
[3] Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 Journal of International Criminal Justice 1137.

2025. It focuses on some of the key provisions of the most relevant legislation, in particular the Terrorism Act 2000 and 2006. This Chapter critiques provisions that may be controversial, in particular the challenges relating to the definition of terrorism under section 1 of the Terrorism Act 2000, and why the preparation offence under s.5 TA 2006 causes problems for pre-inchoate terrorism offences. In so doing, it establishes the context for the discussions of specific terrorism-related offences in Chapters 5 to 7.

1. The Changing Contours of Terrorism Legislation

The following commentary develops several themes. The first relates to the sheer breadth of security measures against terrorism created under the rubric of prevention and security, as Lord Anderson KC suggests, in order to 'defend further up the field'.[4] This defensive approach views criminal law as a response to risks that need to be minimised to achieve preventive justice through an increasing apparatus of security management, creating a net-widening effect by capturing more would-be terrorists within the justice system as early as possible.[5] Many laws provide direct security against terrorism, such as extending police powers over terrorist suspects, or extending the length of time a person can be detained without charge.[6] Other powers are indirect, for example, relating to seizure and forfeiture of terrorist assets and security measures which impinge on the liberty of citizens as a means to enhance their existing or perceived security.[7]

[4] David Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law' (2013) Available at SSRN 2292950.
[5] Ali Emrah Bozbayindir, 'The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?' (2017) 29 Criminal Law Forum 25.
[6] Victor Tadros, 'Justice and Terrorism' (2007) 10 New Criminal Law Review 658.
[7] Ibid.

A second change concerns the significant development and increased use of the criminal law. The period after the 9/11 attacks has been one of 'hyper-legislation' which saw a dramatic increase in the number of counter-terrorism laws passed.[8] This resulted from international pressures, mainly from UNSC Resolutions, the need for public reassurance, and the UK Government's emphasis on the 'Prevent' workstream as part of the CONTEST strategy published in 2006.[9] The CONTEST strategy is a comprehensive counter-terrorism approach with four strands: Pursue, Prevent, Protect, and Prepare. Pursue detects and investigates terrorist activity, Prevent aims to prevent individuals from becoming terrorists or supporting terrorism, Protect strengthens UK security against attacks, and Prepare enhances the country's resilience to respond to terrorist incidents. The Prevent strand of the UK's CONTEST strategy is most concerning due to its far-reaching and intrusive measures. Strategies aimed at reducing tendencies thought to radicalisation raise concerns about encroaching on freedom of expression and stifling legitimate discussions on sensitive topics. Additionally, the use of encouragement offences and pre-inchoate offences can lead to over-criminalization, as individuals may be prosecuted for mere expression of opinions which have only remote connections to potential harms. Balancing the need for national security with safeguarding civil liberties becomes critical to avoid unintended consequences and protect individual rights within a robust counter-terrorism approach.

A third change is the expansion of pre-inchoate liability, which has been described as 'one of the tools of a newly emerging security law or preventive justice' globally.[10] The main examples

[8] Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011).
[9] HM Government, 'CONTEST: The United Kingdom's Strategy for Countering Terrorism' 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf> accessed 10th June 2024, 9.
[10] Ruetaitip Chansrakaeo, 'Thailand's Legal Measures for Terrorism Prevention: Criminalisation of Terrorism and Challenges in Enforcement' (2021) 12 Turkish Online Journal of Qualitative Inquiry.

of preventive criminalisation in the UK can be found in the Terrorism Act 2000 and 2006 which enacts preparatory offences, pre-inchoate offences, crimes of possession of 'innocent' objects, and crimes of 'abstract endangerment'.[11] As Bozbayindir observes, these offences target early preparatory acts so that everyday activities such as merely buying a map of the underground or possessing items fall within the reach of terrorism law.[12] Zedner and Ashworth note that this expansion of the criminal law reflects an increasing pressure on the UK Government to act pre-emptively to prevent the greatest harms and embodies a 'precautionary' logic whereby extreme measures are taken to prevent uncertain threats, despite the hazards posed to civil liberties and human rights.[13] I contend that pre-inchoate offences represent a new paradigm in the apparatus of counter-terrorism strategies- one that differs from traditional criminal law by making conduct illegal not for its actual harm or attempted harm, but for the potential risk it may pose in the future.

A fourth change is the shifting focus of counter-terrorism legislation to issues of sentencing and early release.[14] The sentencing of terrorism offenders has not attracted as much attention in Parliament until recently, when there has been an extraordinary increase in legislation that governs the release and monitoring of terrorism offenders as part of an initiative to strengthen every step in the process surrounding the management of convicted terrorist offenders. This includes the introduction of the Terrorist Offenders (Restriction of Early Release) Act 2020 which ensures that terrorist offenders sentenced to a determinate sentence would not be released before the completion of their custodial term and subjected to the oversight of the

[11] See Sections 5, 57 and 58 of the Terrorism Act 2000.
[12] Bozbayindir (n 5) 13.
[13] Lucia Zedner and Andrew Ashworth, 'The Rise and Restraint of the Preventive State' (2019) 2 Annual Review of Criminology 22, 5.
[14] Florence Lee and Clive Walker, 'The "Counter-Terrorism and Sentencing Act 2021" and the Advance of Intensified Terrorism Punishment' (2022) Criminal Law Review 864.

Parole Board,[15] and the Counter-Terrorism and Sentencing Act 2021, which introduces a range of new sentencing measures designed to 'ensure that serious and dangerous terrorist offenders will spend longer in custody'.[16]

2. Outline Of Contemporary Terrorism Legislation From 2000-2025

2.1 Terrorism Act 2000 ('TA 2000')

The TA 2000 is one of the most important pieces of legislation in the UK. Its main goal is to give law enforcement agencies and intelligence services the authority to stop, identify, investigate, and prosecute terrorism-related crimes.[17] The Act came from the recommendations of the Government's consultation paper on *Legislation Against Terrorism*, released in December 1998.[18] This consultation document addressed Lord Lloyd of Berwick's *Inquiry into Legislation Against Terrorism*, which was released in October 1996.[19] Before the enactment of TA 2000, earlier legislation against terrorism included the Prevention of Terrorism (Temporary Provisions) Act of 1974, which disbanded the Irish Republican Army (IRA) and criminalised any support for the IRA, and the Prevention of Terrorism (Temporary Provisions) Act of 1976, renewed in 1984. These Acts were directed at stopping the terrorist acts of the IRA in Northern Ireland. By the late 1990s, it became apparent that terrorism was not restricted to Northern

[15] Home Office, *Counter-Terrorism and Border Security Bill Impact Assessment IA No: HO0308 (2018) 8* <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/Overarching%20Impact%20Assessment%20Final%20signed.pdf> accessed 31st October 2023.
[16] UK Parliament, 'Counter-Terrorism And Sentencing Bill: Explanatory Notes ' (2020) <https://publications.parliament.uk/pa/bills/lbill/58-01/129/5801129en02.htm> accessed 10th June 2024.
[17] David Anderson, The Terrorism Act in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 (2011) https://assets.publishing.service.gov.uk/media/5a7c6bf540f0b62aff6c18e7/9780108511769.pdf accessed 9 July 2025.
[18] Legislation Against Terrorism: A Consultation Paper. London: The Stationary Office (Home Office 1998).
[19] Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* (Crnnd Paper 1996).

Ireland, necessitating a comprehensive and unified legal framework to prevent Northern Ireland terrorists from carrying out attacks in mainland Britain and address the emerging global terrorist threats arising from Islamic terrorist groups.

A series of events in 1995 led the government to authorise Lord Lloyd of Berwick to conduct an inquiry into legislation to enable long-lasting peace in Northern Ireland.[20] This inquiry was published in two volumes, the first of which provided the context for the report.[21] The second volume focused primarily on the current and projected trends of domestic and international terrorism in the UK (apart from that related to Northern Ireland's affairs).[22]

The TA 2000 was enacted in response to several events that highlighted the need for a comprehensive legal framework to tackle terrorism. TA 2000 was, in part, a reactionary piece of legislation. In addition to enacting measures that tackled Al-Qaeda-related terrorism, the TA 2000 set out to respond to a specific terrorism incident- the 1998 Omagh bombing in Northern Ireland, which was one of the deadliest acts of terrorism in the region's history.[23] The atrocity, carried out by a dissident splinter groups group of the Irish Republican Army named the Real Irish Republican Army, resulted in widespread public outrage and revealed the need for updated legislation to prevent similar attacks. Furthermore, the TA 2000 set out to harmonise UK terrorism law with international standards. It sought to bring the counterterrorism policies of the UK into compliance with global norms, particularly those set out in United Nations

[20] The Belfast Agreement and the Omagh bombing prompted the government to ask Lord Lloyd of Berwick to determine whether there are needs for more comprehensive anti-terrorism legislation in the UK in the event of peace in Northern Ireland.
[21] Legislation Against Terrorism: A Consultation Paper (n 18).
[22] Berwick (n 19).
[23] Gavin G Lavery and Ene Horan, 'Clinical Review: Communication and Logistics in the Response to the 1998 Terrorist Bombing in Omagh, Northern Ireland' (2005) 9 Critical Care 1.

agreements and protocols on terrorism.[24] This harmonization made it easier for governments to work together internationally to combat terrorism.[25]

Finally, the TA 2000 paved the way for the modernisation of the UK's legal framework for countering terrorism. The Prevention of Terrorism (Temporary Provisions) Act 1989 and other earlier anti-terrorism laws were deemed insufficient to handle the shifting nature of home-grown and international terrorism and the new dangers that they created.[26] With the enactment of the TA 2000, counterterrorism laws were updated and consolidated, to give law enforcement authorities better resources to investigate and prosecute terrorist activity far beyond their usual powers.

2.1.1 Scope Of The Terrorism Act 2000

The TA 2000 spans eight parts, sixteen schedules, and 300 pages. The Act introduced significant provisions, including an expanded definition of terrorism, empowering the police to investigate and prevent terrorist activities, enhanced measures for prosecuting and sentencing terrorists, and provisions for international collaboration in counterterrorism efforts.[27] However, since its enactment, the TA 2000 has undergone several amendments and revisions to address concerns raised and adapt to changing circumstances. Subsequent legislation has refined and expanded the legal framework for countering terrorism in the UK.

[24] Charles Chatterjee, 'The Terrorism Act 2000: an Analysis' (2002) 2002 Amicus Curiae 19.
[25] Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) Criminal Law Review 901.
[26] Berwick (n 19).
[27] Section 1 of the Terrorism Act 2000

As this thesis focuses on offences that criminalise remote risk-based terrorism conduct, it is important to highlight some of the offences set out in the TA 2000 that are analysed in the substantive chapters to follow. These will include pre-inchoate offences, as well as other key provisions outlined in the TA 2000.

2.1.2 Definition Of Terrorism (Section 1 Terrorism Act 2000)

According to the section 1 of the TA 2000:

(1) In this Act 'terrorism' means the use or threat of action where-

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it-

(a) involves serious violence against a person,

(b) involves serious damage to property

(c) endangers a person's life, other than that of the person committing the action

(d) creates a serious risk to the health or safety of the public or a section of the public, or

e) is designed seriously to interfere with or seriously to disrupt an electronic system. [28]

This definition has proven unsatisfactory in defining the meaning of terrorism and has raised a series of controversies and criticisms. First, although section 1 of the TA 2000 defines and constrains what is and is not considered 'terrorism', scholars have argued that the definition remains too broad and subjective.[29] This has made it susceptible to diverse interpretations, potentially capturing a wide range of activities beyond traditional acts of terrorism. It gives unusually wide discretion to all those concerned with applying and enforcing counter-terrorism law.[30] Additionally, the broad definition of terrorism creates, in effect, a 'black hole' where the discretion of police, prosecutors and judges cannot be questioned, leaving the definition of terrorism more of a facilitator of power rather than a constraint upon it.[31] Secondly, scholars such as Gearty and Greene have argued that the broad definition and associated powers granted under the Act may have a chilling effect on civil liberties, particularly freedom of expression and assembly.[32] There are also concerns that the wide powers given to law enforcement officials to stop, search, arrest and detain suspected terrorists could be abused, particularly through racial and religious profiling.[33]

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[28] Section 1 Terrorism Act 2000

[29] Clive Walker, 'The Legal Definition of'Terrorism'in United Kingdom Law and Beyond' (2007) Public Law 331; Alan Greene, 'Defining Terrorism: One Size Fits All?' (2017) 66 International & Comparative Law Quarterly 411; George Williams and Ben Golder, 'What is 'Terrorism'? Problems of Legal Definition' (2004) 27 The University Of New South Wales Law Journal 270.

[30] David Anderson, 'The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (London: The Stationery Office, 2013), 53-54.

[31] Noa Ben-Asher, 'Legal Holes' (2009) Harv. J. Legal Left 1 5 Unbound.

[32] Conor Gearty, 'Rethinking Civil Liberties in a Counter-Terrorism World' (2007) 2 European Human Rights Law Review 111; Alan Greene, 'The Quest for a Satisfactory Definition of Terrorism: R v G ul' (2014) 77 The Modern Law Review 780.

[33] Tufyal Choudhury and Helen Fenwick, 'The Impact of Counter-Terrorism Measures on Muslim Communities' in Helen Fenwick (ed), *Developments in Counter-Terrorist Measures and Uses of Technology* (Routledge 2013) 45–77.

Third, the lack of clarity and precision in the definition of terrorism makes it difficult for individuals to understand what actions constitute terrorism. This can result in inconsistent application and creates the potential for arbitrary enforcement. Schmid argues that terrorism is used 'promiscuously for such a wide range of manifestations...that one wonders whether it is a unitary concept'.[34] Thus, the definition of terrorism preferred in the Act leave wide discretion to the state and its actors to decide which organizations are proscribed.[35] Fourth, perhaps the most striking feature of the TA 2000 definition is the fact that terrorist action is 'equally criminal whether it is intended to take place in the UK or elsewhere'.[36] The effect is to give the UK state extraterritorial jurisdiction over terrorist conduct globally directed against any regime in the world, however unsavoury or opposed to UK interests that regime may be, and however praiseworthy the objective of the terrorists may appear.

2.1.3 Proscription And Possession-Related Terrorism Offences

Section 3 of the TA 2000 empowers the Secretary of State to proscribe any organization that is concerned in terrorism.[37] Proscription powers give way to the creation of associative offences relating to terrorism. These include three offences that will be discussed in Chapter 7: 1) section 11 of the TA 2000 creates the offence of being a member of a proscribed organization and plays a crucial role in combating terrorism by targeting the support networks and infrastructure of proscribed organizations;[38] 2) section 12 of the TA 2000 criminalises various forms of support, whether direct or indirect, toward organizations proscribed by the UK government;[39] and 3) section 13 of the TA 2000 creates an offence of wearing any clothing or

[34] Alex Schmid, 'Terrorism-the Definitional Problem' (2004) 36 Case W Res J Int'l L 375.
[35] Anderson (n 17) 33-36.
[36] Government reply to Lord Carlile's Report on the Definition of Terrorism (Cm 7058, June 2007), [13].
[37] Section 3(5)(c) Terrorism Act 2000
[38] Section 11(1) Terrorism Act 2000
[39] Section 12(2) Terrorism Act 2000

carry articles in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.[40]

Section 57 of the TA 2000 criminalises the possession of articles or materials that are reasonably suspected to be intended for use in connection with acts of terrorism. Section 57 of the TA 2000 establishes an offence related to possession, rather than the actual use, of articles for terrorist purposes. It applies to physical objects, documents, records, and electronic data.[41] Similarly, section 58 of the TA 2000 criminalises the act of collecting or possessing information likely to be useful for terrorist purposes. Sections 57 and 58 of the TA 2000 have so far been the most controversial provisions of the Act as a growing number of cases have been tried in courts based on this offence. They will be analysed in Chapter 5.

I chose these two categories of pre-inchoate terrorism-related offences for doctrinal analysis because they are exceptionally problematic counterterrorism offences. These offences represent some most egregious yet commonly charged provisions under the TA 2000, as will be seen in Chapters 5 and 7, thereby offering a significant body of case law and legislative background for analysis. these offences require scrutiny due to their 'pre-inchoate' nature, which criminalises conduct far removed from the commission of terrorist acts. By targeting actions that precede even the early stages of a criminal conspiracy- such as mere membership, support, or possession/viewing of terrorism-related materials- these offences expand the scope of criminal liability to encompass a broad range of behaviours potentially infringing on civil liberties and raising concerns about over-criminalization. The tension between national security interests and individual rights is particularly pronounced in these cases, warranting

[40] Section 13 Terrorism Act 2000

[41] Ben Middleton, 'Sections 57 and 58 of the Terrorism Act 2000: Interpretation Update: R v G; R v J [2009] UKHL 13' (2009) 73 The Journal of Criminal Law 203.

thorough doctrinal scrutiny. Further, their frequency of use in prosecution makes them a focus for understanding the implications of the UK's terrorism-related pre-inchoate offences and how far criminal law extends.

2.1.4 Other Pre-Inchoate Terrorism-Related Offences

The TA 2000 contains several other pre-inchoate terrorism-related offences that I do not analyse in this thesis. First, sections 15 to 17 of the TA 2000 created offences related to financing terrorism and money laundering in the context of terrorism. The specific offences included in these sections include terrorism-related fundraising,[42] money laundering[43] and funding arrangements for terrorist activities.[44] These offences aim to disrupt the financial networks supporting terrorism and prevent the use of legitimate financial systems for illicit purposes.[45]

Secondly, section 54 of the TA 2000 created an offence for a person to receive training in the use, making, or handling of firearms, explosives, or chemical, biological, or radioactive substances for the purposes of terrorism.[46] This extends to the act of providing instruction or training in the use, making, or handling of the aforementioned weapons or substances for the purposes of terrorism.[47] This offence aims to prevent individuals from acquiring or disseminating knowledge and skills related to weapons and substances for terrorism-related purposes.

[42] Section 15(1) Terrorism Act 2000
[43] Section 16 Terrorism Act 2000
[44] Section 17 Terrorism Act 2000
[45] *R v Amal el-Wahabi T20147025*
[46] Section 54 (2) Terrorism Act 2000
[47] Section 51 (2) Terrorism Act 2000

Thirdly, section 56 of the TA 2000 created an offence to direct or be involved in the direction of a proscribed terrorist organization. To secure a conviction under section 56 of the TA 2000, the prosecution must establish that the accused directed or participated in directing the activities of a proscribed organization, and the organization in question must be designated as a terrorist group under the TA 2000.

I did not analyse the above offences because of their comparatively less problematic nature and narrower scope. While these pre-inchoate offences are problematic in their own right, they tackle specific and clearly identifiable terrorism-related activities, such as the provision of financial support, weapons or training for terrorist purposes. Arguably, these activities are less controversial because their connection to actual terrorist acts is more direct and tangible. For instance, the offence of weapons training is inherently tied to the operational capabilities of terrorist groups, making it easier to justify its criminalization from both a legal and prosecutorial view, unlike broader offences such as the 'one-click' viewing offence under s.58 TA 2000 that I have chosen for analysis. The above pre-inchoate offences raise fewer concerns regarding overreach or potential infringement on civil liberties because they target conduct that is more clearly linked to terrorist activity, such as direct preparations or overt assistance, so their application is more straightforward and less prone to misinterpretation.

2.2 Anti-Terrorism, Crime And Security Act 2001 ('ATCSA 2001')

Parliament enacted ATCSA 2001 in response to the heightened security concerns following the 9/11 terrorist attacks. The legislation significantly expanded the UK's counter-terrorism

measures, granting law enforcement agencies enhanced powers to combat terrorism.[48] The government was given a wide range of powers to deal with terrorist threats and maintain national security, including powers of seizure of suspected terrorist assets, freezing orders and allowing the Home Secretary to indefinitely detain suspected terrorists pending deportation. However, the power to detain indefinitely was abolished with the introduction of the Prevention of Terrorist Act 2005. As the government stated, 'the purpose of the Act is to build on legislation in a number of areas to ensure that the Government, in the light of the new situation arising from the September 11 terrorist attacks on New York and Washington, have the necessary powers to counter the threat to the UK'.[49]

Several sections of ATCSA 2001 stand out for their unique provisions and ensuing controversies. These include the Home Secretary's wide powers to impose indefinite detention on foreigners suspected of terrorism in Part IV of the Act.[50] Since these sections have been repealed by the Prevention of Terrorism Act 2005,[51] this section will not discuss the provisions and controversies surrounding its abolition.

2.3 Prevention Of Terrorism Act 2005

The Prevention of Terrorism Act 2005 (PTA 2005) was a significant Act that granted authorities enhanced powers to prevent and counter terrorism. It was introduced as a response to the House of Lord's ruling in December 2004, which held the detention without trial of eight

[48] Genevieve Lennon and Clive Walker, *Routledge Handbook of Law and Terrorism*, vol 58 (Routledge London 2015), 31.
[49] Explanatory Notes to the Act, The Stationery Office (2002).
[50] Sections 21- 23 of the Anti-terrorism, Crime and Security Act 2001
[51] Lord Carlile of Berriew QC, *Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003* (UK Parliament 2004), 10.

foreigners (the 'Belmarsh case') under Part 4 of ACSA 2001 to be unlawful as it was incompatible with European and domestic human rights laws.[52]

One of the most controversial provisions of the PTA 2005 was the introduction of Control Orders, which allowed authorities to impose restrictions on individuals suspected of involvement in terrorism. These control orders included powers to impose curfews, electronic tagging, restrictions on movement, forcible relocation, and limitations on communication and association.[53] The Act also established a system for the detention and monitoring of individuals suspected of involvement in terrorism, allowing authorities to detain and question individuals without charge under certain circumstances. In April 2006, a High Court judge declared that section 3 of the PTA 2005 was incompatible with the right to a fair trial under Article 6 of the ECHR. The Act was repealed in December 2011 under Section 1 of the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA 2011). The TPIMA 2011 introduced new powers to allow the Home Secretary to implement restrictions such as tracking, monitoring and restrictions on financial activities on suspicious individuals via a 'TPIM' notice, a lighter touch version of Control Orders.

2.4 **Terrorism Act 2006 ('TA 2006')**

In July 2005, following the London bombings of 7/7, a Bill introduced new criminal offences to empower the police and intelligence agencies to intervene before the precise details of a planned terrorist act were known; criminalised indirect incitement to commit terrorist acts which aligned with the Council of Europe Convention on the Prevention of Terrorism,[54] and

[52] *A v Secretary of State for the Home Department [2004] UKHL 56*
[53] *A v (FC) v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 W.L.R. 87*
[54] Article 5 of the Council of Europe Convention on the Prevention of Terrorism

criminalised the provision or receipt of terrorism training in accordance with this Convention.[55] The Bill received a second reading with a vote of 471 in favour and 94 against.[56] The resulting Act being 'to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes' was enacted on 30 March 2006.[57] Alder rightly held that the new Act was a 'further panic-filled retreat' from established human rights.[58]

The TA 2006 gave UK law enforcement agencies the tools and powers to avert the threat posed by terrorism by reforming and expanding existing anti-terrorism legislation.[59] The Act also modified earlier legislation governing investigative authority and intelligence services by extending the duration of emergency warrants, permitting urgent authorisations over UK property, and increasing penalties for the failure to comply with decryption notices.[60] The TA 2006 served to solidify the foundation already laid by TA 2000 and created numerous new offences relating to terrorism. These include the dissemination of terrorist literature,[61] encouraging terrorism,[62] planning terrorist acts,[63] and engaging in terrorist training.[64] The TA 2006 also amended the punishment for offences involving nuclear material and enacted a number of new offences involving radioactive equipment and facilities.[65]

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[55] Article 7 of the Council of Europe Convention on the Prevention of Terrorism

[56] The Terrorism Bill- Second Reading- 26 Oct 2005. Available at <https://www.publicwhip.org.uk/division.php?date=2005-10-26&number=70>.

[57] Terrorism Act 2006

[58] John Alder, *Constitutional and Administrative Law* (Palgrave Macmillan 2013), 577.

[59] Memorandum to the Home Affairs Committee 'Post Legislative Amendment of the Terrorism Act 2006' (CM 8186, September 2011).

[60] Ibid.

[61] Section 2 Terrorism Act 2006

[62] Section 1 Terrorism Act 2006

[63] Section 5 Terrorism Act 2006

[64] Section 6 Terrorism Act 2006

[65] Lennon and Walker (n 48) 1141-1142.

The TA 2006 modified the TA 2000 in several ways, including amending some offences. First, the 2006 Act amended several pre-existing offences. For example, it increased the punishment for the offence of possession for terrorist purposes from 10 years to 15 years.[66] Secondly, it changed two facets of the Secretary of State's power to prohibit organizations that support terrorism. It was earlier pointed out that the Secretary of State may ban an organization that supports terrorism under TA 2000.[67] The TA 2006 gave the Secretary of State greater authority to deal with prohibited organizations that change their names, including the authority to add aliases to a list of proscribed organizations to include other names under which a proscribed group operates.[68] Additionally, TA 2006 expanded police investigative powers regarding terrorism, including including clauses that allow for the prolongation of terrorist suspects' custody with judicial approval for up to 28 days and authorizing the issuance of 'all premises' search warrants.[69] Apart from modifying the TA 2000, the TA 2006 further revised several other terrorism-related laws which are outside the scope of this thesis.

2.4.1 Scope Of The Terrorism Act 2006

The Act is made up of three parts and 39 sections. The discussion below focuses on relevant sections of the Act that relate to pre-inchoate offences, which are the subject of this thesis.

2.4.2 Encouragement And Dissemination Offences (Sections 1 And 2 TA 2006)

[66] Section 24 Terrorism Act 2006
[67] Section 3 Terrorism Act 2000
[68] Section 22 Terrorism Act 2006
[69] Memorandum to the Home Affairs Committee 'Post Legislative Amendment of the Terrorism Act 2006' (CM 8186) September 2011.

Section 1 criminalised the publication of statements that are likely to encourage or induce others to commit acts of terrorism or provides assistance in carrying out such acts. Any publication with the intention of encouraging terrorism or the belief that the statement is likely to be understood as a direct or indirect encouragement to commit acts of terrorism is an offence.[70] Section 2 of the TA 2006 criminalised the publication, distribution, or possession of materials that contain information likely to be useful to someone committing or preparing an act of terrorism.[71] This section aimed to combat the dissemination of materials that can aid or encourage terrorist activities. The broad language used in the definition allows for a dangerously wide interpretation to cover materials that could assist in terrorist activities.[72]

These two offences deal with actions that could be deemed innocuous or peripheral but are criminalised due to their potential to encourage radicalization or terrorist acts. Therefore, they present more complex doctrinal issues, particularly regarding the balance between national security and civil liberties. Particularly important is the criticism that these offences might result in the punishment of acceptable political speech or creative expression that is not intended to encourage violence but may be construed as endorsing terrorism.[73] Flynn observes that 'there has also been a strong underlying message that respecting human rights while countering terrorism is not only a matter of legal obligation, but is also essential to an ultimately successful strategy.'[74] A chilling effect on public debate and restrictions on freedom of

[70] Section 1(2)(b)(I) and (II) Terrorism Act 2006
[71] Section 2 Terrorism Act 2006
[72] Imran Awan, 'The Problem with Defining Terrorism and the Impact on Civil Liberties-Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper' (2008) 1 J Pol & L 2.
[73] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters (Third Report of Session 2005–06)*, HL Paper 75-I/HC 561-I (The Stationery Office 2005) <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf> accessed 10 July 2025, 28.
[74] Edward J Flynn, 'Counter-Terrorism and Human Rights: the View from the United Nations' (2005) European Human Rights Law Review 29.

expression may result from this broad interpretation because Article 10 ECHR is a qualified right and can be limited in the interests of national security or public safety.[75]

2.4.3 Other Pre-Inchoate Terrorism-Related Offences

Several other pre-inchoate terrorism-related offences are found in TA 2006. First, section 5 of the TA 2006 criminalises the engagement in conduct that is preparatory to committing acts of terrorism. It covers a wide range of activities, including planning, preparing, or collecting information with the intention of assisting others in carrying out terrorist acts.[76] This offence aims to prevent individuals from engaging in activities that are preparatory to committing acts of terrorism by extending the reach of criminal law, enabling investigators to arrest a person at an early stage to prevent a terrorist act from occurring.[77] The problem with section 5 of the TA 2006 is that the offence is so broad that law enforcement officials have wide discretion to determine what acts amount to 'preparation' for this offence. To establish preparation, it must be proven that the individual engaged in the preparatory conduct with the intention of committing acts of terrorism or assisting others to commit such acts[78] It is irrelevant whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.[79] This provision targets conduct that falls short of the actual commission of a terrorist act but is deemed to be preparatory to it. This can include activities such as acquiring or making explosive substances, conducting surveillance, or preparing weapons. The list is non-exhaustive.

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[75] Article 10 ECHR

[76] Section 5 Terrorism Act 2006

[77] D Lowe, 'Preparation of Terrorist Acts, Section 5 Terrorism Act 2006: Evidence Required and Sentencing Guidelines' (2021) Expert Witness Journal 94.

[78] *R v Kahar and Others [2016] EWCA Crim 568*

[79] Section 5(2) Terrorism Act 2006

As the ambit of Section 5 of the TA 2006 is potentially broad, its *mens rea* is tightly tied to the intention of assisting others in committing acts of terrorism. It requires a direct link between the preparatory conduct and the overall terrorist act, emphasizing the importance of proving a connection to terrorism beyond preparatory activities due to the breadth of the offence. The maximum sentence for this offence is life imprisonment.[80] Section 5 of the TA 2006 is one of the most commonly charged terrorism-related offences.[81]

When exploring possession, encouragement, and associative terrorism offences, it is important to consider their relationship with section 5 of the TA 2006. Arguably, the preparatory terrorism offence creates a 'nesting' problem where preparatory (pre-inchoate) liability can apply to possession, encouragement, and associative offences, thereby capturing, for example, an individual 'preparing' to 'encourage' another to commit an act of terrorism. How far can this extended form of liability apply on top of other pre-inchoate terrorism-related offences? Roach observes rightly that the existence of section 5, as well as the offences explored in Chapters 5-7 'run the risk of piling inchoate liability on top of inchoate crimes', extending criminal liability temporally and laterally beyond the rightful limits of criminal law.[82] Because of the hierarchal 'Russian-doll' relationship between inchoate terrorism offences and pre-inchoate counterparts, all other forms of inchoate offences such as attempts, conspiracy and incitement still apply to section 5 TA 2006 as well as the offences explored in Chapters 5-7.

[80] Section 5(3) Terrorism Act 2006

[81] Home Office, 'Operation of Police Powers Under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes, and Stop and Search, Great Britain, Quarterly Update to September 2024' (2024) <https://www.gov.uk/government/statistics/operation-of-police-powers-under-tact-2000-to-september-2024/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-quarterly-u> accessed 13th March 2025, section 3.1

[82] Kent Roach, 'The New Terrorism Offences and the Criminal Law' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 151-172.

The extent to which liabilities may pile on top of each other is moot.[83] However, it is important to note that this thesis focuses on offences that are more distant from the completed offence than section 5 of the TA 2006 because they verge on the 'pre-pre-inchoate' stage and are less proximate to the commission of a terrorist atrocity. By focusing on these offences, I can explore the complexities of offences that target early-stage terrorist activities and the implications of these offences.

Second, section 6 of the TA 2006 creates an offence to provide or receive instruction or training in the skills useful for terrorist purposes.[84] This includes training in the use of firearms, explosives, or other techniques associated with terrorism and applies to both physical and non-physical forms of instruction or training. Notably, this offence focuses on the pre-inchoate act of providing or receiving instruction or training, rather than penalising the actual commission of a terrorist act. It is preventive and aims to disrupt the preparation and facilitation of terrorist activities by targeting those who provide the necessary knowledge or skills to individuals involved in terrorism, however remote their participation might be. The maximum sentence is imprisonment for life.[85]

Third, section 8 of the TA 2006 criminalises attending a place for terrorist training. This offence aims to prevent individuals from receiving training or instruction that could be used to facilitate acts of terrorism.[86] This means that individuals who attend training camps, facilities, or any location where they receive instruction or training related to terrorist activities can be prosecuted under this provision.[87] This section focuses on the acquisition of skills that could

[83] Ibid 159-160.
[84] Section 6(1)(a) Terrorism Act 2006
[85] Section 6(5) Terrorism Act 2006
[86] *R v. Barot [2007] EWCA Crim 1119*
[87] *R v. Mohommod Hassin Nawaz and Hamza Nawaz [2014] T20137466*

be used in the commission, preparation, or instigation of acts of terrorism, making it one of the few *genuinely* 'pre-inchoate' offences that predates even inchoate terrorist activity. Interestingly, the offence requires proof that the individual attended the place with the intention of acquiring skills related to terrorism. This suggests that mere presence at a location where terrorist training is taking place may not be sufficient to establish guilt. The prosecution must demonstrate that the person had a specific intent to learn or receive training in terrorist-related activities.[88]

It is important to state that the jurisdiction of the courts over the activities mentioned in this section extends beyond the borders of the UK. The act applies to UK nationals, residents, and corporations, regardless of whether the training occurred within the UK or abroad. This provision allows the UK authorities to prosecute individuals who travel abroad for the purpose of attending terrorist training camps.[89] It is worth noting that extra-jurisdictional offences were already enacted in the TA 2000 mentioned above, such as terrorist financing and terrorist bombing offences. These allow the UK to meet its obligations under the 'extradite or prosecute' requirements under conventions such as the United Nations Convention for the Suppression of Terrorist Bombings and the UN Convention for the Suppression of the Financing of Terrorism.[90]

[88] Ibid.

[89] Section 8(1)(a) Terrorism Act 2006

[90] House of Lords, 'Crime (International Co-Operation) Bill [HL]: Schedule 4 — Minor and consequential amendments ' 2002) <https://publications.parliament.uk/pa/ld200203/ldbills/005/en/03005x-b.htm> accessed 13th March 2024, [114].

2.5 Counter-Terrorism Act 2008

The Counter-Terrorism Act 2008 (CTA 2008) introduces several key provisions to enhance law enforcement agencies' powers and measures against terrorist activities. One notable aspect of the CTA 2008 is its focus on technology and data access. The CTA 2008 increases surveillance capabilities, including monitoring and intercepting digital communications to prevent and detect terrorism-related acts before they occur. It also grants intelligence agencies and law enforcement authorities access to electronic data held by communication service providers. The CTA 2008 also includes provisions for DNA retention, enabling the storage of DNA and fingerprint data from individuals suspected of terrorism-related offences, even if they are not charged or are acquitted.[91] These measures have drawn both support and criticism, with proponents arguing for the necessity of robust counter-terrorism measures, while critics raise concerns over potential encroachments on civil liberties and the potential for abuse of power.[92]

2.6 Terrorist Asset-Freezing Etc. Act 2010

The Terrorist Asset-Freezing Act 2010 (TAFA 2010) aims to prevent terrorists and terrorist organizations from accessing and utilizing financial resources to cause harm. The Act provides the government with powers to freeze the assets of individuals and entities involved in terrorism-related activities, both within the UK and internationally. It establishes a legal framework for asset-freezing measures to disrupt the financial networks supporting terrorism.[93]

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[91] Sections 9-13 (Part 1) Counter-Terrorism Act 2008

[92] Daragh Murray, 'Freedom of Expression, Counter-terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' (2009) 27 Netherlands Quarterly of Human Rights 331; Clive Walker, 'Counter-Terrorism and Human Rights in the UK' in Marie Breen-Smyth (ed), The Ashgate Research Companion to Political Violence (1st edn, Routledge 2012); Jessie Blackbourn, 'Counter-Terrorism and Civil Liberties: The United Kingdom experience, 1968-2008' (2008) 8 JIJIS 63.

[93] David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc Act 2010* (TSO London 2011).

Under TAFA 2010, the UK government can designate 'terrorist individuals' and 'terrorist organizations' and freeze their assets.[94] The Act enables the government to impose asset freezing on bank accounts, properties, and other financial assets, thereby preventing individuals and organizations from using these resources to support terrorist activities. The legislation also establishes an appeals process, allowing designated entities to challenge their asset freeze designation through the courts. Overall, the TAFA 2010 plays a crucial role in preventing the flow of funds to terrorists and safeguarding the financial systems from exploitation by terrorist groups.

2.7 Justice and Security Act 2013

The Justice and Security Act 2013 (JSA 2013) introduced significant changes to the country's legal framework for national security and civil proceedings. The Act aimed to enhance the government's ability to protect sensitive information and handle cases involving national security concerns. It established a framework for Closed Material Procedures (CMPs) in civil cases, allowing the use of secret evidence that is not disclosed to the claimant or their legal representatives.[95] The Act also expanded the powers of oversight bodies, such as the Intelligence and Security Committee, to scrutinise the activities of the security and intelligence agencies.[96] Overall, the JSA 2013 sought to strike a balance between national security interests and the principles of justice and fair proceedings in cases involving sensitive information.

[94] Section 11 Terrorist Asset-Freezing etc. Act 2010 (now repealed by section 59(1) of Money Laundering Act 2018)
[95] Sections 6-12 (Part 2) Justice and Security Act 2013
[96] Sections 1-2 Justice and Security Act 2013

2.8 Counter-Terrorism and Border Security Act 2019

The Counter-Terrorism and Border Security Act 2019 (CTBSA 2019) was enacted in direct response to the series of terrorist attacks that occurred in London and Manchester in 2017, as well as the surge in attempted attacks during that period.[97] The justification for the bill was grounded in the perceived necessity to modernise and update certain offences to account for the digital age, address evolving patterns of radicalization, and eliminate gaps in their scope.[98] The CTBSA 2019 recognised that the internet has become a potent platform for radicalization, facilitating terrorist activities, promoting proscribed organizations, and disseminating information used by individuals involved in planning terrorist acts.[99]

A noteworthy provision of the CTBSA 2009 is the amendment of Section 58(1) of the TA 2000. Before this amendment, a person was not liable for the offence of collection of information for terrorist purposes when the person viewed or otherwise accessed, on the internet, a document or record containing terrorism-related information.[100] New measures included extending the maximum penalty for certain terrorism offences**,**[101] criminalizing the access or viewing on a single occasion of terrorist-related material online amending s.58 of the TA 2006 (discussed in Chapter 5),[102] granting additional powers to law enforcement agencies for gathering electronic evidence, enhancing border security checks, and enabling authorities to impose specific restrictions on individuals returning from designated conflict zones.[103] The expansive scope of

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[97] Counter-Terrorism and Border Security Act 2019 Explanatory Notes (Home Office) <*http://www.legislation.gov.uk/ukpga/2019/3/notes/division/2/index.htm*> accessed 31st October 2023.
[98] Ibid.
[99] Nick Thomas-Symonds, *Counter-Terrorism and Border Security Bill (Fourth sitting) Commons: 3 July 2018, col.95* (Hansard 3rd July 2018).
[100] Section 58(1)(c) Terrorism Act 2000
[101] Section 7 Counter-Terrorism and Border Security Act 2019
[102] Section 3 Counter-Terrorism and Border Security Act 2019
[103] Section 22 Counter-Terrorism and Border Security Act 2019

these offences can potentially criminalise activities that do not pose a direct and immediate threat to security and will be discussed in Chapters 5-7.

2.9 Counter-Terrorism And Sentencing Act 2021

The Counter-Terrorism And Sentencing Act 2021 (CTSA 2021) introduces several key provisions, including the imposition of a minimum sentence for specified terrorism offences such as a 14-year minimum for possessing or disseminating terrorist publications.[104] It also introduces the possibility of 'whole life orders' for terrorism-related offences, ensuring that the most serious terrorists can be imprisoned for the rest of their lives. The Act extends the scope of Extended Determinate Sentences, allowing for longer periods of supervision and monitoring for terrorist offenders. Additionally, the Act introduces new powers for the police and other authorities to manage individuals with terrorism convictions, including measures such as more stringent notification requirements that allow authorities to impose extra surveillance and licensing conditions after their release from prison.[105] The legislation aims to provide a robust response to the evolving threat of terrorism by enacting sentencing reforms, largely overlooked in previous legislative reforms.[106]

It is challenging to assess whether longer sentences will deter individuals from committing further acts of terrorism. Some have questioned how detaining terrorists in prison for additional periods, some for relatively short custodial sentences will successfully achieve the government's goals in its series of counter-terrorism legislative reforms.[107] A policy focusing

[104] Section 26 Counter-Terrorism and Border Security Act 2019
[105] See part 1 and 2 of the Counter-Terrorism and Border Security Act 2019
[106] Walker (n 3).
[107] Lee and Walker (n 14).

narrowly on longer sentences of detention creates the risk that deradicalisation and desistance schemes in prison will be neglected. If the Government wishes to reduce the risk of released terrorist prisoners committing further terrorist acts, it needs to focus on the effective rehabilitation of prisoners, rather than the longer prison sentences, which may not achieve more than marginal effects.[108]

3. Assessment Of UK Anti-Terrorism Legislation- Policy Strands And Critiques

UK terrorism laws have been 'amongst the most extensively and fiercely debated of any devised in the past decade.[109] These debates involve choices, inherent or explicit, in the design of the laws and the values they represent or infringe'.[110] The former IRTL recognised that the 'arsenal of terrorist offences remains amply stocked'.[111] As the overview above showed, the proliferation of new laws created many new offences, investigatory powers and increased penalties. These offences fall within the 'Pursue' strand of CONTEST, which focuses on a 'criminalisation' and 'control' approach.[112] Choudhury aptly observes that 'control' is at the heart of the CONTEST strategy, evident in the increasing number of offences aimed at reducing the spread of terrorism-related articles, materials, and offences aimed at reducing susceptibility to radicalisation by restricting online access of information.[113]

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[108] Marc Mauer, 'Long-Term Sentences: Time to Reconsider the Scale of Punishment' (2018) 87 UMKC Law Review 113.
[109] Rory Kelly, 'Sentencing Terrorism Offences: No Harm Intended' (2019) Criminal Law Review 772; David Cole, 'English Lessons: A Comparative Analysis of UK and US Responses to Terrorism' (2009) 62 Current Legal Problems 136; Jon Moran, 'State Power in the War On Terror: A Comparative Analysis of the UK and USA' (2005) 44 Crime L & Soc Change 335.
[110] Walker (n 3) 6.
[111] Anderson (n 17) 130.
[112] Tufyal Choudhury, 'The Terrorism Act 2006: Discouraging Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009), 465.
[113] Ibid.

Counter-terrorism legislation is not the same as 'regular' criminal law legislation; 'while clearly concerned with preserving (or re-establishing) order, anti-terrorism provisions are enacted in times of public panic or emergency situations…while not necessarily out-out-place…anti-terrorist provisions have military and national security aspects'. [114] Counter-terrorism legislation must be evaluated critically as they broaden the criminal law and poses problems for criminal law doctrine, human rights and the rule of law. Walker warns that 'there must be adherence to limiting principles which reflect the values of constitutionalism and democratic accountability which can be considered universal moral goods and not simply autopoietic features' of a legal system. He identifies five principles:

1) Respect for national traditions- compatibility with documents or agreements protecting human rights;
2) Anti-terrorist laws should derogate as little as possible from 'normal' measures;
3) Special measures should be clear and precise and safeguards should be provided to prevent their improper introduction or exercise;
4) The application of anti-terrorism laws should be necessary and contain remedies against improper use;
5) Special laws should be distinguished from ordinary powers because the assimilation of the two may damage in confidence in existing law.[115]

Many of the provisions in the legislation discussed above fall short of these principles, particularly the pre-inchoate offences created by the TA 2000 and TA 2006, which feature

[114] Gary T Trotter, 'The Anti-Terrorism Bill and Preventative Restraints on Liberty' (2001) in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 239-248.
[115] Ibid.

extremely broad *actus reus* elements and non-existent *mens rea* safeguards. Although the UK generally adopts a 'criminal justice' (as opposed to war) model in tackling terrorism- which Walker praises as the correct policy to ensure that legislation is consistent with rule of law values- the rise of pre-inchoate terrorism offences undermine the model because they 'run the danger of over-breadth from vague drafting terms' and 'penalizing equivocal actions so that the conviction will not be seen as a legitimate ascription of criminality'.[116]

Broader tensions arise from a preventive expansion of criminalisation. The main tension is the conflict between security policy and civil liberties. The threat of terrorism fuels a politics of 'zero risk', making the enactment of preventive offences more desirable. As terrorism is highly unpredictable, governments expand offences in the hope of reducing risk.[117] There is a tendency to overreach in response to the threat of grave yet uncertain risks like terrorism.[118] Substantive criminal law is thus expanded and distorted to promote feelings of security, but other considerations, such as individual rights are threatened and infringed.

Walker calls for the use of a 'language of rights' rather than a 'language of balance' as a policy strand relevant to the enactment of laws as part of the counter-terrorism strategy, arguing that a language of rights enables the identification of absolute rights that ought not to be derogated from, as well as the recognition that terrorist laws are a 'specialised' form of criminality that presents peculiar difficulties in terms of policing and criminal law.[119] This reframing of the

[116] Walker (n 3) 9.
[117] Lee and Walker (n 14).
[118] David Schneiderman, 'Terrorism and the Risk Society' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 63-72.
[119] Walker (n 3) 34.

language of rights partially resolves the tension between an expansive criminal law and its potential to undermine individual rights.[120]

Several factors compromise the effectiveness of these laws to reduce or deter terrorism. First, the deterrent effect of legislation is weak since many terrorists are willing to sacrifice their lives for their cause. [121] Additionally, when analysing the objectives of increased detection and investigation, it is crucial to consider both the positive and negative aspects, especially regarding the potential dangers of these laws undermining civil liberties. Striking a balance between enhancing security measures and preserving individual rights can be challenging. Many scholars, including Tulich, raise the concern that counterterrorism laws may disproportionately affect people of a certain race, potentially leading to discriminatory practices.[122] This creates further tensions between the necessity to combat terrorism and the need to ensure fairness and equality in the application of preventive justice measures and the criminal law.

4. A Policy Driven By Greater Punishment- Some Remarks

Broader criticisms regarding the efficacy of a policy driven by more severe punishment and incapacitation can be made. First, Gross identifies four fundamental challenges that can bias judgments and legal decision-making processes involving lawmakers, the government, and

[120] Ibid.

[121] Martha Shaffer, 'Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 195-204.

[122] Tamara Tulich, 'Critical Reflections on Preventive Justice' in Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt and Sarah Murray (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (1st edn, Routledge 2017) 34.

judges.[123] One of these is the 'tension of tragic dimensions' between democratic values and terrorism threats.[124] In the pursuit of countering terrorism, governments often prioritise the swift execution of emergency legislation, potentially overlooking essential safeguards and the principles of separation of powers.

The second problem is the rush to legislate in response to terrorist attacks, often resulting in the passage of laws without sufficient debate and scrutiny. For instance, the Counter-terrorism and Sentencing Act 2021 was enacted hastily (as were many other terrorism-related Acts), bypassing full debate and critical evaluation.[125] When governments feel compelled to act swiftly, they may be willing to forego legislative safeguards and enact draconian measures. This tendency to prioritise expediency over careful deliberation can undermine the effectiveness and legitimacy of anti-terrorism legislation. It is essential to critically examine recent examples of such legislation, including the processes by which they were enacted, to shed light on potential shortcomings and the need for more balanced and well-considered approaches.

The third problem lies in the normalization of emergency powers and the blurring of distinctions between emergency and normalcy.[126] During times of crisis, governments are often more inclined to intervene with emergency legislation, and a prevalent 'us versus them'

[123] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 The Yale Law Journal 1011.
[124] Ibid 1027.
[125] Lee and Walker (n 14).
[126] David Dyzenhaus, 'The Permanence of the Temporary: Can Emergency Powers Be Normalized?' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 21; David Dyzenhaus, *The constitution of law: Legality in a time of emergency* (Cambridge University Press 2006); David Cole, 'The priority of morality: The emergency constitution's blind spot', *Civil Rights and Security* (Routledge 2017); Oren Gross and Fionnuala Ní Aoláin, *Law in times of crisis: emergency powers in theory and practice*, vol 46 (Cambridge University Press 2006).

mentality in the 'war against terrorism' can shape legal decision-making processes. However, the ability to separate emergency powers and return to normalcy can become misguided, leading to excessive and unnecessary transgressions against human rights and civil liberties. Gross highlights the illusory nature of the bright-line distinctions between emergency and normalcy, exposing the potential risks of expanding counter-terrorism laws. Governments manipulate definitions of terrorism to pass broad legislation that may label non-terrorists (or 'not-yet' terrorists) as terrorists.[127] Moreover, legislative measures that never expire and continue to expand can be used for purposes beyond their original intention, capturing a wider net of offenders. The accumulation of extreme measures, structural and institutional changes, and the normalization of emergency powers contribute to the erosion of the rule of law and the potential neglect of underlying social and political conditions that foster terrorism.

UK anti-terrorism legislation faces many challenges that must be addressed to strike an appropriate balance between security measures and safeguarding civil liberties. These problems require a comprehensive reassessment of the effectiveness and long-term implications of counter-terrorism strategies, emphasizing the need for robust safeguards, transparent debates, and a holistic approach that addresses the root causes of terrorism while preserving democratic values.

Terrorism legislation will continue to generate controversies as the boundaries of criminal liability expand, giving rise to more coercive measures of prevention, which create some of the greatest justificatory challenges.[128] Throughout the last two decades or so, the substantive

[127] Oren Gross, 'Cutting Down Trees: Law-Making Under the Shadow of Great Calamities' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 39-62.
[128] Andrew Ashworth and Lucia Zedner, 'Counterterrorism Laws and Security Measures' in Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press 2014).

criminal law relating to terrorism has undergone broad changes that directly erode liberty because they deviate from traditional legal principles, and are liable to misuse. Individually, many of these legal changes have been small and have been 'reactive' responses to tragic events such as September 11 and other terrorism events in the UK.[129] Taken together, they significantly erode liberty and create a body of legislation that is broad, confusing and cumbersome- which, ironically, as Walker observes, 'damages the very values that the laws seek to protect' amidst the 'distress and emotion of the terrorist spectacular'.[130]

5. Conclusion

This chapter has explored some of the main provisions and themes within the counter-terrorism legislation that contextualises the pre-inchoate offences, which will be analysed in the following chapters. Although of the thesis focuses on the UK's counter-terrorism legislation, I have shown that an increasing number of very broad terrorism offences have been enacted to 'defend further up in the field'. Pre-inchoate terrorism-related offences are growing in popularity amongst prosecutors in terms of actual and proposed measures, and terrorism sentencing reforms are being implemented to add more tools to the counter-terrorism toolbox.[131] These trends raise concerns regarding their potential impact on civil liberties, the scope of criminalization, and the need for careful evaluation to ensure the effectiveness and proportionality of these legal measures. Overly broad anti-terrorism laws are also counterproductive in that they may cause alienation and lead to radicalisation, while at the same time limiting the scope of counter-radicalisation programmes such as Prevent because

[129] Clive Walker, 'The United Kingdom's Anti-terrorism Laws: Lessons for Australia' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press 2007).
[130] Walker (n 3) 1, 15.
[131] See for example, the sentencing reforms under the Counter-Terrorism and Sentencing Act 2021.

indicators of radicalisation are already criminal, so those at risk are liable to be prosecuted instead of deradicalised. These concerns will be discussed in greater detail in Chapters 5-7.

This chapter has provided a general overview of the changing contours of counter-terrorism law in the UK. Chapters 5 to 7 will focus on selected categories of pre-inchoate offences and examine them in more detail. They will focus on three categories of pre-inchoate offences which are prevalent in UK counter-terrorism legislation: 1) possession, 2) encouragement and 3) association with proscribed terrorist organisations. To this end, the following chapters will analyse the scope of these substantive pre-inchoate terrorism offences and discuss the wrongs inherent within the offences, what harms they are trying to prevent, and the rights implicated by the offences. It attempts to elucidate some of the justifications for infringing these rights and evaluate different constraining principles that may serve to delimit these offences. The chapters will consider whether these pre-inchoate offences have a similar purpose, aim and scope or are fundamentally different in nature. A question remains as to whether pre-inchoate offences can be seen as part of a unified group or whether the differences between them defy such classification. By exploring the legislative background for these offences and the case law, this thesis generates important new insights into the applicability of constraints to different categories of pre-inchoate offences and explores which constraints best delimit the potential overreach of these offences.

IV. Constraining Principles For Pre-Inchoate Offences

1. Balancing Preventive Pursuits And Protection Of Rights- Why Focus On Constraints?

The question of whether, and to what extent, it is necessary to protect individual liberties in order to enhance security and prevent terrorism has been one of the key foci of the literature in recent years. On one hand, some argue that a restriction of liberty is necessary to prevent the threat of terrorism in a liberal democracy, and therefore warrants the curtailment of freedoms in times of emergency.[1] On the other hand, others argue that 'it is particularly in times of crisis that the liberal democratic state must adhere strictly to its defining principles; rights would lose all effect if they were easily revocable in situations of necessity'.[2] Undermining fundamental liberal principles such as the respect for human rights and the rule of law 'poses a threat to fundamental pillars of our justice system' and would amount to 'losing the war on terrorism without firing a single shot'.[3]

A more realistic view lies in the middle: the criminal law is the best means to combat terrorism and risk but should not encroach on civil liberties without restraint.[4] Bozbayindir claims that the criminal law is better than other alternatives such as military detention, infinite arrest or administrative orders.[5] On this view, the criminal law provides a stronger framework of accountability, openness and transparency than state interventions such as the covert operations

[1] Christopher Michaelsen, 'The Proportionality Principle, Counter-Terrorism Laws and Human Rights: A German-Australian comparison' (2010) 2 City UHKL Rev 19, 20.
[2] Ibid 20.
[3] Ibid 21.
[4] Ibid 20.
[5] Ali Emrah Bozbayindir, 'The Advent of Preventive Criminal Law: An Erosion of the Traditional Criminal Law?' (2017) 29 Criminal Law Forum 25, 25.

of security services can offer.[6] The question remains, therefore, how to develop a normative theory that can distinguish the substantive offences under criminal law that are justified from those that are not.

It is important to define what 'justification' means in the context of counter-terrorism legislation. A justification essentially renders an impermissible act permissible because it advances some social interest, or upholds a right of such importance that it outweighs the wrongfulness of the act.[7] In the context of counter-terrorism, the question then becomes: for what terrorism-related conduct may the state subject individuals to criminalisation and punishment? What conduct ought to be punished? One problem with terrorism-related counter-terrorism offences is that the decision to criminalise particular conduct usually takes place within a political-legal context where 'the stage is already set', making it difficult to fit into the language of criminal law theory when political considerations prevail.[8] Counter-terrorist legislation is often enacted as a political reaction to a terrorist attack, and its enactment may bypass procedural formalities, adequate public consultation, pre-legislative scrutiny and political debate about the necessity and justifiability of the proposed new law on grounds of expediency.

Additionally, Husak argues that 'punishment has proven incredibly difficult to defend' due to the opposing philosophical views as to what conduct ought to be criminalised.[9] He notes that

[6] Ibid 25.
[7] John Kaplan, Robert Weisberg and Guyora Binder, *Criminal Law: Cases and Materials* (9th edn, Wolters Kluwer 2021).
[8] Kimmo Nuotio, 'Theories of Criminalisation and the Limits of Criminal Law: A Legal Cultural Approach' in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2010) 238, 250.
[9] Douglas Husak, 'Internal Constraints on Criminalization' in Douglas Husak (ed), *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007), 24.

while scholars disagree on how punishment is justified, they do not disagree that *a* justification is needed.[10] Husak goes on to argue that the question of justifications ought to be trumped by a consideration of what is *unjustified*, in the sense that if we can identify a set of constraints that any acceptable defence of punishment must satisfy, we might be able to show that some (real or imaginary) criminal laws should be placed 'beyond the reach of the punitive sanction'.[11]

Justifications and limitations are inextricably interrelated and interdependent. What abides by limiting principles tends to fall in the realm of what is justified. Husak argues that exploring justifications is a less fruitful exercise than analysing what constraints ought to limit penal sanction.[12] The central idea of a liberal criminal law is that it complies with democratic principles, such as adherence to the rule of law and respect for civil liberty. Hence, even in the context of counter-terrorism, citizens have a right to demand that coercive state actions are legally justified. In the following chapters, discussions on constraining principles will consider what is a justified (or unjustified) expansion of the criminal law.

2. The Importance Of Constraining Principles

The pursuit of counter-terrorism and the protection of rights can be safeguarded by the legislative branch (creating the law), the executive branch (enforcing the law) and the judiciary (adjudicating cases).[13] Recent academic debates have been increasingly focused on the

[10] Ibid 24.
[11] Ibid 25.
[12] Ibid 24.
[13] E. Billis, N. Knust and J.P. Rui, *Proportionality in Crime Control and Criminal Justice* (Bloomsbury Academic 2021).

limitations that should be placed in pursuit of preventive criminal law.[14] Many scholars recognise the need to develop a 'preventive jurisprudence' in response to the expansion of the criminal law for preventive purposes.[15] Constraining principles identify conditions that permit justified criminalisation, so that it is only permissible to do X if it satisfies the condition Y.[16] Constraints are important because they ensure the protection of legal interests by setting a 'critical yardstick by which to judge all criminal offences'.[17] Although some scholars argue that constraints on criminalisation fail, Edwards argues that constraints on criminalisation are valuable because they set clear limits on the criminal law, and require that 'due weight' be given to these constraints when considering a specific law.[18] Setting out what constraints apply, and ought to apply, to certain offences can help to determine the limits of a particular set of laws.

Such normative exercises have been carried out by several scholars, including Husak, who argues that the law ought to be shaped by internal constraints such as satisfying a burden of proof and seeking to prevent a 'non-trivial' harm, which are derived from inside the criminal law itself, and external constraints such as the requirement that the legislation must advance the government's purpose and be no more than necessary to achieve the government's legitimate aims, which depend on a 'normative theory imported from outside the criminal law itself''.[19] Husak details seven principles, including the wrongfulness and necessity principle, that limit the reach of the criminal law and identifies key limiting principles that apply to *all*

[14] Matthew Dyson and Benjamin Vogel, *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2018); Andrew Ashworth and Lucia Zedner, 'Conclusions: The Preventive State and Its Limits' in Andrew Ashworth and Lucia Zedner (ed), *Preventive Justice* (Oxford University Press 2014).
[15] Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt & Sarah Murray (Eds.) *Regulating Preventive Justice: Principle, Policy and Paradox* (1st ed. Routledge 2007); James Edwards, 'Theories of Criminal Law' (*Stanford Encyclopedia of Philosophy*, Fall 2021) <https://plato.stanford.edu/entries/criminal-law> accessed 9 July 2025.
[16] Edwards (n 15).
[17] Kimmo Nuotio, 'Money Laundering and Terrorist Financing as Preventive Criminalizations' (2023) 11 Peking University Law Journal 35.
[18] Helen Duffy and Kate Pitcher, 'Indirectly Inciting Terrorism? Crimes of Expression and the Limits of the Law' in Benjamin J Goold and Liora Lazarus (eds), Security and Human Rights (Hart Publishing 2019) 343.
[19] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008), 55.

branches of the criminal law. However, his account is not specific to the context of counter-terrorism which may require further constraints. Husak is also less concerned with how these constraints apply in the context of case law. Others, such as Ashworth and Zedner, develop a variety of principled constraints that may limit preventive offences, including counterterrorism measures, but do not attempt to rank these constraints in order of priority, according to their relevance to specific offences nor discuss their applicability to specific offences. Further consideration of the ranking of principles, the relationship between principles, and how to resolve the tensions where principles are not compatible are necessary.

To fill in this gap in the literature, the following section critically examines the main constraints so far identified by academics to delimit preventive offences. The following discussion evaluates their strengths, weaknesses and applicability to pre-inchoate counter-terrorism offences specifically. It develop a normative weighting of applicable constraints, and applies these to terrorism-related offences in Chapters 5-8.

3 An Analysis Of Various Constraining Principles

3.1 Harm Constraint And Direct Proscription Constraint

The constraint which has attracted the most scholarly attention is the harm principle.[20] The starting point for discussion is John Stuart Mill's articulation of the harm principle: 'the only purpose for which power can be rightfully exercised over any member of civilized community, against his will, is to prevent harm to others'.[21] This is an important enabling principle of the

[20] Although it may be queried whether the harm principle is a constraint, as it may merely be a necessary but insufficient condition of permissible coercive measures.
[21] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press, USA 1998), 86.

criminal law and has been drawn upon by many subsequent criminal law scholars. For example, Duff, drawing on the work of HLA Hart,[22] develops the concept of 'accounting' for one's responsibility for creating harm central to his theory of responsibility.[23] Feinberg develops the harm principle further. For Feinberg, '[it] is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor... and there is no other means that is equally effective at no greater cost to other values'.[24] His version of the harm principle is welcomed, because it says that wrongdoers should not be punished unless harm is caused by their actions. Feinberg also elaborates Mill's harm principle when he argues that harm is caused if there is a 'thwarting, setting back, or defeating of an interest'.[25] Therefore, harm occurs if it reduces a component of another person's wellbeing.

The most important part of Feinberg's analysis of the harm principle is that laws should only be passed if 'there is no other means that is equally effective at no greater cost to other values'.[26] This approach has been termed the 'Standard Harm Analysis', which has been detailed by von Hirsch:

> [T]he Standard Harm Analysis involves the following steps for deciding whether a given type of risk satisfies the requirements of the harm principle:

[22] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 1968); H. L. A. Hart, 'Legal Responsibility and Excuses' in Jules L Coleman (ed), *Readings in the Philosophy of Law* (Routledge 2013).
[23] R. A. Duff, 'Harms and Wrongs' (2001) 5 Buffalo Criminal Law Review 13.
[24] Joel Feinberg, *The Moral Limits of the Criminal Law. Volume 1, Harm to Others* (Oxford University Press 1987), 26.
[25] Ibid 34.
[26] Feinberg (n 24) 26.

> Step 1: Consider the gravity of the eventual harm and its likelihood. The greater the gravity and likelihood, the stronger the case for criminalisation.
>
> Step 2: Weigh against the foregoing the *social value* of the conduct and the degree of intrusion upon actors' choices that criminalization would involve. The more valuable the conduct is, or the more the prohibition would limit liberty, the stronger the countervailing case would be.
>
> Step 3: Observe certain *side constraints* that would preclude criminalization. The prohibition should not, for example, infringe rights of privacy or free expression.[27]

The Standard Harm Analysis can, therefore, act as a *negative* constraint on the reach of the criminal law, for state intervention must be weighed against the intrusion upon an individual's liberties. [28]

The harm principle has been criticised on two main grounds. First, it is under-inclusive because it fails to identify a harm without requiring that it also entail a wrong. Certain harms, such as murder or rape, are constituted primarily by the 'wrongfulness' of these actions. Duff rightly contends that the harm principle is 'vacuous' if the distinction between harms and wrongs are blurred; he argues that all wrongs will cause a harm and therefore criminalization cannot be limited by the harm constraint.[29] This critique seems to apply when one is analysing pre-

[27] Andrew P Simester and Andrew von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28 Criminal Justice Ethics 89; Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in A. P.; Smith Simester, A. T. H. (eds) (ed), *Harm and Culpability* (Oxford University Press 1996), 261.
[28] Duff (n 23).
[29] Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Bloomsbury Publishing 2007) 127.

inchoate offences such as receiving instruction or training for a terrorism-related skill, because the 'harm' caused seems to be the wrongful involvement in learning skills that *may* be used for terrorism.[30] Nonetheless, the Standard Harm Analysis requires that criminalisation and any intrusions upon an actor's choice must be weighed against the social value of the conduct & subject to side constraints. Therefore, the harm constraint remains useful as it goes beyond merely asking if a conduct is harmful or not.

The second critique of the harm principle is that it is over-inclusive. The harm constraint supported by Feinberg permits the criminalization of conduct that causes 'remote' harms in order to defend 'further up the field'.[31] It is well established that prevention is a legitimate goal of the criminal law.[32] If one accepts this, then one is endorsing a *wide* view of harm as entailing a risk of harm, which is pre-emptive and reactive in nature.

The Standard Harm Analysis leads to a further question: what types of risk would justify the infringement of liberties and core values? The main difficulty with pre-inchoate offences is that they target harms that are remote from the harm caused by the individual in question. The harm principle would need to be expanded if criminalization of remote harms were to become a question of the degree of involvement in risk creation. This is a valid concern regarding the usefulness of the harm principle, because it weakens the 'bite' of its constraint considerably. A better way forward is to view the harm principle as a powerful tool to delimit state power in the sense that it offers a tool by which to distinguish between unjustified and justified offences

[30] This is illustrated by the offence under Section 6 of the TA 2006, unless one follows Finkelstein's argument that the creation of 'risk' is itself a harm on the grounds that training for terrorism increases the risk that one might go on to use those skills.
[31] Andrew Ashworth and Lucia Zedner, 'Preventive Offences in the Criminal Law: Rationales and Limits' in Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press 2014).
[32] Andrew Ashworth and Lucia Zedner (n 31).

of risk prevention.[33] This requires further refinement of exactly what type of harm should be criminalised and whether the state can justly criminalise specific categories of offences.

The essence of (and problem with) pre-inchoate offences is that they treat risk as a sufficient harm to justify criminalisation. The Standard Harm Analysis does not consider whether unconsummated harm is sufficient to justify criminalisation. Ashworth examines the justifications for criminalising incomplete attempts and found that harm-based analyses are not sufficient unless harm is defined as causing some form of risk or fear in others.[34] Finkelstein puts forward the idea of 'risk as harm' which, if accepted, would extend the harm principle to encompass pre inchoate offences.[35] Indeed, one can argue that imposing impermissible risk on other citizens has a moral significance, which resides in a 'certain kind of nonmaterial autonomy interest that is implicated whenever one imposes risk of harm on another'.[36] Certainly, the harm principle would carry significant weight for most, if not all, pre-inchoate offences if risk were viewed as harmful.

The 'risk as harm' debate raises several questions: how much 'risk' is deemed impermissible and worthy of criminalisation? What if a person changes his mind halfway through the commission of an act? How should one measure the level of risk created? As Tadros points out, the level of risk an individual faces from terrorism is unknown and unquantifiable; any assessment of risk is likely to be a prediction or simplification.[37] Finkelstein's risk as harm

[33] Nina Persak, *Criminalising Harmful Conduct: the Harm Principle, its Limits and Continental Counterparts* (Springer Science & Business Media 2007); Sanford H Kadish, 'The Criminal Law and the Luck of the Draw' (1993) 84 J Crim L & Criminology 679

[34] Bernadette McSherry, Alan Norrie and Simon Bronitt, *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing 2008).

[35] Claire Finkelstein, 'Is Risk A Harm?' (2002) 151 U Pa L Rev 963.

[36] John Oberdiek, 'The Moral Significance of Risking' (2012) 18 Legal Theory 339.

[37] Victor Tadros, 'Controlling Risk' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013).

thesis is not about predicting what risk might eventuate but argues that to engage in risking is itself a harm irrespective of outcome.[38] However, Tadros argues that the risk must be 'substantial' in the sense that it is likely to lead to serious harms such as killing and maiming, the most important harms that terrorism may cause.[39] However, the problem with pre-inchoate offences is that they do not seem to satisfy the substantive risk test because the causal contribution between the defendant's remote act of conduct may differ from case to case. An offender may also change his or her mind through a course of conduct, which may impact the level of risk created and ought to be reflected through sentencing.[40] Husak suggests that culpability constraints ought to be considered alongside the substantial harm test so that recklessness and negligence should be punished if the offender has ignored a substantial risk.[41] He also argues that the state should not criminalise conduct to reduce the risk of harm unless the state would be permitted to criminalise conduct that 'intentionally and directly causes the same harm'.[42] These refinements are welcomed and ought to be adopted in a normative framework for pre-inchoate offences and would also be relevant to offences that do not seem to cause a 'substantial risk' of harm though the culpability constraint would come into play.

Regarding how to assess the level of risk created, Westen argues that when the law refers to a 'threat' or 'danger', these refer to 'fears of *counterfactual events* of a certain kind' that judges and juries feared would occur, and had they occurred, would have resulted in the harms the offence ought to prevent.[43] On this view, a defendant who attempts a pre-inchoate offence

[38] Finkelstein (n 35).
[39] Tadros (n 37).
[40] John Danaher, 'Attempted Crimes and Changes of Mind' (Philosophical Disquisitions, April 28, 2012) <https://philosophicaldisquisitions.blogspot.com/2012/04/attempted-crimes-and-changes-of-mind.html> accessed March 19, 2025.
[41] Husak (n 19) 162.
[42] Ibid 166.
[43] Peter Westen, 'The Ontological Problem of 'Risk' and 'Endangerment' in Criminal Law' in R. A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011), 325.

through a means that is unlikely to result in the ultimate terrorist harm is not a 'threat' and thus will not be judged to have caused a substantive risk because judges and juries are inclined to believe the counterfactual conditions would never have occurred. This understanding of what level of risk would justify criminalisation is helpful in delimiting the reach of offences such as the offence of viewing terrorist material online, but less helpful for offences where the ultimate harm is closer in proximity to the pre-inchoate act.

A 'Standard Harm Analysis' model lends itself to a second constraint called the 'direct proscription' constraint.[44] This constraint requires that preparatory acts committed with an ulterior intent to cause remote harms cannot be criminalised unless it is justifiable to punish the causation of that harm.[45] There is some uncertainty surrounding this constraint. Simester and von Hirsch argue that the state may justify the criminalisation of a morally *wrongful* causation of an ultimate harm regardless of whether there is an ulterior intent.[46] Husak, on the other hand, argues that there must be *intentional* causation of the harm for the constraint to apply.[47] This distinction is important for pre-inchoate offences such as possession for terrorist purposes, where there is no ulterior intent requirement.[48] However, it is less important in respect of the membership or facilitation offences on which this thesis will focus.

[44] Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Bloomsbury Publishing 2011), 55.
[45] Ibid 55.
[46] Ibid 55.
[47] Husak (n 19) 165-166.
[48] Section 57 Terrorism Act 2000

3.2 Wrongfulness Constraint

Another prominent constraint identified by scholars is the wrongfulness constraint.[49] This constraint states that the criminal law should not be applied unless an individual culpably commits a wrongful act. Otherwise, the state acts unjustifiably as it would 'lose its moral authority to guide citizens' behaviour'.[50] Therefore, it is essential to examine whether pre-inchoate offences, which may result in harm, criminalise conduct that are wrongful acts in themselves.

Superficially, the question of what conduct counts as 'wrongful' seems to be straightforward. One may argue that pre-inchoate offences are wrongful because the state declares them to be wrongful. Duff, for example, uses the example of strict liability and regulatory offences, which are not pre-legally wrong, but only 'wrongful' because the law states that they are.[51] The key is to distinguish between different kinds of wrongs. It is generally accepted that there are two types of wrongfulness: *mala in se* (a wrong in its own right) and *mala prohibita* (a wrong that is not inherently wrongful but only wrongful because it is prescribed by the law).[52] The state can proscribe wrongful conduct if there is a legitimate reason for doing so. However, if the act is not inherently wrongful, then it is against the wrongfulness principle to criminalise the action.

Several problems arise when we apply the *mala in se* and *mala prohibita* distinction to pre-inchoate offences,. First, most pre-inchoate terrorism offences contain *actus reus* that are not

[49] Husak (n 19); Ashworth and Zedner (n 31).
[50] Bunmee Ronnakorn, 'Preparatory Offences: a Challenge to Criminal Law Boundaries, Democracy and Human Rights Principles' (2016) 2 Social Science Asia, 10.
[51] Antony Duff, 'Risks, Culpability and Criminal Liability: Pre-empting the Commission of Criminal Harms' in G.R. Sullivan and Ian Dennis (eds.), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012).
[52] Ibid.

inherently wrongful, for example possessing articles that may be useful for terrorism or viewing terrorism-related material over the internet.[53] The distinction therefore fails to show how wrongfulness constrains the reach of *mala prohibita* terrorism-related offences.

The question then becomes how the wrongfulness constraint operates in respect of *mala prohibita* offences. It is easy for the state to show that certain actions, such as membership of a proscribed organization, can harm citizens' subjective security and liberties. From an objectivist perspective, an action is wrong if it is harmful to the public, for example, by undermining trust or creating social instability. This perspective has been critiqued for failing to recognise the *heart* of what is wrongful in grave offences such as rape.[54] A better approach is to say that only 'public' wrongs can be justifiably criminalised.[55] Public wrongs include wrongs that are matters of public importance and therefore warrant a collective response from the polity.[56] Pre-inchoate offences impinge on core values that bring a community together and therefore warrant criminalization. There are merits to this approach, for it was previously argued that a communitarian view of the criminal law plays a big role in understanding complicated offences of risk-creation that involve *diffused* levels of criminal responsibility where criminalisation is pushed backwards in time and also across vertical space to capture a wider range of persons. However, what amounts to the shared values in society and how these values can vary will affect the legitimacy of the wrongfulness principle.[57] Hence, the impact

[53] Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Alan Norrie Bernadette McSherry, Simon Bronitt (ed), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart 2008), 163.
[54] Youngjae Lee, 'Mala Prohibita, the Wrongfulness Constraint, and the Problem of Overcriminalization' (2022) 41 Law and Philosophy 375.
[55] S. E. Marshall and Antony Duff, 'Criminalization and Sharing Wrongs' (1998) 11 The Canadian Journal of Law and Jurisprudence 7.
[56] R. A. Duff and S. E. Marshall, 'Crimes, Public Wrongs, and Civil Order' (2019) 13 Criminal Law and Philosophy 27.
[57] Grant Lamond, 'What is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609.

of the wrongfulness constraint depends on the legal and political context in which the offence is enacted.

From a subjectivist perspective, pre-inchoate offences are wrongful because the offenders have committed themselves to the wrong of the ultimate crime. Because many offences require ulterior intent, offenders are culpable and, therefore, liable for punishment.[58] Many pre-inchoate offences punish acts that indicate a 'risky' or dangerous disposition, or criminalise offenders who are caught early in the act of committing a wrongful harm. Husak argues that it is unjust to criminalise an act that indicates wrongful conduct rather than being wrongful in itself.[59] The main problem with punishing a disposition to *become* wrongful in the future is that it amounts to punishing illicit intentions, which is tantamount to a thought crime.[60]

The requirement of wrongful intention lies at the heart of many pre-inchoate offences such as facilitation of terrorist training and membership of proscribed terrorist organizations, which satisfy the wrongfulness constraint. However, this is not as straightforward for other pre-inchoate offences such as possession offences or the viewing of material over the internet where the actions are seemingly innocent and every day. Simester persuasively argues that these acts are 'morally ambiguous' because they do not cause harm to others even if they are committed with wrongful intentions.[61] Therefore, possession offences seem to violate the wrongfulness constraint as these acts may be objectively innocent. McSherry further points out

[58] Ronnakorn (n 50).
[59] Douglas N Husak, 'Reasonable Risk Creation and Overinclusive Legislation' (1997) 1 Buff Crim L Rev 599.
[60] Gabriel S Mendlow, 'Thoughts, Crimes, and Thought Crimes' (2020) 118 Michigan Law Review 841.
[61] Grant Lamond, 'Core Principles of English Criminal Law' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law: Anglo-German Concepts and Principles* (Intersentia 2020).

that the need to prove an intention to commit substantive offences, such as encouraging terrorism, can lead to evidentiary problems.[62]

Overall, the principle of wrongfulness is complex and multi-faceted as its definition can vary, resulting in different interpretations of what is wrongful or not. This weakens the principle's capacity to delimit the reach of pre-inchoate offences. Terrorism offences are usually classified as a form of public security legislation and, therefore, contravene many of the norms of the criminal law.[63] Given that most of the offences I will examine are *mala prohibita,* it will be argued that the wrongfulness constraint may be less useful than other constraints identified in this thesis, although the requirement of a wrongful intention as a *mens rea* element in some offences may help refine the scope of such offences.

3.3 Culpability Constraint

The culpability constraint states that risk-creating actions are justifiably criminalised only if the individual who engages in such conduct has the required mental state regarding the harm risked.[64] Husak notes that this constraint serves to delimit criminalisation of offences of risk-prevention that do not cause harm, for example dangerous driving.[65] Husak argues that to be justifiably criminalised, there must be some intention or knowledge present in the person who drives dangerously or the individual must believe that they are driving in a way that risks

[62] McSherry (n 53) 160.
[63] Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (Basic Books 1977), 203.
[64] Lamond (n 61).
[65] Husak (n 19) 174.

harm.[66] Hence, the culpability constraint imposes a judgment on a certain mental state for which punishment can be justified.

One confusion that arises is that Husak blurs the line between wrongfulness and culpability, for a 'wrongful' intentional participation in a risk-creating activity may also be *culpable* in order for this constraint to work. Indeed, Leader-Elliott argues rightly that culpability is often used to describe an amalgamation of principles of legal and moral blameworthiness.[67] However, Husak defends this constraint by arguing that wrongfulness is not the same as culpability in that agents may be culpable even if their conduct is legally permissible.[68] The problem with this approach, as Husak acknowledges, is that it requires the harms risked to be explicitly identified. Yaffe argues that 'if the culpability constraint is correct, a judge faced with the task of determining if a defendant's act was prohibited by a particular statute must be able to determine precisely what harm or evil the prohibition is aimed at preventing'.[69] Following this logic, most pre-inchoate offences will fail to satisfy the culpability constraint because they target more than one type of harm, or even many unspecified harms. As argued above, most pre-inchoate offences criminalise the creation of risk and deem 'risk as harmful'.[70]

Consider the offence of viewing terrorist-related material over the internet, an offence whose scope is very vague.[71] What kinds of information are so harmful that they can be classified as sufficiently dangerous and harmful to justify criminalisation? This offence criminalises the

[66] Ibid 174.
[67] Ian Leader-Elliott, 'Framing Preparatory Inchoate Offences in the Criminal Code: The Identity Crime Debacle' (2011) Criminal Law Journal, 35, 80.
[68] Husak (n 19) 76.
[69] Gideon Yaffe, 'Harmfulness, Wrongfulness, Lesser Evils and Risk-Creation: A Comment on Douglas Husak's Overcriminalization' (2010) 1 Jrslm Rev Legal Stud 35, 43.
[70] Finkelstein (n 35).
[71] Section 58 Terrorism Act 2000

viewing of information of a kind likely to be useful to a person committing or preparing for an act of terrorism without requiring proof that the viewer intended to assist or actually assisted a terrorist.[72] However, not all viewing of material is culpable. As Tadros and Hodgson point out, 'offences [such as this] are considered useful to the police as much because they allow disruption of terrorist activities through surveillance, searches and arrests as because they allow prosecutions and convictions. Whether this provides a legitimate reason for creating a criminal offence is another question altogether.'[73]

The further an offence moves away from traditional understandings of 'harm' and 'wrongdoing', the harder it is to apply the culpability principle, unless we can define what exactly is culpable about the specific offence. Chapters 5 to 8 explore the context behind certain pre-inchoate legislation and the wrongs implicated by these offences. Terrorism-related offences such as membership, encouragement and facilitation may involve culpable risk-creation, but the extent to which something is culpable is debatable and may vary. We need to consider the uncertainties and overlaps between the culpability constraint and other constraints to develop a satisfactory account of their respective limits on the legitimate criminalization of pre-inchoate offences. In conclusion, the culpability constraint is weak on its own and only operates in tandem with other constraints such as wrongfulness, harm and remoteness.

[72] Section 58(1) Terrorism Act 2000

[73] Jacqueline Hodgson and Victor Tadros, 'How to Make a Terrorist out of Nothing' (2009) 72 The Modern Law Review 984.

3.4 Remoteness Constraint

The remoteness constraint refers to limits on the spatial and temporal distance that links an offender's actions to harm caused.[74] This constraint would seem the *most* applicable in a study of pre-inchoate offences. Many offences of possession, membership, facilitation and publication are *too* remote as they criminalise conduct that is insufficiently linked to the ultimate harm for criminal responsibility to be attributed. Indeed, Ashworth and Zedner have argued that 'the more remote the conduct criminalised is from the harm-to-be-prevented, and the less grave that harm, the weaker is the case for criminalization'.[75]

A criticism of the remoteness constraint often made is that it does not adequately limit the scope of preventive offences due to their utilitarian nature of preventing harm from occurring. Simester identifies three aspects of 'remoteness': 1) the need for a *nexus* between the criminalised conduct and the harm to be prevented; 2) the *distance* between the conduct and the ultimate harm to be prevented; and 3) *imputation* of responsibility (if the consummate harm is carried out by another).[76] In terms of the first requirement, Simester argues that there must be an adequate causal connection between the prohibited act and the ultimate harm. This means that a seemingly innocuous act such as possession of articles that may be useful for terrorism can only be criminalised if done with the *intent* of causing a terrorist attack. Ashworth and Zedner notes that this requirement means that offences in sections 1 and 2 of the Terrorism Act 2006 would fail the remoteness test given their *mens rea* requirement of recklessness rather than intention. Following Ashworth and Zedner, I argue that the nexus requirement is missing in many of the pre-inchoate offences examined due to the weak mental elements required.

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[74] Edwards (n 15).
[75] Ashworth and Zedner (n 31) 112.
[76] A.P. Simester, 'Prophylactic Crimes' (2012) in G.R. Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Oxford, Hart Publishing) 59, 68.

The second requirement states that there must be a sufficient distance between the prohibited conduct and the ultimate harm to justify criminalization. Academic debates have focused on the appropriate point prior to the completion of an offence at which liability should be determined, including 'last act', 'substantial step' or 'more than merely preparatory.[77] However, few scholars have asked where the stopping point should be for pre-inchoate offences, which seem to violate the 'distance' requirement significantly by imposing criminal responsibility on persons even further back in time.

Ashworth and Zedner argue that these tests may violate individual autonomy because they do not respect an individual's window of opportunity to change their mind prior to the commission of the ultimate harm.[78] It might be that the distance constraint is less useful given that many of the pre-inchoate offences involve the *stretching* of the distance between a prior act and a completed crime. This thesis focuses on pre-inchoate offences because they stretch the limits of justifiable criminalisation because the distance between the harms to be prevented and the ultimate harms are great. Therefore, it is doubtful that these offences satisfy the distance constraint.

The third problem arises when preventive offences lead to the creation of harms indirectly from the prohibited act, in that any harm arises only 'after further human interventions, either by the original actor or by others'.[79] For example, offences such as facilitation or encouragement hold

[77] Jerome Hall, 'Criminal Attempt. A Study of Foundations of Criminal Liability' (1940) 49 The Yale Law Journal 789; Gideon Yaffe, 'Criminal attempts' (2014) 124 Yale LJ 92; Gideon Yaffe, *Attempts: In the Philosophy of Action and the Criminal Law* (Oxford University Press 2010); Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1987) 19 Rutgers LJ 725.
[78] Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Bloomsbury Publishing 2007).
[79] Simester and von Hirsch (n 27) 97.

someone accountable for the future actions of third parties, which violates the remoteness principle unless the original actor is sufficiently 'normatively' involved in the principal's subsequent choice for responsibility for their actions to be fairly imputed to the original actor.[80] Even though this requirement may be satisfied in respect of facilitation or encouragement offences, if there is sufficient normative involvement in the scale or degree of harm that a third-party actor goes on to commit, it is harder to say the same for vaguely defined offences such as viewing material relating to terrorism over the internet.[81] The problem lies in defining what counts as sufficient 'normative involvement' in future acts and whether this constraint weakens as offences move backward in time. Despite its conceptual weaknesses, the remoteness constraint plays a key role in delimiting the scope of pre-inchoate offences. These offences criminalise conduct far removed from any actual terrorist act, raising concerns about fairness, and proportionality, yet it is precisely this lack of proximity from harm that makes these offences problematic in the first place. Therefore, remoteness serves as a crucial limiting principle that ensures the criminal law does not extend too far into the realm of speculative or non-imminent threats.

3.5 Least Restrictive Alternative Approach Constraint

The principle of the least restrictive appropriate alternative is endorsed by Ashworth and Zedner and others, who argue that preventive criminal laws should only be used as a last resort when alternative legal remedies are incapable of preventing harm from occurring.[82] This constraint aims to ensure that less intrusive measures (such as specific offences targeting

[80] Simester and von Hirsch (n 44) 81.
[81] Section 58 Terrorism Act 2000
[82] Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 New Criminal Law Review: An International and Interdisciplinary Journal 542.

specific harms or non-criminal regulations such as civil or administrative orders) are favoured over more intrusive ones (such as coercive laws that are too broad) if this would suffice to achieve the same end.[83]

An alternative view of the criminal law opposes the use of this constraint. Simester and von Hirsch argue that the least restrictive constraint is potentially too minimalist, as the function of the criminal law is to condemn wrongdoers through censure in a community.[84] They argue that the criminal law serves an important *expressive* function that renders it appropriate even if a less intrusive measure would achieve better prevention.[85] This may be true in the context of the terrorism legislation, where even if it were possible to reduce terrorism through other channels, the criminal law would still be employed as it sends a strong signal of condemnation to society- that *anyone* who engages in a terrorism-related preparatory act (even if the act far removed from an ultimate harm) would be subjected to high levels of punishment.[86] This is especially relevant to terrorist offences, which may not have a direct victim when prosecuted (such as possession or preparator-based offences) but are considered extremely serious because they put public safety at risk and target society as a whole.

Supporters of public, symbolic or expressive theories of punishment are persuasive in explaining why wrongdoers should be penalised through the criminal law even if there is a less intrusive method of punishment outside the law.[87] However, an expressive view contravenes

[83] Furthermore, the offence must be no more extensive than required to achieve the reduction in risk.
[84] Simester and von Hirsch (n 44) 193.
[85] Ibid 193.
[86] Clive Walker, 'Terrorism Prosecutions and the Right to a Fair Trial' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (2nd edn, Edward Elgar Publishing 2020) 384-398.
[87] Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397; Thomas M Scanlon, *What We Owe to Each Other* (Harvard University Press 2000); Dan M Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 Virginia Law Review 349.

the argument that normative legal constraints should limit the reach of pre-inchoate offences. The principle of least restrictive alternative approach is important as it requires exploring other ways to achieve the aims, in addition to the proposed law, to find the most balanced solution.. The least restrictive constraint is strong but should be considered part of the proportionality constraint, which is more comprehensive- as will be discussed below.

3.6 Necessity Constraint

For preventive offences achieving a preventive purpose, the necessity principle requires that any interference with personal liberty should be kept at a level necessary to achieve the specified aim.[88] Like the least restrictive alternative approach constraint, the necessity constraint embodies a proportionality test, in that any state action should be limited if alternative options are available.[89] This constraint is useful when analysing pre-inchoate offences because many offences, such as publication or possession, are overinclusive.[90] Husak uses the example of a statute punishing all drug users, which was enacted in response to the claim that drug use increases child abuse (harm X).[91] Husak argues that this fails to meet the necessity principle, and a better way of drafting the statute would be to prohibit drug use only amongst people with children of a given age.[92] The strength of Husak's argument is that it enables statutes to be clearer and more precise. Pre-inchoate offences are often broadly and vaguely drafted in the hope that 'harm X' may be captured indirectly. As such, many such

[88] Michaelsen (n 1) 30.
[89] Ibid 30.
[90] Lucia Zedner, 'Ends and Means: Why Effective Counter-Terrorism Requires Respect for Proportionality and Rights' in Emmanouil Billis, Nandor Knust, Jon Petter Rui, (Eds), *Proportionality in Crime Control and Criminal Justice* (Oxford, Hart Publishing 2021).
[91] Husak (n 19) 165.
[92] Ibid 166.

offences fail to satisfy the necessity principle.[93] However, this begs the question of how broadly to conceptualise the necessity principle and how to characterise the harms involved.

The necessity constraint is useful but more difficult to apply in the context of counter-terrorism legislation because terrorism is a highly uncertain risk. The higher the uncertainty of the risk occurring, the broader the offence definition is necessary. Cohan goes further to argue that necessity is a utilitarian principle and that the prospect of saving many lives through counter-terrorism legislation is morally appealing.[94] The necessity test is important because it endorses the weighing of alternative options to what is necessary under a proportionality logic. It is useful when evaluating the breadth and depth of pre-inchoate offences where the criminalised *actus reus* may stretch far beyond what is necessary to achieve the same result in preventing crime.

3.7 Proportionality Constraint

The proportionality constraint comes in various forms. It is a key principle of international law, a decision-making tool and an analytical structure that 'does not, in itself, produce substantive outcomes or answers to legal or policy problems' but leads to a decision that deals with the tensions between two or more competing legal or socio-political goals.[95] As Sweet and Mathews argue, proportionality is a doctrinal creation which 'emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice'.[96] Proportionality

[93] Liora Lazarus, ''The Right to Security- Securing Rights or Securitising Rights?' in Rob Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012).
[94] John Alan Cohan, 'Torture and the Necessity Doctrine' (2006) 41 Val UL Rev 1587, 1632.
[95] Michaelsen (n 1) 25.
[96] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Colum J Transnat'l L 72, 75.

is a powerful constraint because it serves many functions. It is not only a judicial tool for courts to review the legality of state action, but also a legislative mechanism for political actors to carry out their decision-making process.[97] In respect of counter-terrorism, Michaelsen notes that proportionality acts as a 'benchmark' for courts to review anti-terrorism measures against other important values such as human rights and civil liberties.[98] As such, the proportionality principle acts as a 'constitutional barrier' to excessive counter-terrorism laws.

The biggest strength of the proportionality constraint lies in its rigorous three-stage test, which has been recognised by both UK and EU courts. First, the proportionality assessment requires the measure in question to be 'suitable' for achieving its purpose. Secondly, the measure must be 'necessary'. Thirdly, it must be 'proportionate' and appropriate.[99] In terms of the suitability test, Michaelsen argues that it carries little weight in decision-making as what is suitable can be broadly defined by the government; 'the government must only enact legislative measures that are generally suitable to achieve the intended purpose'.[100] As such, the suitability requirement is a weak constraint on the creation of pre-inchoate offences as it can easily be argued that they are suitable for achieving heightened security.[101]

The necessary test carries more weight because it deploys a 'least-restrictive approach' test, discussed previously. Therefore, it means that any new legislation must not unnecessarily infringe on people's liberties unless there is no alternative measure. If a new offence is too broad or too restrictive, it fails to satisfy the suitability or necessary test and is disproportionate. This certainly seems to be the case for pre-inchoate offences targeting the risk of radicalisation,

[97] Michaelsen (n 1) 26.
[98] Ibid 31.
[99] Ibid 30.
[100] Ibid 30.
[101] Zedner (n 90) 7.

such as publishing or viewing material online, where less drastic measures may be more justified.

The last step is what Michaelsen calls proportionality in a *narrow* sense. This is more complex as it entails a deeper examination of what is 'appropriate' given the circumstances.[102] Within this step comes a 'balancing' exercise, whereby other factors such as human rights and judicial deference come into play. On its face, the balancing process appears to be a strong constraint against the enactment of broad, vague pre-inchoate offences. However, Lazarus notes that 'there is very little clarity or guidance on how to balance the right to security where it is invoked to legitimize state force', which leads to the question of incommensurability between the pursuit of security and liberty.[103] Zedner notes that the risk of terrorism is notoriously difficult to measure, full of uncertainty and there is little guidance on 'what it means to talk about effective counter-terrorism, which of many metrics of effectiveness should prevail and what relative weight should be assigned to each'.[104] This uncertainty has led to what Zedner rightly observes to be a lack of commitment to addressing questions of suitability and necessity of counter-terrorism legislation.[105]

Proportionality raises more questions in the context of pre-inchoate offences. First, the proportionality constraint cannot set out an appropriate response for offences that capture 'dangerous' offenders. For measures to conform to this constraint, the criminal law should 'be able to generate a spectrum of both dangerousness and permissibly proportionate responses

[102] Ibid 6.
[103] Lazarus (n 93) 90.
[104] Zedner (n 90) 8.
[105] Ibid 7; this weakness is exacerbated by the fact that terrorism is often politically motivated. The proportionality constraint carries less weight because courts apply a high degree of judicial deference or margin of appreciation to give weight to the democratic decisions of the government.

along that spectrum'.[106] Second, because preventive offences such as pre-inchoate offences are forward-looking, proportionality may require frequent review to assess the 'dangerousness' of individuals or certain groups of people, which could be written into the legislative framework. In the context of an ever-shifting realm of terrorism, laws based on a single instance of dangerousness may become disproportionate later if the level of risk changes.[107]

Nonetheless, the comprehensiveness of the three-pronged test embodied in the proportionality constraint has led some scholars to argue that there is a 'reason not to worry too much about (at least some) preventive innovations…[and] as a prescription for severely restricting the turn toward preventive policies'.[108] Overall, I contend that proportionality remains a normatively strong constraint. Despite its weaknesses, proportionality is broad enough to subject the state to pre-legislative and post-legislative scrutiny, as well as to enable judges to impose appropriate sentences on offenders. Only where new measures are suitable and necessary should they be enacted, and in the post-legislative realm they may face constitutional challenge if they are not proportional or appropriate.

3.8 Rule of Law Constraint

The rule of law is an 'essentially contested concept'[109] as it incorporates several procedural and formal principles that address the way a society should be governed.[110] The formal principles concern the clarity and generality of the norms that shape society. The requirement of legal

[106] Carol S Steiker, 'Proportionality as a Limit on Preventive Justice: Promises and Pitfalls' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013).
[107] This depends on whether the risk is determined at the point of sentence or the time of release.
[108] Steiker (n 106) 193.
[109] Tulich et al (n 15) 97.
[110] Lamond (n 61) 17.

clarity- that laws must be clear and certain to provide fair warning to citizens- is an important limiting principle because preventive offences must be drafted clearly and precisely so citizens know what constitutes wrongful behaviour and can guide their actions accordingly.[111] Laws must also be stable and consistent, and be applied fairly to all citizens.[112] This means that preventive offences should not unjustifiably target specific categories of people in society and must not be enacted retrospectively. Another principle of the rule of law is that legislation must be enacted using legal formalities and provide due process protections.[113] This is an important limiting factor for it entails that legislation must be created accountably through a system of checks and balances, and offer safeguards that protects individual rights, although not all anti-terrorism legislation are enacted through the normal legislative route as they are often passed under expedited procedures on security grounds that are fast-tracked through the legislative process, which may deny adequate opportunities for public debate and scrutiny.[114]

These requirements have important implications for pre-inchoate offences. The requirement of clarity is particularly important because clarity may be lost when pre-inchoate offences stretch beyond merely punishing preparatory conduct. As Ashworth and Zedner note, offences should be drafted in accordance with rule of law principles to ensure that specific wrongs are precisely targeted rather than capturing broad or vague criteria.[115] This is relevant because many of the offences analysed in this thesis are very broad in terms of the wrongful conduct they target, and vague in terms of what harms they seek to prevent.

[111] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013).
[112] Ibid.
[113] Tulich et al (n 15) 58.
[114] Emergency terrorism legislation includes examples like the Counter-Terrorism and Sentencing Act 2021; see Florence Lee and Clive Walker, 'The "Counter-Terrorism and Sentencing Act 2021" and the Advance of Intensified Terrorism Punishment' (2022) Criminal Law Review 864.
[115] Ashworth and Zedner (n 31) 114.

The rule of law constraint is an important 'constitutional guarantee' of the criminal law, but it is not without problems.[116] Gardner critiques the idea of legal certainty as being part of a conflicting (and often contradictory) concept of the rule of law.[117] He argues that the rule of law encompasses tensions 'between generality and specificity, between stability and flexibility [and] between clarity and arguability' which are often unresolved in the case law.[118] Schmitt also argues that the rule of law is easily sidestepped if a government enacts legislation designed to contain emergencies.[119] On this view, the rule of law does not act as a strong constraint on state action in times of emergency.[120] Another view is to preserve rule of law values that must be followed amidst times of danger- rules that allow for the erosion of liberties to achieve greater security.[121] These endorsements of a rule of law '*lite*' are relevant because many of the pre-inchoate offences that will be examined step outside the bounds of a 'fuller' rule of law by being overly vague and broad.

Therefore, it is important to note that the rule of law cannot be a constraint without further elaboration of what it encompasses and which of its sub-principles apply to pre-inchoate offences. [122] It is argued that certain aspects, such as certainty and clarity, should play a greater role in delimiting the reach of pre-inchoate offences. The most fundamental constraint should be the clarity constraint, given that it requires pre-inchoate offences to be drafted in a predictable, clear manner.

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[116] Malcolm Thorburn, 'The Constitution of Criminal Law: Justifications, Policing and the State's Fiduciary Duties' (2011) 5 Criminal Law and Philosophy 259, 35.
[117] John Gardner, 'What Security is There Against Arbitrary Government?' (2006) 28 The London Review of Books 2, 6.
[118] Ibid 6.
[119] David Dyzenhaus, 'The Permanence of the Temporary: Can Emergency Powers Be Normalized?' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press 2001) 21.
[120] Jeremy Waldron, 'The Rule of Law' (*Stanford Encyclopedia of Philosophy*, Fall 2023) <https://plato.stanford.edu/entries/criminal-law> accessed 9 July 2025.
[121] Ibid section 8.4.
[122] Ibid.

3.9 Human Rights Constraints

Human rights principles delimit the reach of precursor offences in various ways.[123] Ashworth examines the European Convention on Human Rights (ECHR) and its safeguards against the use of excessive state power in criminal justice.[124] However, as a means of constraining substantive criminal law, human rights are of limited use. Ashworth notes that convention rights such as the freedom of thought and religion (Article 9), freedom of expression (Article 10) and freedom of association (Article 11) denote the rights that must be protected under any criminal law, subject to the grounds for derogation explicitly contained within the Articles, which are arguably so expansive as to significantly limit these rights.[125] Apart from these rights, he argues that there is little to protect individuals against the reach of the criminal law.[126]

Although few studies have examined the 'bite' of human rights constraints in the context of pre-inchoate offences, Ashworth's critique is persuasive and correct.[127] Relatively little of the criminal law is protected by human rights constraints, as a 'rights-based' approach is too general to provide a framework for criminalisation.[128] Specific pre-inchoate offences target different wrongful conduct and may penalise acts that expand the reach of the criminal law in

[123] Lamond (n 61) 11.

[124] For example, Article 5 ECHR protects the right to liberty and security of the person but allows the lawful arrest or detention of a person effected for the purpose of bringing him [or her] before the competent legal authority on reasonable suspicion of having committed an offence; see Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (2009) in in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (1st edn, Hart Publishing 2009), 87.

[125] Ibid.

[126] Ibid.

[127] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds.) (ed), *Security and Human Rights* (Hart Publishing 2007); Lazarus (n 93).

[128] Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012), 136.

multiple directions, which means that they ought to be limited by narrower constraints if they are unjustifiably broad. Some human rights principles bear directly on pre-inchoate offences, such as the freedom of association (membership offences), however, it is unclear whether they carry much weight for other offences. Further, Goold and Lazarus rightly note that the process of 'balancing' considerations between human rights and security 'not only lacks specificity…it naturally lends itself to the political rhetoric of greater security and to the curtailment of rights'.[129]

According to Dworkin, 'only privileges that state a certain threshold weight against collective ends can be denominated as genuine rights'.[130] Rights also contain what Dworkin calls a 'moral' element- rights are moral entitlements individuals possess as beings with dignity and self-respect.[131] Therefore, rights ought to override collective goals or the interests of the majority when they come into conflict with policies like the pursuit of security by the state. Bowie notes that Dworkin's definition of rights has an 'anti-utilitarian tradition' as he argues that the law must regard individuals as having fundamental rights that cannot be easily overridden.[132]

However, the fact that human rights are (sometimes too easily) overridden by the pursuit of security is unsurprising. If, according to Dworkin, rights are conceived of as a 'statement of principles', then it follows that they can also be 'weighed' in the same manner as other principles albeit carrying a different moral significance in kind. Rights are powerful and can

[129] Benjamin J Goold and Liora Lazarus, *Security and Human Rights* (Bloomsbury Publishing 2019), 16.
[130] Martina Rifve, 'Rights as Principles of Adjudication-Ronald Dworkin´s Model of Principles as a Legal Interpretation Device Applied to the Problem of Self-Incrimination in Community Competition Law Procedures' (2001) LUP Student Papers, Lund University Libraries, 16; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1987).
[131] Norman E Bowie, 'Taking Rights Seriously. By Ronald Dworkin. Massachusetts' (1977) 26 Harvard University Press California University Law Review 563, 911.
[132] Ibid 911.

effectively 'trump' and therefore restrain the reach of certain offences. But the point is that the actual operation and applicability of rights are imperfect and complicated. Dworkin himself conceptualised his judge as having to engage in a complex balancing/weighing process:

> 'You will now see why I have called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well…Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels.'[133]

The last part of Dworkin's theory shows that even his idea of a rights-based theory of justification emphasises the importance of fundamental rights while acknowledging that other factors matter.[134] Not only do principles and rules engage in a 'duel' but rights also compete for adherence and dominance. The idea that rights can act as effective restraints on state power regarding pre-inchoate terrorism-related offences is questionable.[135]

Goold and Lazarus rightly argue that human rights cannot be regarded as powerful constraints without a clear account of the protections that these rights offer and the reasons why they cannot be violated (subject to the derogations) in the face of threats such as terrorism. Moreover, they argue, 'most Convention rights may be qualified on the basis of national security, as long as they have a legal basis and are proportionate to this objective' and much discretion remains in

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[133] Dworkin (n 130).

[134] Christopher Michaelsen, 'Balancing Civil Liberties against National Security?: A Critique of Counterterrorism Rhetoric' (2006) 29 University of New South Wales Law Journal.

[135] Michaelsen (n 134) 13; Michaelsen observes that 'if security is to be understood primarily as a 'state purpose' rather than as an individual right, then it no longer constitutes a weighable good'.

the hands of the judiciary.[136] Chapter 8 will further consider the constraining effects of rights as part of a larger, ethical-normative theoretical framework as rights-based questions frequently arise in the case law.

4. Towards a Hierarchy of Constraints: Six Observations

The question of which constraint applies and ought to have greater weight on which pre-inchoate offences is a complex one, which the later chapters aim to tackle. Following the discussion above, however, six conclusions can be drawn as to which constraints may play a greater role in limiting the reach of this unique class of offences.

First, pre-inchoate terrorist offences should be understood in the context of what Beck calls the 'risk society', where more 'prophylactic' crimes are enacted to reduce the risk of harm occurring.[137] In a risk society, pre-inchoate offences create problems for legal theory as they do not fit into a traditional understanding of the harm principle. As Simester and von Hirsch note, 'prima facie, they result in over-criminalization, in that they prohibit instances of conduct that are not themselves harmful'.[138] The traditional view of the harm constraint does not elaborate on what type of harm can be justifiably permitted and therefore fails to dictate what counts as 'harm'. Improving the effectiveness of the harm constraint would require one to view substantive (non-trivial) risk *as* harm. This would enable the harm principle to set a limit as to what conduct ought to be criminalised prior to the commission of an ultimate harm.

[136] Liora Lazarus, 'Do Human Rights Impede Effective Counterterrorism?' (*UK Constitutional Law Association* 2017) <https://ukconstitutionallaw.org/2017/06/15/liora-lazarus-do-human-rights-impede-effective-counterterrorism/> accessed 13th March 2025.
[137] Ulrich Beck, 'Risk Society' in Jean-Frederic Morin and Amandine Orsini (eds), *Essential Concepts of Global Environmental Governance* (Routledge 2014) 178.
[138] Simester and von Hirsch (n 27) 96.

Reconceptualising the harm principle to include a definition of what amounts to harmful 'risk' would give the constraint much more weight.

Secondly, pre-inchoate offences often feature multiple layers of criminal responsibility embedded within their vague *actus reus* and *mens rea* elements. Pre-inchoate publication offences such as s.13(1A) of the Terrorism Act 2000 lack a defined *mens rea* element and contain a broad conduct requirement which expands the scope of the offence considerably. There is nothing intrinsically wrong with, for example, publishing a photo of clothing that *may* cause others to suspect that person is a supporter of a terrorist organisation but for the fact that it may arouse a suspicion or cause a risk to something else if done without intent. The wrongfulness constraint is one of the foundations of criminal law theory and requires a wrongful deed before responsibility is attributed to an individual. Yet, many pre-inchoate offences punish conduct on the grounds that it indicates that the offender is going to commit a wrongful act in the future. Wrongfulness as a constraint is linked to the idea of a wrongful intention, and as a result, it overlaps with the culpability constraint. When viewed in isolation, the culpability constraint lacks strength because pre-inchoate offences vary in how clearly they define the wrongs they target. Nevertheless, when the two constraints are considered together, they force us to examine the context behind each pre-inchoate crime and the wrongs implicated by the offences.

Thirdly, the remoteness constraint is a very strong constraint that can be used to argue against the expansion of pre-inchoate offences. Pre-inchoate offences are typically characterised by their extremely remote *actus reus* requirements that are temporally distant and spatially diffused from the ultimate harm. The remoteness principle states that the further away the offence is from the final harm, the higher the fault needed to justify criminalisation. If Simester

and von Hirsch's refinement of the remoteness constraint is accepted, then remoteness is arguably the most important limiting constraint on pre-inchoate offences due to the nexus, distance, and fair imputation requirements it imposes on criminal liability.[139] It is likely that many pre-inchoate offences would fail to satisfy all three of these requirements, though it remains to be seen whether the courts would recognise the strength of this constraint in practice.

Fourthly, in the UK terrorism legislation is often reactive to recent atrocities and commonly introduced through fast-tracked processes that 'that curtail time and opportunity for internal deliberation and external consultation with experts and the wider public'.[140] This means that pre-legislative scrutiny is often lacking or limited even though expansive offences, such as those found in the Terrorism Acts 2000 and 2006, are enacted.[141] In this context, the proportionality constraint can play a significant role in ensuring that any new laws satisfy the suitability, necessity and appropriateness tests. The proportionality constraint is one of the most important constraints on counter-terrorism legislation. It 'supervises' both pre-legislative and post-legislative procedures by providing a mechanism to keep lawmakers accountable and restrained. However, the role of proportionality varies across different stages of the criminal justice process. Even though pre-legislative scrutiny remains high, courts often exercise judicial deference to the government's assessment of national security risks. Consequently, reviews of proportionality are frequently narrow in scope, which undermines the principle's capacity to restrain expansive counter-terrorism offence.[142] Furthermore, discussions of proportionality inevitably involve both the necessity and least restrictive alternative approach constraints, as they form part of the same test. Although proportionality is a strong constraint,

[139] Simester and von Hirsch (n 44).
[140] Zedner (n 90) 11.
[141] See Chapter 3 for an overview of the relevant terrorism legislations in the UK.
[142] See Chapter 8 for more on this argument.

it remains to be seen whether the case law surrounding pre-inchoate offences recognises the importance of the proportionality constraint at all levels of the criminal process.

Fifthly, the broader the constraint is, the more difficult it is to apply to pre-inchoate offences directly. The strongest limb of the rule of law constraint is the requirement of clarity, which states that laws must be clearly drafted so that offenders can guide the course of their actions and choose to comply with the law. This is directly relevant to many pre-inchoate offences that are drafted vaguely. Other aspects of the rule of law, such as the rule against retrospectivity, are less relevant to an examination of pre-inchoate offences. It is clear that a 'thin' or formal/procedural view of the rule of law is more useful to a normative evaluation about the constraints of the criminal law; a 'thicker' or substantive rule of law begins to fall within the realm of constitutional theory.[143] As such, it is suggested that the rule of law is less useful than other constraints discussed above.

Sixthly, the human rights constraint has similar problems to the rule of law constraint in that it encompasses a wide range of principles and rights. Human rights contain a varied armoury of tools, rights and discourses that can be used to delimit the reach of pre-inchoate offences. Certain provisions, such as Article 11 (freedom of association), may be useful in arguing that membership or encouragement offences violate the principles enshrined in the ECHR. However, in times of public danger which threatens the life of a nation, states may take measures that derogate from their human rights obligations if Article 15 is invoked, a fact which has been observed in some jurisdictions around the world.[144] The pitting of one human right

[143] This debate is outside the scope of this thesis since I am examining constraints of criminal law. That being said, some constitutional theorists view the rule of law as an ideal that can never be fully achieved. See: Timothy Endicott, 'The Impossibility of the Rule of Law' (1999) 19 Oxford Journal of Legal Studies 1.

[144] Helen Fenwick and Daniel Fenwick, 'The Role of Derogations from the ECHR in the Current "War on Terror"' (2019) International Human Rights and Counter-Terrorism 259.

against other rights, or indeed the state's call for protecting its own citizens' right to a life, means that inevitably some form of proportionality logic comes into play in the assessment of which rights trump others.[145] The focus of this thesis is less on the constitutional elements of human rights, but instead examines whether the case law around pre-inchoate offences raises human rights issues and how important they are to the judge's decision.

Finally, it is important to remember that none of these constraints operate on their own**.** For example, the harm constraint is inextricably linked to the wrongfulness and culpability constraint. The proportionality constraint embodies the necessity and least restrictive alternative approach constraint. The remoteness constraint plays against the harm and wrongfulness debate. The problem of how to attribute causation in pre-inchoate offences is one that can only be resolved if one considers whether a variety of constraints operate together to delimit and improve the scope of the offence. I suggest that the boundaries of counter-terrorism offences should be evaluated by considering the whole legal process, from how specific offences are drafted to how they are interpreted by courts, which is how Chapters 5-7 will be structured.

5. Conclusion

This chapter has formulated and assessed nine legal constraints that should play a role in limiting the reach of pre-inchoate offences. In doing so, the discussion above has furthered the academic debate surrounding the constraints applicable to pre-inchoate terrorism offences and terrorism offences more generally. The current theoretical challenge is to develop a set of

[145] Joan Fitzpatrick, 'Speaking Law to Power: the War Against Terrorism and Human Rights' (2003) 14 European Journal of International Law 241.

constraints for different categories of pre-inchoate offences, which should guide and limit the state's use of preventive criminal law.

At this preliminary stage, however, the weighting given to each constraint is not fixed and should remain fluid through the course of examining the substantive offences in Chapters 5 to 7. This is because each constraint may play a greater or lesser role depending on the type of offence, their legislative background, Parliamentary intention and the judicial treatment of case law in different circumstances.

To this end, the following chapters will evaluate the relevant constraints through a doctrinal analysis of the law. I first discuss the three categories of pre-inchoate terrorism offences that will be the focus of the thesis. I then discuss the category of offence, the wrongs inherent in the offence and what harms they aim to prevent to refine what constraining principles ought to apply. I the discuss the rights implicated by the offence and any justifications given for infringing these rights. Finally, I evaluate the constraints that ought to limit the reach of the offence.

By following this structure in analysing these offences I aim to formulate a normative framework to evaluate the applicability of specific constraints to different categories of pre-inchoate offences. The application of this framework will provide a basis to distinguish those offences that are justified from those that are not in order to curb the reach of an expanding set of criminal laws that increasingly erode individual freedoms in pursuit of security. It remains to be seen whether the hierarchy of constraints set out in this chapter will apply equally to the different categories of terrorism offences in question. Chapter 9 will revisit and re-work the theoretical framework so that it better reflects the findings set out in Chapters 5 to 8.

V. Collecting, Viewing, And Possession Of Information Offences

Possession of information offences relating to terrorism have become increasingly controversial in recent years. Terrorism offences relating to the collection and possession of information of a kind likely to be useful to a person preparing to commit a terrorist act are complex and contentious. This raises questions about whether these offences stretch too far into the realm of preventive criminal law by penalising conduct that is not wrongful *per se* and too remote from the infliction of harm. Yet, terrorism-related possession offences have attracted limited scrutiny in both public and academic realms.[1] In the two decades since the enactment of sections 57 and 58 of the Terrorism Act 2000 (hereafter referred to as 'section 57' and 'section 58'), critical literature has failed to engage with the doctrinal, theoretical, or moral underpinnings of these offences. The limited convictions resulting from these offences, as well as the lack of case law, have resulted in large gaps in our understanding of these commonly prosecuted offences.

The possession-based terrorist offences examined in this chapter are emblematic of a type of pre-inchoate offences that criminalise conduct which falls short of preparation to commit a terrorist act. Under sections 57 and 58, an individual can be charged with a criminal offence for collecting, possessing, or viewing material that is connected to terrorism, regardless of whether there is any evidence of a plan or intent to commit a terrorist act. This expansive approach to criminal liability raises several concerns. How have courts interpreted the vague and expansive elements of these offences? What is the underlying wrong and what are the harms targeted by risk-based possession offences? Given their extent, is criminalisation

[1] Andrew Cornford, 'Terrorist Precursor Offences: Evaluating the Law in Practice' (2020) Criminal Law Review 663.

legitimate and justifiable? And most importantly, how should the different constraining principles that limit these offences be weighted to address their deficiencies?

To answer these questions, this chapter will explore the problems identified above and examine whether risk-based terrorism possession offences are objectionable and on what different grounds. The chapter will first explore the legislative background of related offences, highlighting the main goals behind each statutory offence. The following sections will define these offences, identify the *actus reus* and *mens rea* elements and any defences, and assess the problems within the drafting of these offences. The chapter will then discuss whether these offences are justified by analysing wrongfulness and culpability factors, as well as the rights implicated in these offences in order to assess how they extend the contours of criminal liability. Through this analysis, this chapter aims to contribute to the ongoing debate on the balance between security and civil liberties in the context of risk-based terrorism possession offences.

1. Legislative Background

Sections 57 and 58 have sparked controversy due to their broad *actus reus* and the reverse burden of proof that allows pre-emptive action to be taken against persons without a requirement for the person's involvement with or intent to commit an act of terrorism. These offences were controversial during their passage through Parliament and afterwards.[2]

Section 57 of the TA 2000 embodies a provision that was first enacted in legislation concerning terrorism in Northern Ireland and was later extended to Great Britain by the Criminal Justice

[2] National Statistics Home Office, 'Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes, and Stop and Search, Great Britain, Quarterly Update to December 2022' (2023).

and Public Order Act 1994.[3] According to Lord Lloyd of Berwick in his Review of terrorism legislation *Inquiry into Legislation against Terrorism (1996)*:

> 'The purpose of the provision is to allow action to be taken against a person who is found in possession of articles which, though perhaps commonplace in normal circumstances, are well known to be used in the manufacture of bombs. It is, of course, not the possession of the items themselves which constitutes the offence, but possession in such circumstances as to give rise to a reasonable suspicion of their connection with terrorism'. [4]

The focus of this offence, as defined by Lord Lloyd, is the prevention of the manufacture of homemade explosive devices. While having weedkiller or fertiliser does not directly cause harm through a bomb, there is a connection between the items used to make the bomb and the harm it may cause. Defending this offence, Lord Lloyd argues that:

> 'The need for the police to intervene against the terrorist at an early stage, before he has an opportunity to plant a bomb is well recognised. Given that terrorist bombs are usually homemade, it is quite possible that, during a search of premises occupied by a suspected terrorist, the police will find materials such as timers or chemicals in highly incriminating circumstances without finding explosives or other prohibited materials…I see no reason why the person should not be required to account to the court for his possession of the articles'.[5]

[3] Section 60 of the Criminal Justice and Public Order Act 1994
[4] Lord Berwick, *Inquiry Into Legislation Against Terrorism* (Crnnd Paper 1996), [14.6].
[5] Ibid.

Therefore, the offence was intended to be pre-inchoate in nature, catching actions that are prior to the preparation of an act of terrorism. The section 57 offence capture behaviours that are broader than Lord Lloyd's imagined scenario as it allows for the prosecution of possession 'in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'.[6] Therefore, it is not the *possession* of such items alone that is penalised by section 57, but rather the possession in circumstances that 'gives rise to a reasonable suspicion' of their purpose and connection with terrorism. In other words, this section only operates on a defendant's possession of the article in 'highly incriminating circumstances' *(circumstance-focused)*, which enables the police to prevent terrorist acts which might otherwise have taken place.[7] As will be seen when analysing section 58, the section 57 offence is more widely defined and potentially more problematic, because it is not limited to the criminalisation of articles that could be used to produce harm-causing devices, but includes any article as long as the purpose of possession is connected with a pre-inchoate act of terrorism.

Similarly, early intervention in terrorism is the legislative justification behind section 58. Although enacted in 2000, section 58 drew heavily from earlier provisions in counterterrorism legislation in Northern Ireland, notably section 33 of the Northern Ireland (Emergency Provisions) Act 1996 which criminalised the collection or possession of information likely to be useful to terrorists., This section was incorporated into national legislation via section 63 of

[6] It is important to distinguish between 'mindset material' like propaganda or extremist literature, which may be relevant to prove *mens rea* where required by a terrorist-related offence, and material that is practically useful which is prosecuted and punished. See: Jonathan Hall, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act 2011* (Independent Reviewer of Terrorism Legislation, UK Government 2021) <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020/the-terrorism-acts-in-2020-report-of-the-independent-reviewer-of-terrorism-legislation-accessible-version> accessed 9 July 2025.
[7] Berwick (n 4).

the Criminal Justice and Public Order Act 1994 as section 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989. In his 1996 report, Lord Lloyd stated that its purpose was:

> 'Similar to [section 57 offence]… the case in favour of retaining the power is very much the same. It is designed to catch the possession of targeting lists and similar information, which terrorists are known to collect and use'. [8]

According to Lord Lloyd's understanding of sections 57 and 58, it appears as if the two offences were intended to be complementary, although targeting different things. In *R v G*, the court observed that while section 57 applies only to possession, section 58 applies also to *'collecting or making a record' of information of a certain kind* and to the possession of a 'document or record' *containing that information*.[9] This distinction, however, is not a clear one in both the drafting of the offence and in the courts, as will be discussed in the later sections of this chapter.

To broaden the scope of the offence even further, Parliament amended section 58 through section 3 of the Counter-terrorism and Border Security Act 2019 (CTBSA 2019) which was implemented to 'amend certain offences to update them for the digital age, to reflect contemporary patterns of radicalisation and to close gaps in their scope'.[10] This amendment was justified partly by the need to ensure that online viewing of allegedly harmful information would be brought within the scope of the offence. Section 3 of the CTBSA 2019 extended

[8] Ibid.

[9] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*

[10] Home Office, *Securing the Future: Counter-Terrorism Strategy Published* (Press release, 4 June 2018) <https://www.gov.uk/government/news/securing-the-future-counter-terrorism-strategy-published> accessed 9 July 2025.

section 58 to criminalise merely viewing or accessing 'information of a kind likely to be useful to a person committing or preparing an act of terrorism' online without reasonable excuse.[11]

The initial amendment presented to Parliament aimed to define a 'pattern of behaviour' by making it illegal to view or stream terrorist material online repeatedly, specifically on three or more counts without the need to prove criminal intent. It was criticised by the then Independent Reviewer of Terrorism Legislation Max Hill QC, who asked 'why can someone be innocently curious once, or even twice, but not a third time?'[12] The final legislation was amended to reduce the 'three-click' requirement to one to avoid evidential difficulties. However, the result of this amendment is that the reach of section 58 has extended considerably to cover even one-time viewing of information of a kind likely to be useful to a person committing or preparing an act of terrorism. The reality of section 58 is that it departs from Lord Lloyd's original formulation of the offence in that it covers a much *wider* array of possession than originally intended due to the growth of the internet and the new impetus for governments to prevent digital 'possession' through means of access through online avenues, stretching the boundaries of this offence more widely than before. Thus, the pre-inchoate offence of online viewing arguably puts too much distance between the act and resulting harm, leaving too much room for prosecutorial discretion and the encroachment of civil liberties as will be explored later.

[11] Lucia Zedner, 'Countering Terrorism or Criminalizing Curiosity? The Troubled History of UK Responses to Right-Wing and Other Extremism' (2021) 50 Common Law World Review 57.
[12] Ibid.

2 Clicks And Convictions: Examining Possession Offences

2.1 Section 57- Possession Of Articles

Section 57 is a provision that deals with possessing articles for terrorist purposes. It states that:

(1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(3) In proceedings for an offence under this section, if it is proved that an article—

(a) was on any premises at the same time as the accused, or

(b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.

(3) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding [15 years], to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

The offence under section 57 is considered serious and carries severe penalties. If convicted, an individual can face imprisonment for a term not exceeding 15 years, a fine, or both.[13]

2.2 Actus Reus

The *actus reus* of the section 57 is found within section 57(1), which not only requires an individual to 'possess' an 'article' but must do so 'in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'. In this sense, the *actus reus* might not be separable from the vague and somewhat problematic requirement of what circumstances give rise to a reasonable suspicion that the possession is for a purpose connected with an act of terrorism.

Determining what constitutes an 'article' under section 57 may seem straightforward, but in reality, case law has shown that it can encompass a broad range of objects and even intangible material. This means that the offence's range wider than it appears. An 'article' is defined broadly and can refer to any item, including physical objects, substances, documents, or records. The ambit of the term 'article' extends liability to include the possession of items that may be used for terrorist activities, such as weapons, explosives, extremist literature, or other materials that can be used to plan, aid, or facilitate acts of terrorism.[14] As Walker notes, objects such as

[13] The maximum sentence for breach of section 57 was increased from 10 to 15 years by section 13 of the TA 2006.

[14] Alex Chalk, 'Possession of Terrorist Materials' (2014) *Westlaw Insight* https://6kbw.com/wp-content/uploads/2022/01/AJC_Article.pdf accessed 9 July 2025.

'wires, batteries, rubber gloves, scales, electronic timers, overalls, balaclavas, agricultural fertilizer, and gas cylinders, especially in conjunction, form the fare of s 57'.[15]

Documentary items such as bomb-making manuals are deemed to be 'articles' under this section. For example, in *Rowe v R*,[16] a notebook containing written notes on how to assemble and operate a mortar was considered an 'article' even though it was used to 'record' information on how to launch a mortar that was later deemed to be crucial to the commission of a potential terrorist act.[17] A key question arose in that case as to whether the recording of information would constitute an 'article' for the purpose of this offence. The court agreed that documents and records constituted an 'article' if the information recorded on it 'gives rise to a reasonable suspicion' that the possession is for a purpose connected an act of terrorism.[18] There is an overlap between section 57 and 58 which will be discussed in the last section of this chapter. However, documentary materials tend to be charged under section 57 instead of section 58 when they are found alongside other items such as explosives or videos that impute an overall terrorist purpose.[19]

The *actus reus* of section 57 is, therefore, *very* broad in the sense that any digital or physical articles containing anything that can lead to an objective judgment that they are for the purpose of instigating or preparing to commit a terrorist act might suffice. The true wrongfulness embedded in this offence is not mere possession itself, but an imputed, objective 'wrong' constructed through the purported 'purpose' of the individual's possession. This is unsurprising

[15] Clive Walker, 'Cyber-Terrorism: Legal Principle and Law in the United Kingdom' (2005) 110 Penn St L Rev 625.
[16] *Rowe v R [2007] EWCA Crim 635*
[17] Ibid [18].
[18] Ibid [33].
[19] *R v Zafar (Aitzaz) [2008] WL 370958* [22]: 'a general purpose article such as a computer, or a telephone, or a vehicle can be said to be 'possessed for the purpose of' any single use that is intended to be made of the article'.

given that the legislative intent of Parliament during the enactment of both section 57 and section 58 of the TA 2000 was one of terrorism risk-prevention through the net widening of the criminal law to prevent and incapacitate would-be terrorists. As Lord Bingham observes in *Kebilene*, both sections are directed 'to the possession of articles and items of information innocent in themselves but capable of forming part of the paraphernalia or operational intelligence of the terrorist'.[20] A question remains as to how one can limit the reach of this ever-widening scope through legal constraints. This question will be explored later in the chapter.

2.3 Mens Rea- No Requirement of Intent?

There are several contentious issues relating to the vague *mens rea* of section 57. These include: 1) whether there can be overlapping 'purposes' to the possession, 2) the third-party imputation of what circumstances gives rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism, and 3) the undefined nature of the *mens rea* element.

On the first issue, a question arises as to the definition of 'purpose' and whether the possession of articles for multiple purposes as opposed to a 'single action' (as the court puts it in *Rowe v R*) suffice.[21] In *Rowe v R,* the defendant appealed his conviction on the basis that he possessed a notebook containing instructions on how to operate a mortar, because for the dual purpose of '(i) defending Muslims from unlawful attack and (ii) advancing a political, religious or

[20] *R v DPP, Ex parte Kebilene [2000] 2 AC 326*
[21] *Rowe v R [2007] EWCA Crim 635* [40].

ideological cause.[22] The court held that what matters is not that there are multiple purposes for possession itself, but that:

> 'The defendant would still be guilty of the offence if he also was in possession of the article for this separate purpose, so long as it was distinct from possession for the defence of Muslims from assault and/or atrocity by others'.[23]

In other words, the jury has to be satisfied that one purpose for which the defendant possessed the articles was terrorism-related activity, even if he had other purposes that were purely or wholly defensive.[24] This argument was put forward in *Rowe v R* where the court said that to convict there must be '[proof] that, separately from the defensive purpose *and activity,* he was also in possession of the article for a separate and different purpose *and activity*' (emphasis added by the court).[25] The problem here is that this places a heavier burden of proof on the defendant to prove that the multiple purposes for which he possesses the article are separately and distinctly *unrelated* to a purpose related to a terrorism act. In the case of multiple purposes for possession, the defendant must provide evidence to refute *all* of his purposes. He will be convicted if, for example, one out of ten of his purposes give rise to a reasonable suspicion that it is connected with the commission, preparation, or instigation of an act of terrorism.

In relation to the second issue, the most striking part of this offence is not the *actus reus* physical requirement to possess an article of some sort, but that the offence also contains an 'objective' element, that is the judgement whether the possession gives rise to a reasonable

[22] Ibid [40].
[23] Ibid [44].
[24] Ibid [45].
[25] Ibid [46].

suspicion that is connected with the preparation or instigation of an act of terrorism. Therefore, *possession* of the item in itself is not the object of the offence. Rather, it is the possession of it in *circumstances* which give rise to a reasonable suspicion of its connection with terrorism.[26] The possession 'in circumstances which give rise to a reasonable suspicion' condition is dependent on what a reasonable person would believe the situation to be rather than what subjective intentions the defendant holds.

Structuring the offence in this way is open to criticism. By focusing on the circumstances surrounding possession, it can be argued that wrongfulness can be implied even though the individual may not have such an intention. Still, the relevant wrong is the 'presumed' ulterior harmful intent of the individual who possesses such articles. Cornford argues that this offence is the epitome of terrorism offences that target 'prelegal wrongs', which penalise the creation of a risk or a situation that gives rise to suspicion of an underlying wrong.[27]

The requirement in section 57(1) to prove that the material was possessed 'for a purpose connected with' the commission, preparation or instigation of an act of terrorism was deemed in *R v Zafar* to be problematic and could give rise to ambiguity unless defined in a manner that constrains it.[28] This case concerned appellants who were convicted of possessing articles such as ideological propaganda, hard discs, and computer drives on which materials were stored electronically. The materials included ideological propaganda as well as communications between the appellants and others that the prosecution claimed evidenced a plan in which the appellants would travel to Pakistan to undertake training to commit terrorist acts in Afghanistan.

[26] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*
[27] Andrew Cornford, 'Preventive Criminalization' (2015) 18 New Criminal Law Review 1.
[28] *R v Zafar (Aitzaz) [2008] WL 370958* [28].

The appellants originally faced charges under section 58 and appealed, so the prosecution elected to proceed with charges under section 57.

A central issue in this case was what it means to possess 'for a purpose connected with the commission, preparation or instigation of an act of terrorism'. To clarify this, the court imposed a 'direct connection' test to determine whether an article was possessed for a 'purpose' connected with a terrorist act. Lord Phillips of Worth Matravers CJ noted that the section should be interpreted as:

> 'A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that *he intends it* to be used for the purpose of the commission, preparation or instigation of an act of terrorism'.[29]

By adding the words 'he intends it to be used for the purpose…' to the interpretation of section 57, Lord Phillips tightened the requirements for the *mens rea* elements of the offence. In this sense, adding the requirement of a reasonable suspicion for an 'intention' into the reading of this section means that a tighter nexus between the article and the act of terrorism must be shown for the prosecution to convict a defendant, which is to be welcomed. However, it can be argued that this reading of the offence does not add an intention requirement into the *mens rea* of the offence. Rather, what is required is that the circumstances of the possession give rise to the suspicion of an intention for the item to be used in relation to a terrorist act. Therefore, it cannot be said that this interpretation satisfies the ulterior intent requirement that ought to be in place for such serious terrorism offences.

[29] Ibid [29] (emphasis added).

A third critique is the problematic way that the offence is worded, which reflects the remoteness of the conduct element. Section 57 is the epitome of a pre-inchoate offence because it is multi-layered. It penalises possession that is 'connected' with the 'commission, preparation or instigation' of an act of terrorism. This pre-inchoate liability complicates how we define the reach of the offence. A question that arises is how loose of a connection between the material possessed and the terrorist act would be sufficient to establish the defendant's guilt. In *R v Zafar*, the court was quick to clarify that there are limits in place as to the remoteness of the offence. The court relied on the 'direct connection' test established and used it to reign in the ambit of the offence, noting that does not suffice if materials were shown merely to be 'for a purpose connected with the travel to Pakistan' as an example.[30]

Perhaps a more interesting point lies here. The court in *R v Zafar* later considered the issue of whether possessing materials that could be used to incite someone else to commit acts of terrorism falls within the ambit of section 57. The court held that materials used to incite acts of terrorism certainly fall within the scope of the offence as 'incite' can be defined similarly to 'instigate'. While the prosecution relied on the MSN messages between the appellants as proof of an intention to incite each other to commit a terrorist act in the future, the court held that on the face of the evidence given, the 'utterances' made between the appellants were 'general' and was not sufficient evidence for a 'proximate' act of terrorism in the present. This interpretation is welcome because it restricts the meaning of the pre-inchoate elements (incitement in particular). However, the scope of liability that extends to 'commission' and 'preparation' remains unclear and potentially far-reaching.

[30] Ibid [34].

2.4 Defence

The above analysis demonstrates that the offence has an extremely broad *actus reus* and a vague, almost non-existent *mens rea,* which lacks a subjective intention requirement. This makes it easier for the prosecution to prove the elements of the offence, which could have wide-reaching consequences including, on conviction, a maximum sentence of 15 years' imprisonment. However, the threshold of 'reasonable suspicion' required to satisfy section 57(1) is effectively counterbalanced by section 57(2), which establishes a defence based on the need to 'prove' that possession was not intended for terrorist purposes.

The defence found under section 57(2), as well as the one under section 58 of the TA 2000, have to be read subject to s.118 of the TA 2000, which provides:

> 118. – (1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.
>
> (2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
>
> (3) Subsection (4) applies where in accordance with a provision mentioned in subsection (5) a court –
>
> (a) may make an assumption in relation to a person charged with an offence unless a particular matter is proved, or

(b) may accept a fact as sufficient evidence unless a particular matter is proved.

(4) If evidence is adduced which is sufficient to raise an issue with respect to the matter mentioned in subsection 3(a) or (b) the court shall treat it as proved unless the prosecution disproves it beyond reasonable doubt.

(5) The provisions in respect of which subsections (2) and (4) apply are—

(a) sections….57, 58….of this Act.

Section 118 of the TA 2000 was put into place after the nature of the reversed burden of proof contained in section 57(2) TA 2000 was considered in *Kebilene (1999)*.[31] In that case, the defendant was charged under section 16 Prevention of Terrorism (Temporary Provisions) Act 1989, relating to possessing articles for use in terrorism. Section 16A(3) imposed a reversed burden of proof on the accused, on a balance of probabilities, that the article was not in his possession for a purpose connected with terrorism.[32] The defendant applied for judicial review on the grounds that the reversed burden of proof undermined the presumption of innocence under Article 6(2) of the ECHR. In this case, the House of Lords distinguished between an 'evidential burden' and a 'persuasive burden' (legal burden), holding that:

'A 'persuasive' burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused.

[31] *R v DPP, Ex parte Kebilene [2000] 2 AC 326*
[32] Section 16A(3) of the Prevention of Terrorism (Temporary Provisions) Act 1989

> An 'evidential' burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt'.[33]

It was held that according to Article 6(2) of the ECHR, the burden placed on the defence for this offence is an evidential burden whereby the defence must present sufficient evidence to justify their claim.[34] As such, there is no breach of Article 6(2) as it was not a persuasive burden that might be challenged under the ECHR. Further, the court held that under Article 6(2) a reversed burden of proof is permitted in limited circumstances provided that it was reasonable.[35] Taken together, the situation under section 57 is that if the defence successfully discharges the evidential burden, the court shall assume that the defence has been shown unless the prosecution can prove beyond reasonable doubt that it has not.[36]

Significantly, the prosecution is only required to demonstrate that the reasonable excuse is false. There is no requirement to establish that the defendant's possession of the article was for a purpose related to a terrorist act.[37] Chalk rightly argues that this undermines the defence by adding an extra element of the offence that was not originally intended in the drafting.[38] An example was set out in *R v G*, where the court gives the example of possession of fertiliser.[39]

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[33] *R v DPP, Ex parte Kebilene [2000] 2 AC 326* [221].
[34] Ibid [217].
[35] Ibid [246].
[36] Chalk (n 14).
[37] Ibid.
[38] Ibid.
[39] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13* [56].

If a defendant argues that they possessed fertiliser for gardening, the prosecution can refute this by showing that the garden was consistently neglected, there were no gardening tools present, or the fertiliser was in excess of what was reasonably required.[40] There is no need to prove beyond reasonable doubt that the possession *was for a purpose connected with* an act of terrorism.

To satisfy the defence, a defendant has to produce evidence to a higher-than-normal standard showing that his possession was reasonable. Further, no intention requirement is included in this defence, which means that a defendant can be convicted where the substantive terrorist act might not be shown to have been intended. It might be argued that this places a more stringent, distorted burden of proof on the defendant that is unjustified, unnecessary, and disproportionate. In sum, although section 57(2) places a reversed 'evidential' burden of proof on the defendant, the broad *actus reus* and lack of a proper *mens rea* element in the offence means that in practice it is not difficult for the prosecution to establish a case against a defendant that raises a reasonable suspicion of possessing materials connected with the preparation, instigation or commission of a terrorist act. It can be argued that an unreasonable burden is placed on the accused to provide *extra* evidence that his possession is reasonable or to account for his or her conduct.

Arguably, the intention behind section 57- to require defendants to *justify* their possession and provide reasonable excuses as to why they possess suspicious materials- undermines the presumption of innocence. The breadth of the *actus reus* means that the wrongfulness captured by this offence relates to the purported 'connection' of the articles with preparation of a

[40] Ibid [68].

potential terrorist act. This undermines legal certainty and makes it difficult to attribute blameworthiness or wrongfulness to the defendant's actions.

3. Section 58- Collection Of Information

Section 58 of the Terrorism Act 2000 relates to the possession of terrorist-related material. As Dinesson notes, the offence is designed for risk prevention and therefore designed to facilitate quicker and easier prosecution through capturing terrorists at an extremely early stage of their act.[41] The collection of information offence states that: [42]

> (1) A person commits an offence if
>
> > (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
> >
> > (b) he possesses a document or record containing information of that kind.
> >
> > (c) the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind.
>
> (2) In this section 'record' includes a photographic or electronic record.
>
> (3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

[41] Kajsa E. Dinesson, 'Preventing Harm: The 'Collection of Information' Offence in Commentary, Case Law and Data' (2022) Criminal Law Review 469.

[42] Section 58(1)(c) of the Terrorism Act 2000 and preceding word inserted (12.4.2019) by Counter-Terrorism and Border Security Act 2019 (c. 3), ss. 3(2)(b), 27(3) (with s. 25(1)).

(4) A person guilty of an offence under this section shall be liable

(a) on conviction on indictment, to imprisonment for a term not exceeding 15 years,[43] to a fine or to both or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both.

3.1 Actus Reus

The *actus reus* of the section 58 offence is much broader than section 57. There are three ways that a person might commit an offence: if he 1) collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, 2) possesses a document or record about information of that kind, or 3) views or accesses, using the Internet, a document or record of that kind.[44] The conduct elements are expansive and target both tangible and intangible material. A 'record' refers to tangible documents such as computers, phones, laptops, notebooks[45] or digital storage cards.[46] The current state of the law is that even a single click of a button on the internet might satisfy the *actus reus* element, further reducing the nexus between viewing information and criminal liability.

[43] Words in Section 58(4)(a) of the Terrorism Act 2000 substituted (12.4.2019) by Counter-Terrorism and Border Security Act 2019 (c. 3), ss. 7(3), 27(3) (with s. 25(2)).
[44] Section 58(1)(c) of the Terrorism Act 2000 and preceding word inserted (12.4.2019) by Counter-Terrorism and Border Security Act 2019 (c. 3), ss. 3(2)(b), 27(3) (with s. 25(1)).
[45] *Amjad v R [2016] EWCA Crim 1618*
[46] *R v Iqbal (Abbas Niazi); R v Iqbal (Ilyas. Niazi) [2010] EWCA Crim 3215*

This section will focus on the first and third conduct elements as they are more controversial. There are several contentious issues relating to: 1) what constitutes the usefulness of the information, 2) the pre-inchoate elements, and 3) whether the extension of the concept of 'possession' simply to 'accessing and viewing' materials online is too broad and its potential consequences. First, section 58 assigns wrongfulness to the act of possessing certain kinds of information that might be useful to a person committing or preparing an act of terrorism. It calls into question the nature of the information possessed and deems certain information and contextual situations as more 'harmful' than others. As such, the information is assessed for its 'usefulness' by showing its ability to provide practical assistance to an act of a potential terrorist. While establishing possession is more straightforward (one has to show control and knowledge of the record), the first issue relates to the breadth of the interpretation of the 'usefulness', which is a subject of controversy among scholars.[47]

In *R v K*, the issue was whether information 'likely to be useful' was so vague that it violated the principle of legal certainty under Article 7 of the ECHR.[48] The court clarified the concept of usefulness by stating that information must be of a kind that is likely to provide 'practical assistance' to a person committing or preparing an act of terrorism.[49] The court added that:

> 'The natural meaning of that section requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is

[47] Dinesson (n 41); Stéphanie De Coensel, 'Self-Study, Obtaining or Viewing Terrorist Material Over the Internet: A Legitimacy Test of Consumer-Oriented Criminal Law Provisions in Four Western-European Countries' (2020) 28 European Journal of Crime, Criminal Law and Criminal Justice 379.
[48] *R v K [2008] EWCA Crm 185*
[49] Ibid [13].

> intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that calls for an explanation'.[50]

In this case, the court held that extrinsic evidence could be used to explain the possession of suspicious information. The court's interpretation narrows the scope and breadth of the type of information likely to be covered, as information that is *prima facie* innocuous (such as a tube map) would not be inherently useful to a would-be terrorist and therefore, fails to raise a reasonable suspicion. This case was followed by *R v G*, where the court backtracked on its narrowing of the offence. In this case, the court specified that information that is not intrinsically useful to terrorists would not be beyond the scope of section 58.[51] This means that something innocuous such as a map of the London underground *might* fall within the offence if circumstances are suspicious, which would inevitably depend on factors that are outside merely assessing the information itself. Interestingly, the court noted that:

> 'The role of extrinsic evidence is limited. It can be used to explain to the jury the significance of something in the document, say, a chemical formula, in connection with the planning of an explosion.
>
> It can also be used to explain the true nature of the information in a document which has been prepared so as to appear innocuous but whose actual nature and contents are concealed by the use of some sort of code or equivalent device.

[50] Ibid [14].
[51] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [43].

> But, since the document must contain information which is, of its very nature, likely to be useful to a potential terrorist, evidence cannot be led with the aim of showing that a document, such as a timetable, containing everyday information, should be treated as falling within section 58(1)'.[52]

It seems that extrinsic evidence can be used to establish a connection between the information and a specific terrorist act but cannot be relied upon to argue that information which is intrinsically suited to terrorist purposes- such as a bomb-making manual- is unlikely to be useful to someone accused under section 58. The refinement of the offence after *R v G* leaves considerable problems. The fact that external evidence can be used only to ascribe guilt means that the offence may, as Dinesson notes, involve 'excessive prosecutorial discretion with insufficient safeguards in place'.[53] *R v G* serves to undo the attempt in *R v K* to narrow the offence, leaving the precise scope of the offence extremely vague.

Recent cases concerning section 58 have demonstrated that the courts adopt a broad interpretation of what counts as 'useful' information. In *R v Iqbal and Iqbal*, the two defendants were charged under this section for possessing video and images of the accused holding various weapons and pictures of known terrorists, as well as other violent imagery.[54] The defence argued the defendants possessed these records because they were 'dreamers obsessed with weapons and action films'[55] and were 'morbidly curious' about violent images.[56] However, due to the intrinsic nature of the records, it was held that these were not innocent expressions of curiosity, but records that showed a clear connection to the risk of harm. This demonstrates

[52] Ibid [44].
[53] Dinesson (n 41).
[54] *R v Iqbal (Abbas Niazi); R v Iqbal (Ilyas. Niazi) [2010] EWCA Crim 3215*
[55] Ibid [19].
[56] Ibid [19].

that section 58 is far-reaching as what is 'useful' is interpreted widely, so this offence extends criminal liability across 'incomplete chains of conduct ultimately leading to harm' as noted by Dinesson.[57]

Second, the pre-inchoate liability embedded within section 58(1)(A) is problematic as its scope remains unclear. Per section 58(1)(A), information must be of a kind likely to be useful to a person committing or preparing an act of terrorism. It is unclear why incitement or instigation is left out of this provision. However, the risk posed by collecting information of this kind is still remotely connected to any ultimate harm, given that this is a pre-inchoate offence containing an inchoate preparatory element. Some cases are more straightforward in that the defendant demonstrated a risk of preparing or committing a terrorist act which satisfies the remoteness constraint. In the 2020 case of *Umar Hafeez*, the court rightly noted that the defendant's extensive collection of over 3500 pages of PDF documents and other terrorism manuals collected over 7 years were 'significant' and covered documents relevant to 'practically every aspect of potential interest to a terrorist'.[58] However, given the defendant's autism disorder, it could be argued that he lacked the intent to carry his desires through. It is important to note that section 58 lacks a clear *mens rea* element to prevent the offence from being too broadly applied, a point that will be discussed later.

This case can be contrasted with *R v Amjad* where the risk is far more remote to the commission of terrorist harm.[59] The defendant possessed a notebook containing a list of fitness requirements for a Mujahaddin fighter, as well as other documents relating to Jihaad and defence. The defendant appealed his conviction on the basis that the open-source material was

[57] Dinesson (n 41).
[58] *R v Umar Hafeez [2020] EWCA Crim 453*, [31].
[59] *Amjad v R [2016] EWCA Crim 1618*

wrongfully admitted. The appeal was dismissed on the grounds that the records collected by the defendant were suspicious and indicated that he had an interest in Jihad. It is difficult, however, to imagine how a list of fitness exercises would be sufficiently proximate to be useful to a person committing or preparing an act of terrorism. Again, this case demonstrates that the drafting of section 58 leads to the ascription of liability for conduct that is too remote from the commission of terrorist harm.

The third controversial aspect of this offence relates to its expansion into the realm of online viewing of terrorism-related material. To account for the rise of the Internet and the realm of online extremist materials available to the public, section 58(3) was added by the Counter-Terrorism and Border Security Act 2019 to 'amend certain offences to update them for the digital age, to reflect contemporary patterns of radicalisation and to close gaps in their scope'.[60] This amendment was made partly so that it was no longer necessary to prove that a person had downloaded the material and thus had taken it into his or her possession. In the original draft of the bill, this amendment penalised the viewing of terrorism-related information after 'three clicks', which as Earl Howe observed during the parliamentary debates, served to identify a harmful 'pattern of behaviour' demonstrated by repeated viewing of 'dangerous' information that could lead to radicalism.[61] The 'three click' rule was later removed so that the enacted offence criminalises a single viewing of such materials without reasonable excuse.[62]

[60] Home Office (n 10).
[61] Earl Howe, *HL Deb, Counter-Terrorism and Border Security Bill, 29th October 2018, Volume 793, Column 1167* (Hansard).
[62] Zedner (n 11); HC Deb 11 September 2018, vol 646, col 661 (Ben Wallace) <https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill> accessed 9 July 2025.

The conduct element of this offence is problematic for various reasons. First, the amendment changes the scope of the offence beyond simply possession as it was originally intended. Possession of a record or document that is related to terrorism is a more culpable and proximate act than merely viewing a potentially dangerous document online. It can be argued that criminalising the single viewing of information goes too far into the realm of punishing curiosity.[63] Second, it is difficult to pinpoint wrongfulness in cases where the accused merely viewed a dangerous document once. The original 'three clicks' rule would have allowed wrongdoing to be read into the defendant's conduct given that repeated 'clicks' demonstrate a higher interest in the information and can be used as evidence of intent, which might create a stronger case of incrimination.

These cases demonstrate that the problems identified by scholars do arise in practice when courts are engaged in interpreting the scope of section 58.[64] Drafted in vague terms and relying on a broad *actus reus,* it is still not clear when *mala prohibitum* records would be excluded from the scope of this offence or how the 'single viewing' of terrorism-related material online could operate in practice without creating unjust outcomes. While the courts have attempted to narrow and define the terms of the offence, the precise extent of the offence remains unclear.

3.2 Mens Rea- Strict Liability

There are several contentious issues relating to the vague mens rea of section 58. These include: 1) lack of an intention to cause harm mens rea requirement, 2) reliance on 'knowledge' as a mental element, and 3) whether section 58 amounts to a strict liability offence.

[63] Zedner (n 11).
[64] Ibid.

First, what mental element (if any) can be read into section 58? Because section 58 targets conduct in the pre-inchoate stage and is drafted without an ulterior intent requirement, it becomes difficult to identify whether there are any clear *mens rea* elements in the offence. Section 58 is ultimately concerned with the nature of the information itself and not the purpose of its collection. Section 58 deals with the nature of the information, rather than why it was collected. As a result, any *mens rea* relates to the information itself, not the surrounding circumstances, which is different from section 57. It is hard to attribute blameworthiness to the mere possession or collection of information of a kind when this offence is so detached from the defendant's subjective intention. This has led some critics to label this offence as a strict liability offence requiring no proof of a culpable mind.[65]

However, examining the offence more carefully, it seems that knowledge and control do play a crucial part in whether a defendant would be deemed guilty under this offence. Not only is knowledge required as part of the defence, but the courts also read in a *mens rea* element by interpreting the section to require a defendant to possess some form of 'knowledge' about the nature of the information collected. To establish *mens rea* based on knowledge, the prosecution is required to demonstrate that the defendant possessed factual awareness regarding the elements that render their behaviour unlawful. This implies that the defendant had a knowledge of the nature of the information or the 'kind' of information and what it contained, and still deliberately chose to engage in conduct that they were aware violated the law.[66] Knowledge is only relevant to the nature of the information which the defendant collects. In *R V G,* it was held that:

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[65] Dinesson (n 41).

[66] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [47].

> 'It is enough if he *knew* the nature of the material which it contains. That *may often be apparent from the title* of the document or from even a cursory glance at its contents. Nor can a defendant keep a document in his possession and claim ignorance of its contents by deliberately choosing not to inquire into them. If the document is hidden in some way, this will often be a basis on which the jury can be *asked to infer that the defendant was aware* of the nature of its contents'.[67]

But while actual knowledge serves as a gatekeeper for criminal liability, using constructed or imputed knowledge to determine 'fault' is more problematic. Chan and Simester contend that, unlike ulterior intent or recklessness, knowledge as a *mens rea* standard broadens the scope of prohibition.[68] They argue that recklessness and intent represent higher *mens rea* standards, which reduces the range of activities that autonomous individuals are legally allowed to sacrifice.[69] In contrast, knowing something requires less 'fault'- merely knowing of the nature of, say, a computer disc containing terrorism information is not the same as making a decision to continue possessing it after more thought (as indicated by the 'recklessness' standard). Constructed or imputed knowledge as a *mens rea* cannot reign in the scope of this offence as well as a requirement of terrorist intent. A person with no terrorist intent can easily possess such knowledge of the information they possess. For example, if one accesses information related to terrorism to write a thesis, the conduct would probably fall under the scope of this offence if there is no reasonable excuse for the act.

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[67] Ibid [48] (emphasis added).
[68] Winnie Chan and Andrew P Simester, 'Four Functions of Mens Rea' (2011) 70 The Cambridge Law Journal 381.
[69] Ibid.

The court in *R v G* cited *R v K*, where it was noted that the information must be of a nature that raises a reasonable suspicion it will be used for a terrorism-related act.. It was stated that:

> 'The natural meaning of that section requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism'.[70]

Although this reading of section 58 is helpful for clarifying the type of information that falls within the offence's ambit, it only requires a suspicion of intent and not a subjective intent, the latter of which is a better indicator of a culpable mind which justifies the imposition of criminal liability. Although offences which contain weak or no *mens rea* elements are not always unjustifiable, they are problematic when applied to terrorist offences because of their serious ramifications.

While it is fairer to attribute blame to someone who has 'control' over their document or a record, this might cause problems when it comes to the viewing offence under section 58(1)(3) TA 2000 as far as digital files are concerned. If a single viewing of suspicious information is sufficient for a conviction under this offence, then can a defendant argue that he or she does not have control over the information stored in their computer? Who controls the 'cookies' that are stored on one's computer files after a visit to a website? What about the files shared on a screen or a presentation that will be inadvertently viewed by many? These questions remain unaddressed. All in all, these issues lead to the question of whether traditional limits of criminal law have been overstretched under the rhetoric of risk prevention and whether this is legitimate.

[70] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [17].

3.3 Defence

The broad *actus reus* and lack of *mens rea* elements mean that the defence has an important role in mitigating the ambit of section 58(1a) and (1b) of the TA 2000 of the section 58 offence. As Dinesson argues, this has placed a 'heavy interpretative' burden on the courts and has led to criticisms concerning the 'ad hoc limiting' and 'inconsistent application' of what is reasonable.[71] Under section 58(3) TA 2000, it is a defence for the accused to present a reasonable excuse for possession or access to the material. Section 58(3A) allows for excuses relating to academic work, journalism or when at the time of the person's action or possession the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism. It is important to note that the defendant is not required to show that they lacked an intention to commit or assist in acts of terrorism. Rather, it is the 'reasonableness' of their excuse that matters.

What amounts to a reasonable excuse is the subject of controversy and raises an important question: what constitutes 'reasonableness'? In *R v K,* the court held that a 'reasonable excuse' needs to be an explanation that the document or record is possessed *other than* for the purpose of assisting in the commission or instigation of an act of terrorism.[72] It does not matter what the purpose was even if the conduct might breach civil or criminal law. This decision was rejected in *R v G,* an important case as it limited the range of reasonable excuses to when the defendant:

[71] Dinesson (n 41) 15.

> 'Had an *objectively reasonable* excuse for possessing something which Parliament has made it, prima facie, a crime for him to possess because of its *potential utility* to a terrorist'.[73]

The court clarified that 'objectively reasonable' would include acts that do not breach civil or criminal laws, and that the circumstances in which the documents were found would play a key role in whether an excuse is reasonable or not.[74] However, this goes against the legislative intent behind creating section 58 as a distinct offence alongside section 57. As noted by Lord Phillips in *R v Rowe*, section 58 focuses on the objective nature of the information-specifically, whether it is of a kind likely to be useful to a person committing or preparing an act of terrorism-rather than the defendant's intended use or purpose in possessing it. If this is the case, then surely an unlawful purpose is nonetheless objectively reasonable if it has little utility or is unrelated to terrorism. Dinesson rightly argues that the court failed to distinguish between 'having reason to believe' and a 'reasonable belief'. The former is subjective and concerns the defendant's actual belief, while the latter is concerned with the objective circumstances [75] The court has arguably taken 'objective' too far in interpreting the defence of section 58, leaving the scope of the offence much broader.

Under the court's interpretation, what is reasonable or not depends on the particular facts of the case. But to add to the confusion, the court goes on to suggest that:

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[73] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [79] (emphasis added)
[74] Ibid [79].
[75] Dinesson (n 41).

> ‘The judge may indicate factors in the particular case which the jury might find useful…such as 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’.[76]

While Earl Howe is right to say that what constitutes reasonableness ‘will be very fact-specific and particularly prone to grey areas’.[77] This interpretation of the statutory defence serves to narrow the defence by introducing several other factors that must be taken into account to determine what constitutes a ‘reasonable excuse’. The fact that the defendant’s personal attributes are given so much weight means that there is more uncertainty as to whether a defence will succeed, leading to inconsistent outcomes at trial and the potential for socio-economic factors to affect the outcome of the case.

The defence for section 58(1)(C) is more comprehensive and offers greater scope for protection for those accused of viewing terrorism-related information online. Two exemptions are set out for those that can show that they are carrying out journalistic or academic work, which unjustly exclude other legitimate pursuits, such as legal research or artistic expression. To qualify for these exemptions, one must provide evidence of involvement such as employment records or credentials. This requirement can be challenging and may discourage legitimate activities. A broader approach or more nuanced assessment of intent may better balance security and individual rights. A defence can be made out if the accused did not ‘know’ and ‘had no reason to believe’ that the document or information accessed contained such terrorism-related information that is likely to be useful to another’s terrorist preparations. It is unclear how far

[76] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [81].
[77] Howe (n 61).

this works in practice as the defence is contradictory. Dinesson argues that 'knowing' and 'no reason to believe' are distinct in that the former is subjective, assessing the defendant's knowledge, whereas the latter is an objective test concerning a reasonable belief. A subjective test of knowledge is probably more appropriate here given the breadth of the offence's scope as it examines the defendant's grounds for viewing such information. Ultimately, it is unclear which of these tests the courts would favour in practice, leaving little room for limiting the expanding parameters of this offence.

A final problem with requiring a reasonable excuse and an objective test of knowledge is that it removes the opportunity for the defendant to argue that they lacked the subjective ulterior intent that is required to commit an act of terror. This could deny defendants' autonomy by overlooking their ability to change their minds.[78] This reasoning is problematic because it blurs the boundaries between the section 57 offence and this section 58 offence. This makes the offences overly inclusive and hinders compliance for individuals, as commonplace activities involving diverse information can potentially fall within the scope of both offences. However, few terrorism-related offences require a specific ulterior motive because preventive offences need to target risky behaviour and allow early police intervention, which is their main goal. I will discuss the wide scope of terrorism-related offences and how they ought to be limited further in Chapter 8.

4. Justifying Risk-Based Possession Offences

The previous section examined offences under sections 57 and 58 to understand their scope and impact. The unclear boundaries of these offences raise questions about whether the proper

[78] Dinesson (n 41).

limits of criminal law have been stretched too far in the name of risk prevention, and whether this is legitimate and justified. The following discussion contributes to the broader debate on the legitimacy and justification of criminalisation in risk-based terrorism possession offences by examining the wrongful conduct these offences address, preventive objectives and justifications. To substantiate claims that certain criminal law constraints ought to apply to these offences, this section examines not only the contours of possession offences but also the paradigms surrounding risk prevention and the criminalisation of remote harms.

4.1 Possession And The Act Requirement- State Of Affairs Versus Control

The underlying problem with possession and collecting information relating to terrorism, as Cornford acknowledges, is what the mischief the offence targets.[79] As the above analysis demonstrates, sections 57 and 58 have a vague and unclear conduct element, making it difficult to tell what conduct is or is not prohibited. Ashworth notes that possession offences runs contrary to the act requirement in criminal law- that criminal liability should be based on a voluntary act.[80] A 'voluntary act' is what Moore calls a 'bodily-movement caused-by-a-volition'.[81] If this is required, then sections 57 and 58 appear to violate this requirement as it is doubtful whether possession is a voluntary act that constitutes 'conduct' as possession may be passive and does not necessarily involve an active or willed engagement with the prohibited material.

[79] Cornford (n 1).
[80] Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Criminal Law and Philosophy 237.
[81] Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press UK 2010).

Ashworth notes that the main distinction seems to be between penalising an act (voluntary conduct by an individual) or a 'state of affairs' (such as an illness or addiction).[82] Penalising a state of affairs entails several requirements which is found in the definition of possession under the Model Penal Code:

> 'Possession is an act … if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession'.[83]

According to this definition of possession, two elements can be deduced. First, a person has to have acted with some 'knowledge' in procuring or receiving the thing possessed or had awareness of his control (a weaker form of knowledge). Secondly, the possession has to be for sufficient time to allow the individual to be able to choose to divest of the material. Under the first element, possession requires an element of control. One is only responsible for that over which one has control: this control is the underlying wrong that risk-based possession terrorism offences target.[84]

Under the assumption that control is the means by which a person assumes responsibility for their possession is the presumption that people have autonomy over what they collect and possess. While possession typically implies an element of control, sections 57 and 58 do not require that the individual intends to use the article or information to further terrorist activities. This broadens liability to include passive or unintended possession. According to Husak, this means that a person 'may be morally responsible for a great many states of affairs other than

[82] Ashworth (n 80) 240.
[83] § 2.01(4) Model Penal Code; cf. N.Y. Penal Law § 15.00(2) (Possession as Voluntary Act).
[84] Ashworth (n 80) 241.

their acts'.[85] Morally speaking, it is less objectionable to punish someone if such a state of control is established. Therefore, the control element is a more inclusive approach as it captures the essence of what is penalised in the act of possession.

It can, therefore, be argued that the act requirement under sections 57 and 58 penalises a state of affairs with a form of 'continued control' of risky materials or documents that *may* be linked to an increased risk of the commission or preparation of a terrorist act, as the primary wrongdoing. The focus on control, rather than a voluntary act, is more plausibly justifiable under traditional principles of criminal responsibility that are reflected in the adage 'you are responsible for what you control'. It is normatively persuasive to impose criminal responsibility for possessing something that could cause harm, as it involves having control over things that may lead to harm, and requires examining the nature of the possessed information and the defendant's circumstances at the time of possession.

Applying the above analysis to sections 57 and 58, these offences target a state of affairs that emphasises control as the act rather than a voluntary act. Both offences are structured around a control requirement as the courts have interpreted possession to require both knowledge and control.[86] This requirement is better satisfied by section 58. Section 58 (1A) and section 58(1B) require acts of possession or collecting information likely to be useful to a person committing or preparing an act of terrorism, indicators of 'control' that normatively justify ascribing criminal responsibility to the accused. However, section 57 operates under the presumption that possession is proved if an article was on any premises at the same time as the accused or was on premises of which the accused was the occupier or which he habitually used other than

[85] Douglas Husak, 'Does Criminal Liability Require an Act?' (1998) Philosophy and the Criminal Law 60.
[86] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*, [53].

as a member of the public.[87] These presumptions undermine the control element needed for wrongful possession, as someone can meet the section 57 requirements without knowing or controlling the possession. It can be argued that these assumptions contradict the idea of having control over something as a wrongdoing, extending the act requirement beyond its reasonable limits.

Applying the state of affairs or control tests to section 58(1)(C) raises more serious concerns as to the principled limits of the act requirement. As Zedner notes, 'the act requirement that "the person views, or otherwise accesses, by means of the internet information of a kind likely to be useful to a person committing or preparing an act of terrorism", is insufficiently clear to satisfy the principle of maximum certainty'.[88] Accessing information is different to 'possessing' information, the latter may be justifiably criminalised if the defendant has a high degree of control and knowledge over his possession. Accessing, on the other hand, is more dubious- what is the wrong that it targets? What is the control element?

Accessing something requires even *less* control and knowledge, such as stumbling upon information on the internet that relates to terrorism. Viewing something such as an image posted on a screen by a lecturer in a classroom requires even less control than accessing it and is therefore more problematic. Accessing information of a kind useful to preparing a terrorist act might be justifiably punished if the original 'three-clicks' requirement had been retained in the Bill, which would at least have inserted more active control in the act requirement of section 58(1)(C). It can hardly be said that criminalising a one-time viewing is necessary or principled. There is no basis for establishing any wrongful state of affairs or control based on a single

[87] Section 57(3) of the TA 2000
[88] Zedner (n 11) 70.

viewing of terrorism-related information on the internet, although 'access' suggests more active involvement than the viewing offence requires. Normatively, it is unclear what underlying wrong the offence is aiming to target. The accused could present a reasonable excuse defence under section 58(3A) negating any knowledge or 'reason to believe' that the document contains information of a terrorist kind. However, these categories raise further questions. For instance, freelance journalists and independent researchers may find it hard to prove they are who they claim to be. Others, like NGO workers and policy analysts, may have valid reasons to access such material but don't fit into the protected groups due to the non-academic nature of their research. The practical standard the courts use to assess such defences remains uncertain. A single viewing of information is hardly enough to constitute having 'control' over it; the wrongfulness of the offence will be discussed further in the next section.[89]

Finally, it is important to briefly discuss the second element of possession in the Model Penal Code, namely the 'termination' requirement.[90] Ashworth and Duff criticise this element as creating an omissions offence because a duty to dispose of possession is created.[91] Possession as omission is controversial and the next section will discuss its problems relating to culpability, since it can be characterised as creating a duty to reduce harm rather than as part of the act requirement. However, Duff, Ashworth, and other scholars argue that this part of the definition under the Model Penal Code over-extends the act requirement to beyond what is justifiable. Simply failing to dispose of something should not be regarded as possession and raises several challenges relating to the contours of criminal responsibility for offences of 'abstract

[89] For example, a single viewing may cause cookies to be stored in one's computer unknowingly which hardly constitutes having 'control' of it in a traditional sense.
[90] § 2.06(6)(c) Model Penal Code.
[91] Ashworth (n 80) 214.

endangerment'[92] although some of the caselaw relating to sections 57 and 58 has decided otherwise.[93]

4.2 Possession And Wrongfulness- 'Reasonable Suspicion' And Dangerous Characteristics

As argued in Chapter 4, possession offences are only justifiably criminalised if they prohibit wrongful acts. This is particularly controversial in cases relating to innocent reasons for possession. Possession is therefore penalised only if the circumstances of the possession satisfy the reasonable suspicion requirement. As du-Bois Pedain argues, to conduct oneself in a way that gives 'rise to a reasonable suspicion' of wrongdoing is not a wrong in itself.[94] As the court held in *R v G,* the purpose of section 57 is to require the accused to account for causing the suspicious state of affairs.[95] Under this logic, the underlying wrong is extremely expansive, criminalising conduct that is connected to a suspicion of remote (direct or indirect) future acts of terror that may never occur.

To say that creating a 'suspicious state of affairs' is in and of itself wrongful, one needs to argue that people owe a duty not to create a situation causing others to suspect wrongdoing. In his discussions about the 'insecure state', Ramsay talks about subjective security and how certain offences such as sections 57 and 58 are enacted to furnish subjective security for

[92] Maria Kaiafa-Gbandi, Athina Sachoulidou and Nikolaos Chatzinikolaou, 'Offences of Endangerment (Actual and Abstract Danger)' in Pedro Caeiro and others (eds), *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar Publishing 2024).

[93] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*

[94] Antje du Bois-Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat?' (2009) 68 The Cambridge Law Journal 261.

[95] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012).

citizens.[96] However, this does not accord with Parliament's intent when enacting section 57 and 58 as some of the debates mentioned in the previous sections bring up the need to increase objective security under the PREVENT rationale to tackle counter-terrorism at a broad level.[97]

Ashworth also argues that imposing a duty situation on a person to do (or not do) something about a state of affairs requires strong normative justifications.[98] For example, if a person causes danger unknowingly, they then have a duty to prevent the danger from spreading further, or where the owner of property has a duty to ensure criminal activity is not committed on his premises. Neither of these duty situations applies strongly to the wording of sections 57 and 58. Section 57 penalises someone for creating a reasonable suspicion in a third party's eyes, even if it's unintentional and beyond their control. The effect of section 57 TA 2000 is that a duty to account for or explain the creation of an objectively 'suspicious' situation is imposed on the defendant without convincing normative justification apart from the prevention of a remote harm. There is no duty on the prosecution to show that the defendant had a terrorist intent to secure a conviction.

Section 58 is equally problematic. By assessing the wrongfulness of a defendant's act according to the nature of the information possessed, collected, or viewed, it is argued that the creation of 'risky' circumstances is what justifies the creation of the offence. While the courts have held that information must be intrinsically 'useful' to a terrorist, there is no need for the information to be of assistance for the commission of a terrorist act. All these issues raise the

[96] Ibid.
[97] See, for example, the other offences created by the Terrorism Act 2000 and the government's 'PREVENT' strategy; Howe (n 61).
[98] Ashworth (n 80) 242.

question of whether, as Ashworth puts it, 'citizens are rightly constituted as their fellow citizens' keepers in this respect, singling them out for a duty because of their control and knowledge'.[99] Arguably, the creation of reasonable suspicion cannot be justifiably criminalised unless there is strong evidence of an intent to use the information gathered to commit a future harm. At their core, sections 57 and 58 seem to be targeting the possession of information with an intent for them to be used to further a terrorist act, however remote it may be. This is a more persuasive basis for establishing wrongfulness than simply that the nature of the information is terrorism-related, or that the defendant has control over his or her possession. To that extent, insisting on a clearer act requirement as well as stronger *mens rea* constraints would delineate clearer boundaries which would limit the reach of these expansive offences.

Secondly, risk-based possession offences target a more controversial wrong which relates to the topic of character offences. The section 58(C) online viewing offence is interesting to examine because the offence goes one more step back from the already pre-inchoate nature of many of these terrorism possession offences that were examined in this chapter. This means that the precise underlying 'wrong' targeted by this viewing offence is insufficiently clear, especially as it is a relatively new offence without much case law to clarify its interpretation.

The legislative intent behind section 58(1)(C) provides insight into its underlying goal, which can help clarify what wrong the offence targets and whether this is justified. This section was justified as necessary to 'amend certain offences to update them for the digital age, to reflect contemporary patterns of radicalisation and to close gaps in their scope'.[100] It essentially targets a subject of great complexity- extremism and radicalisation- that is not explicitly mentioned in

[99] Ibid 242.
[100] Counter-Terrorism and Border Security Act 2019 Explanatory Notes (Home Office) <http://www.legislation.gov.uk/ukpga/2019/3/notes/division/2/index.htm> accessed 31st October 2023.

the statute and outside the scope of this thesis. However, a sense of the underlying wrong that the offence targets can be deduced by reading into the offence's parliamentary history. Citing parliamentary debates, Zedner observes that:

> 'The amendment originally placed before parliament sought to identify 'a pattern of behaviour' by criminalizing 'the repeated viewing or streaming of terrorist material online that is on three or more occasions'.[101]

In the original formulation of the Bill, accessing or viewing terrorism-related information was considered a wrongful act because it formed a pattern of behaviour that was objectively, not subjectively, wrong. This was because it could lead to the risk of radicalisation or extremism, whether the viewer or a third party was preparing to or committing a terrorist act. The wrongfulness lies in a 'dangerous' behaviour pattern, which seems unusual as a sufficient act requirement. This is arguably more probative than a single viewing of information likely to be useful to someone committing or preparing a terrorist act.sm, whether the viewer or a third party was preparing to or committing a terrorist act. This raises interesting questions about the justifiability and legitimacy of so-called 'character offences' which are offences designed to criminalise certain undesirable character traits which include a person's patterns of thoughts, feelings, and behaviours they exhibit over time.[102] For instance, the provision that makes viewing terrorist material three or more times a crime implies that repeatedly accessing certain content might be seen as a sign of a person's character or disposition towards certain terrorist views, rather than focusing on a specific harmful action. This suggests that criminal liability

[101] Zedner (n 11); Home Office, Counter-Terrorism and Border Security Bill Impact Assessment IA No: HO0308 (2018) 8 <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/Overarching%20Impact%20Assessment%20Final%20signed.pdf> accessed 31st October 2023.
[102] Michael D Bayles, 'Character, Purpose, and Criminal Responsibility' (1982) 1 Law and Philosophy 5.

depends not just on what someone does, but on assumptions about the type of person they may become.

Dubber criticises the imputation of characteristics to a possessor and argues that certain judgements of 'dangerousness' can be justified if they have strong spatial connections to a dangerous object.[103] Dubber gives the example of the possessor of a gun who justifiably attracts the ascription of responsibility, without harm, if possession is reinforced by the presence of criminal intent to use the object. The intent element legitimately permits a presumption of dangerousness which justifies criminal intervention to minimise threats and maximise security.[104] There is some intuitive appeal to this approach: the 'higher' the *mens rea*, 'the higher level of dangerousness, so the purposeful actor is the most dangerous'.[105] All of this assumes that the defendants' remote actions can be used to determine their intention. Is this then a way of legitimising and justifying risk-based possession offences? If we agree that sections 57 and 58 are designed to tackle and reduce the risk of involved parties becoming radicalised as argued above, is it justified to punish a wrong based on the ascription of dangerousness on someone's character evidenced by their possession? The main objection to risk-based possession offences is- as the name suggests – that they are 'risk-based'. This means that the 'transfer of characteristics' from the act of possession may not accurately reflect the 'risk' of the ultimate harm possession poses. The act of possessing something doesn't necessarily mean the person poses a real or imminent threat. It is not always the case that possession will be dangerous, and not every possessor will be a dangerous person who will commit an ultimate terrorist act. Therefore, even if it might be justified to criminalise a person

[103] Markus Dirk Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2001) 91 The Journal of Criminal Law and Criminology (1973), 829.
[104] Ibid 863.
[105] Ibid 865.

if they have certain character traits, this does not justify the current scope of section 58(1)(C) and sections 57 and 58 more generally.

Possession is not a proxy for dangerousness; accessing or viewing information relating to terrorism offers even less of a sufficient nexus for linking certain character traits to a person. Section 58(1)(C) arguably stretches the act requirement too far to place a single viewing of terrorist-related material into the reach of criminal law. A utilitarian rationale of net-widening the net of counter-terrorism offences in the cause of risk-prevention or preventing radicalisation may be the driving force behind the creation of this single-viewing offence.[106] But without a clear culpability element, it is unjustifiable to criminalise viewing risky information online once as the act is too remote to attribute criminal wrongdoing.

4.3 Possession And Culpability- Problems With Strict Liability

Possession offences often go against the view that a person should only be liable for an offence if fault can be proved.[107] Sections 57 and 58 raises two questions relating to culpability: 1) they contain limited forms of *mens rea*, and 2) both do not require proof of a further intention. On the first issue, Ashworth notes that the *mens rea* elements contained with possession offences often fall into the definition of *actus reus* so that, in practice, it is not easy to distinguish between the two. Indeed, the mental requirements of sections 57 and 58 are embedded within the act of possession, which is characterised as a state of affairs.

[106] Howe (n 61).
[107] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, USA 2013).

A lack of a clear *mens rea* is not problematic since 'the division between *mens rea* and *actus reus* is 'simply an analytical tool which should not stand in the way of principled argument'.[108] What is more problematic is that both sections 57 and 58 contain what Ashworth calls 'constructive possession' whereby presumptions of knowledge due to circumstances 'reduces the role of culpability significantly'.[109] For example, Section 57(3)(a) and 57(3)(b) contain two presumptions which result in what Ashworth calls a 'diluted' culpability element wherein individuals would be penalised for possession of articles without a terrorist intent. Section 58 does not contain presumptions, but the defence is narrower as it requires a 'reasonable excuse' to rebut liability. There is no requirement that the information collected or accessed is to be used for a terrorist purpose. As such, the defendant's intent seems to be irrelevant to this offence.

The lack of a clear culpability element in these offences has led Ashworth to label them strict liability offences.[110] Strict liability is usually justified on the grounds that it provides direct compensation for welfare offences or regulatory law breaches, rather than punishing them directly.[111] Indeed, strict liability plays a central role in low-level or regulatory offences in criminal law.[112] However, for offences as serious as section 57 and 58 that may result in up to 15 years' imprisonment, this reasoning is hardly justified. Horder has argued that 'anticipatory' or preventive offences are purely responsive to the threat of harm- even if the conduct is innocent in itself. Horder argues that criminalisation is justified if doing so will prevent harm to which the conduct may ultimately contribute.[113] However, Cornford argues that the offences'

[108] Andrew Ashworth, *Positive Obligations in Criminal Law* (Bloomsbury Publishing 2013), 157.
[109] Ashworth (n 80) 244.
[110] Ibid.
[111] Stephen Cohen, 'Justification for a Doctrine of Strict Liability' (1982) 8 Social Theory and Practice 213; Richard A Wasserstrom, 'Strict Liability in the Criminal Law' in Paul H Robinson (ed), *The Structure and Limits of Criminal Law* (Routledge 2017) 731–745.
[112] Ibid.
[113] Cornford (n 1) 11.

serious impingements on liberties render it unjust for it to attract strict liability to apply, which surely is the right view.[114] The use of strict liability in sections 57 and 58 is concerning as they carry severe penalties. Arguably, the risk of infringing on individual liberties in counter-terrorism requires a more concise offence that includes a clear culpability element.

5. Conclusion

Risk-based possession offences, which have an underlying aim of punishing the creation of a risk of serious harm, flout many tenets of criminal law. As Ashworth notes, traditional criminal law doctrine requires:

> 'That liability requires an act by the defendant, that liability should be for an act unless the situation gives rise to a positive duty that the defendant fails to fulfil, that in principle mens rea should be required for liability, that the prosecution should bear the burden of proving guilt beyond a reasonable doubt, that the law of attempts should set the limits of inchoate liability, and that a person should only be liable for what he or she causes, encourages, assists or otherwise becomes normatively involved in'.[115]

All of these principles have been distorted by sections 57 and 58 in order to pull would-be (or 'may-be') terrorists into the criminal net.[116]

The implementation of these offences raises serious problems. The courts have attempted to clarify and narrow the scope of the offences through interpretation in certain ways, such as

[114] Ibid.
[115] Ashworth (n 80) 240.
[116] Dinesson (n 41).

requiring the 'nature' of the information under section 58 to be intrinsically 'likely to be useful' to a would-be terrorist and requiring a 'direct connection' test under section 57. Nonetheless, the lack of doctrinal clarity and the inconsistencies between different interpretations have resulted in offences that remain dangerously broad. The offences also suffer from vague mental requirements which amount to a form of strict liability as well as defences which undermine the presumption of innocence. These problems are exacerbated by increased prosecution of sections 57 and 58, which suggests that these offences are becoming more heavily relied upon in the battle against terrorism.[117]

The only convincing justification for creating risk-based possession offences are to 'restrict the availability of certain types of information to prospective terrorists' under a utilitarian rationale for security.[118] But this cannot justify the law as it currently exists. As Cornford notes, 'too much innocent conduct is restricted, and too few realistic preventive benefits achieved, to justify the offence at its margins'.[119] Overall, the offences under sections 57 and 58 are difficult to accept as legitimate extensions of the criminal law. It is, therefore, imperative that constraining principles, in particular wrongfulness, culpability, and remoteness requirements, should operate more strongly to contain the reach of sections 57 and 58. Only then can risk-based terrorist possession offences be brought back within the rightful limits of the criminal law.

[117] Ibid.
[118] Cornford (n 1).
[119] Ibid.

VI. Encouragement And Dissemination Of Terrorist Publications

The proliferation of terrorism-related events and the increase in extremist material online has led to the enactment of legislation aimed at combatting the dissemination of extremist ideologies and preventing the encouragement of terrorist acts. Sections 1 and 2 of the Terrorism Act 2006 (hereafter referred to as 'section 1' and 'section 2') establish offences of direct and indirect encouragement of terrorism and dissemination of terrorist publications. These provisions sought to address the emerging threat posed by the online dissemination of extremist ideologies, which the government has claimed played a role in radicalizing individuals and inciting acts of terrorism. However, the theoretical problems associated with these provisions are multifaceted. There exists a fundamental tension between the criminalization of speech and the principle of free expression, which lies at the heart of democratic societies.[1] Balancing the imperative of national security with the preservation of civil liberties poses a significant challenge in the context of laws targeting the dissemination of terrorist publications.

Theoretical problems arise from the broad scope of criminal liability encompassed in encouragement offences of terrorism. For instance, concerns over this offence were cited as the reason the British Library refused to curate a digital archive of the 'Taliban Sources Project', which caused controversy in the media.[2] The interpretation and application of the terms 'encouragement' and 'dissemination' of terrorist publications have been subject to debate, leading to uncertainties surrounding the boundaries of criminal liability. This expansion of liability through encouragement offences under terrorism law raises questions about the limits

[1] David O Brink, 'Millian Principles, Freedom of Expression, and Hate Speech' (2001) 7 Legal Theory 119; Jan-Peter Loof, 'Restricting Free Speech in Times of Terror: An ECHR Perspective' in Afshin Ellian and Gelijn Molier (eds), *Freedom of Speech under Attack* (Eleven International Publishing 2015).

[2] BBC News*, 'British Library declines Taliban archive over terror law fears'* (BBC, 28th August 2015) <https://www.bbc.co.uk/news/uk-34088661> accessed 1 November 2023.

of criminalization and the potential for overreach, as individuals may face prosecution for merely expressing or sharing opinions that are considered to be supportive of terrorism.

In light of these issues, it is important to examine the provisions of sections 1 and 2 critically. This chapter follows the same structure as the previous chapter. By delving into the complexities and challenges these offences pose, this chapter seeks to shed light on the legal and theoretical issues surrounding encouragement and the dissemination of terrorist publications.

1. Legislative Background

In July 2005, following the London bombings, the then British Home Secretary Charles Clarke contacted Conservative and Liberal Democrat party members seeking their opinions on the updating and amending of terrorism legislation.[3] Clarke argued that:

> 'The July [2005] events indicate that there are people in this country who are susceptible to the preaching … of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that…. What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken'.[4]

[3] Joint Committee on Human Rights, *Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, re draft clauses to the Immigration, Asylum and Nationality Bill as counter-terrorism measures* (5 December 2005) <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75we03.htm> accessed 10 July 2025.

[4] Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) The Criminal Law Review 441.

During the parliamentary debate of the draft Terrorism Bill, the government emphasised the ideological nature of the threat the UK faced.'[5] The debates focused particularly on the role of free speech in contributing to ideas that lead to radicalisation:

> 'We should not ignore the contributory role that radical texts and extremist pamphlets have in radicalisation. They serve to propagate and reinforce the extremist…We should not underestimate the role that such literature can have in radicalising vulnerable and susceptible young people, particularly changing Muslims from law-abiding members of the community to potential terrorists'.[6]

The subsequent Terrorism Bill introduced new criminal offences criminalising direct and indirect encouragement to commit, prepare or instigate terrorist acts, as well as the provision or receipt of terrorism training in accordance with the Council of Europe Convention on the Prevention of Terrorism (CECPT).[7] The main offences of encouragement are found in section 1 and section 2, which criminalise the encouragement and dissemination of terrorism-related statements.

The government offered two legal justifications for the proposed offences which merit examination. First, the Home Secretary stated that introducing a new offence of indirect incitement to terrorism would allow the UK to ratify the CECPT.[8] Article 5 of the CECPT required states to criminalise 'public provocation to commit a terrorist offence'. This included all forms of 'incitement' to terrorism 'whether or not directly advocating terrorist offences'

[5] *Hansard HC Vol. 438 Col. 325 (26 October 2005).*
[6] *Hansard HL Vol. 677 Col. 551 (17 January 2006)*.
[7] *Council of Europe Convention on the Prevention of Terrorism* (2005) Article 7.
[8] *Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 2005.*

provided they 'cause a danger that one or more such offences may be committed' and the individual 'intends to incite the commission of the offence'.[9] However, the proposed offences fall short of the CECPT requirements as they lack the necessary limitations outlined in Article 5. Specifically, the new encouragement offences did not require intent to incite terrorism or require that the public dissemination of a message posed a danger of such offences being committed.

In September 2005, the United Nations Security Council accepted the United Nations Security Council Resolutions 1624 ('UNSCR 1624').[10] In the preamble to UNSCR 1624, the Security Council condemned the 'incitement of terrorist acts' and repudiated 'attempts at the justification or glorification (apologie) of terrorist acts that may incite further acts'. [11] Resolution 1624 thus imposed a further international obligation on all UN member states, including the UK, to enact an offence of incitement to commit an act of terrorism.[12] However, it is arguable whether the Resolution required the UK to enact new encouragement offences since it merely 'condemns' incitement and existing laws already criminalise incitement of hatred through speech, though the Resolution demanded more specific legislation to be created.[13]

The second justification for these new encouragement offences is that these offences filled a 'gap in the law', where protection against certain categories of speech that encouraged

[9] *Council of Europe Convention on the Prevention of Terrorism* Article 5.
[10] *Resolution 1624 (2005)/ adopted by the Security Council at its 5261st meeting, on 14th September 2005* (UN Security Council).
[11] Ibid 1.
[12] Ibid 3.
[13] Ibid 1.

terrorism was 'inadequate'.[14] Speaking for the government, The Rt Hon. the Baroness Scotland of Asthal Patricia Janet Scotland KC observed:

> 'It is not an offence … to incite people to engage in terrorist activities generally, or to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable. That is the gap that we want to close, both to enable us to fulfil our international obligations and because we believe that it is desirable in its own right'.[15]

However, those opposed to the new measures argued that the UK already criminalised incitement to violence, the solicitation of murder, inciting racial hatred, and that incitement to commit terrorism (abroad) was an offence under s.59 of the Terrorism Act 2000.[16] In light of these objections, it is difficult to identify a gap in the law that needed to be filled. Nonetheless, the Joint Committee on Human Rights held that even if there was some overlap with existing offences, there was a valid case for the introduction of a new 'narrowly defined criminal offence of indirect incitement to terrorist acts' on the basis that the scope of the current offences was somewhat unclear.[17] Further, it remains to be seen whether sections 1 and 2 of the TA 2006 are sufficiently narrowly and precisely defined to fall within the proper constraints of criminal law.

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[14] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters (Third Report of Session 2005–06)*, HL Paper 75-I/HC 561-I (The Stationery Office 2005) <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf> accessed 10 July 2025.

[15] *Hansard, HL Vol.676, col.455 (December 5, 2005)*.

[16] For example in *R v El Faisal [2004] EWCA Crim 456*, a Muslim cleric was found guilty of soliciting murder under section 4 of the Offences Against the Person Act 1861 and incitement to racial hatred under the Public Order Act 1986 after disseminating tapes of his lectures to others. See Joint Committee on Human Rights (n 14) 17.

[17] Ibid [25].

2. Defining The Offences

2.1 Section 1- Encouragement

Section 1, as amended by section 5 of the Counter-Terrorism and Border Security Act 2019 (CBTA), is a long and complex offence. It is helpful to set out the first three subsections which delineate the main parameters of the offence. Section 1(1) criminalises the act of publishing or causing it to be published:

> A statement that is likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the members of the public to whom it is published, to the commission, preparation or instigation of acts of terrorism or Convention offences.[18]

Further, section 1(2)-(5) outlines the *actus reus* and *mens rea* requirements:

> (2) A person commits an offence if—
>
> (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
>
> (b) at the time he publishes it or causes it to be published, he—

[18] Section 1(1) TA 2006

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

(3) For the purposes of this section, the statements that are likely to be understood by a reasonable person as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

2.2 Actus Reus

2.2.1 Publishing A Statement

The *actus reus* of this offence is that the accused 'publishes' or 'causes another to publish' a statement that is 'likely to be understood by some or all of the members of the public to whom

it is published' as 'direct or indirect encouragement or other inducement' 'to the commission, preparation or instigation of acts of terrorism or Convention offences.[19] These elements make up the conduct element and will be explored in turn.

The heart of the *actus reus* is that there must be publication of a statement.[20] The definition of publishing a statement is quite broad. A 'statement' is defined in section 20(6) as 'references to a communication of any description, including a communication without words consisting of sounds or images or both'. Publication under section 20(4)(a) refers to 'publishing [the statement] in any manner to the public'.[21] This includes 'speeches at meetings, sermons at places of worship, chants and placards at demonstrations, as well as printed literature' and broadcasts and material posted on the Internet'.[22]

The *actus reus* is further extended by section 20(4)(b) and (c) which defines publication as also including 'providing electronically any service by means of which the public have access to the statement' or 'using a service provided to him electronically by another so as to enable or to facilitate access by the public to the statement'.[23] Hunt notes that this provision would catch persons who run forums and websites that allow people to share messages, as well as internet service providers who would be considered the 'publishers' of statements under this offence.[24] This is true even when they have no direct connection to the messages' content and may not

[19] Section 1(1) of the TA 2006
[20] Section 1(2) of the TA 2006
[21] Section 20(4)(a) if the TA 2006
[22] Imran Awan, 'The Problem with Defining Terrorism and the Impact on Civil Liberties-Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper' (2008) 1 J Pol & L 2, 4.
[23] Section 20(4)(b) and (c) of the TA 2006
[24] Hunt (n 4) 3.

know they exist.[25] The broad definition of 'publication' extends the law of incitement and casts the net of liability far beyond the producer of the original statement.

Although the definition of 'publication' is broad, the provision contains safeguards including the requirement that the anticipated response from the public be determined from the 'statement as a whole' and the 'circumstances and manner' of its publication.[26] Another important safeguard is that the statement must be made to 'some or all the members of the public'.[27] It cannot be made privately between individuals, unlike the broader section 2 offence, which will be examined later. This is questionable, as one of the government's aims when enacting this offence was to prevent radicalisation, a process which involves (but is not limited to) information-sharing occurring in private settings between individuals with close ties.[28]

One reason the government was so insistent that this offence only covers 'public' statements might be because the CECPT only mandates the criminalisation of 'public provocations'. The private/public divide is therefore crucial to the scope of section 1.[29] However, the definition of 'public' may be too broad, as it covers the public in any country or territory under section 20(3). This raises uncertainty about which members of the public the judge would consider when applying the likelihood test if the statement is published globally.[30]

[25] Ibid 3.
[26] Section 1(4) of the TA 2006
[27] Section 1(1) of the TA 2006
[28] Tufyal Choudhury, 'The Terrorism Act 2006: Discouraging Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009); Commission's Expert Group on European Violent Radicalisation, *Radicalisation Processes Leading to Acts of Terrorism* (Report submitted to the European Commission, 2008).
[29] Section 2(3)(A) of the TA 2006 states that the material is assessed based on an understanding by 'a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the persons to whom it is or may become available as a result of that conduct, to the commission, preparation or instigation of acts of terrorism'.
[30] Choudhury (n 28) 470.

Not all members of the public to which the statement is published need to be encouraged; only 'some or all' of them need be affected.[31] But how many individuals constitute 'some'?[32] This was discussed in *R v Ahmed (2018)*, a case that involved a woman who posted and disseminated terrorist material in a closed pro-IS Facebook Group called 'Power Strangers'.[33] This closed group did not have many members and one of the defendants' post only obtained between 26 'likes'. Regardless, the court held the gravity of her repeated expressions of support for a terrorist organisation was substantial given the use of an effective platform for disseminating terrorist propaganda. [34] The case shows that 'direct encouragement' is relatively uncontroversial if the defendant's message is clear and it confirms that the public can include relatively small, closed groups of people.

R v Ahmed can be contrasted with *R v Faraz*, where the scope of 'some or all members of the public' was disputed.[35] This case will be discussed in respect of section 2. However, it warrants inclusion here because the conduct elements of the two offences overlap significantly. In this case, the defendant owned a Maktabah Islamic bookshop and was convicted of selling 1,169 copies of publications, including books, DVDs and videos supporting militant Islam between April 2006 and January 2007. While the main issue concerned the prejudicial effect of the judge's direction to the jury, the court also clarified the meaning of 'some or all members' by reading into the offence that a 'significant number of [the defendant's] readers' must be encouraged by the publications. Since *Faraz* precedes *Ahmed*, it is unclear whether *Ahmed*

[31] Section 1(1) of the TA 2006
[32] Ian Turner, 'Limits to Terror Speech in the UK and USA: Balancing Freedom of Expression with National Security' (2019) Series 2 Vol 1 Amicus Curiae 201.
[33] *R v Ahmed [2018] EWCA Crim 133*
[34] Ibid [16], [30].
[35] *R v Faraz (Ahmed Raza) [2012] WL 6151907*

followed the court's attempt to narrow the scope of section 1 in *Faraz*, since it is there was no assessment of how many people were affected in the closed Facebook group.

Problematically, section 1 does not require that anyone is in fact encouraged as a result of the publication of the statement. Rather, the statement must be 'likely to be understood' as an encouragement to the commission, preparation or instigation of an act of terror or Convention offence. The offence focuses on the objective likelihood of a statement to encourage. Section 5 of the CTBSA 2019 amends section 1 so that 'some…members of the public' is replaced by a 'reasonable person' test. [36] This amendment attempted to limit the scope of the term 'some members of the public' in that the statement must be understood by a reasonable person as a direct or indirect encouragement of terror.[37] However, Awan argues that the 'reasonable person' requirement is problematic because it 'seeks to punish those making statements not for what effect they intended with their words to have but according to what they might suspect others will make of them'.[38] Awan rightly criticises the objective nature of the imputation of liability on the often subjective action of choosing to publish something. It is difficult to see how this amendment narrows the scope of section 1.[39] This issue will be discussed in the section below on *mens rea*, but it illustrates how the line between conduct requirement and mental element can blur.

The objective nature of this offence is emphasised by section 1(5)(b), which states that 'it is irrelevant 'whether any person is in fact encouraged or induced by the statement to commit,

[36] Words in section 1(1) substituted (12.4.2019) by Counter-Terrorism and Border Security Act 2019 (c. 3), sections 5(3)(a) and 27(3) (with s. 25(1)); words in section 1(3) substituted (12.4.2019) by Counter-Terrorism and Border Security Act 2019 (c. 3), sections 5(4)(a) and 27(3) (with s. 25(1)).
[37] Nick Thomas-Symonds, *Counter-Terrorism and Border Security Bill (Fourth sitting) Commons: 3 July 2018, col.95* (Hansard 3rd July 2018).
[38] Awan (n 22) 8.
[39] Ibid 8.

prepare or instigate any such act or offence'.[40] Combined with section 1(4), which deems the contents and the circumstances of publication to be crucial in a 'reasonable' determination of whether the statement encourages terrorism, the whole offence disregards the need for anyone to be actually encouraged by such publications. The requirement that an ultimate terrorist act resulting from exposure to a (potentially) harmful publication is extremely remote. This can be contrasted with the requirements of the CECPT that to constitute a 'public provocation to commit a terrorist offence' the conduct must cause 'a danger that one or more such [terrorist] offences may be committed'.[41] As such, the offence exceeds what is required by the CECPT.

2.2.2 Acts Of Terrorism/Convention Offences

The encouragement must relate to either 'acts of terrorism' or 'Convention offences'.[42] Section 1 makes it a crime to encourage a 'Convention offence', which is an offence committed outside the country that matches crimes outlined in the twelve International Counter-Terrorist Conventions currently in force, and which the CECPT requires to be treated as a criminal offence.[43] These are listed as specific statutory offences in Schedule 1 of the TA 2006 and include serious offences associated with explosives, associated with terrorist funding as well as the offence of directing a terrorist organisation amongst others.[44] Arguably, the list of Convention offences is exhaustive and specific enough to satisfy the requirement of legal certainty. However, Choudhury argues that the extra-territorial element over-extends the aims of the CECPT and 'creates new opportunities for oppressive regimes to seek to have their dissidents prosecuted by the UK courts'.[45]

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[40] Section 1(5)(b) of the TA 2006
[41] *Council of Europe Convention on the Prevention of Terrorism*, Article 5(1).
[42] Section 1(1) of the TA 2006
[43] The counter-terrorism treaties are listed in the Appendix to the Convention.
[44] Schedule 1 of the TA 2006
[45] Choudhury (n 28) 472.

In contrast, an ‘act of terrorism’ is more broadly defined under section 1 TA 2000. It deems a wide variety of conduct as ‘terrorism’. These include:

> ‘All forms of serious violence against any person, serious damage to property, endangering another person's life, creating a serious risk to the health or safety of the public or a section of the public, or seriously interfering with or disrupting an electronic system.
>
> The acts in question must be accompanied by a ‘terrorist’ motive of influencing a government or an international governmental organisation or intimidating the public, and be done for advancing a political, religious or ideological cause’.[46]

The breadth of the *actus reus* of this offence is demonstrated by its reliance on an expansive and vague definition of terrorism under section 1 of the Terrorism Act 2000, which denotes less specific forms of wrongdoing than a ‘Convention offence’. As Hunt notes, ‘Convention offence’ does not catch simple firearms or murder or injury sustained by firearms as distinct from explosives.[47] Hunt rightly points out that the CECPT does not create a mandate to punish ‘indirect or direct’ encouragement of ‘acts of terrorism’ and ‘the inclusion of this notion in the new offences is rooted entirely in domestic law and policy which was connected with the desire to expand the range of behaviour whose encouragement constituted an offence in domestic law’.[48]

[46] Hunt (n 4) 4.
[47] Ibid 4.
[48] Ibid 4.

It is important to note that Section 1 of the Terrorism Act 2000 is not a criminal offence, but it covers a wide range of conduct that may be defined as 'acts of terrorism', including threats or actions made outside the UK.[49] Conduct may fall within this definition if the use of threat of action is designed to influence a government or intimidate the public, and if it is designed to further a political, religious or ideological cause. Human Rights Watch criticise the broad nature of this definition and argue that the term 'influence' is too low a threshold for targeting the state.[50] Both the UNHRC and David Anderson KC, the former Independent Reviewer of Terrorism Legislation, warned that the definition of 'influence' is so broad it puts journalists and bloggers at risk of liability under counter-terrorism powers if they threaten to publish, or prepare to publish, something the government deems a threat to public safety.[51] Therefore, its adoption as the foundation for terrorism-related offences, including section 1 and section 2, risks over-extending the criminal law. As Hunt rightly argues, the broad definition combined with section 1(5)(a) and section 2(7) 'facilitates the criminalisation of a form of direct encouragement to engage in terrorism in a general and undifferentiated way that would not previously have been caught by common law incitement'.[52]

The concern surrounding the wide definition of 'terrorism' was raised in *R v Gul*, where the Supreme Court found that 'the concerns and suggestions about the width of the statutory definition [of terrorism] … merits serious consideration'.[53] In *R v Gul*,[54] police discovered videos on the defendant's computer that were uploaded online depicting, amongst other things, attacks on Coalition forces in Afghanistan and Iraq. The question for the court was whether

[49] Choudhury (n 28) 471.
[50] Human Rights Watch, 'Briefing On The Terrorism Bill 2005' (Human Rights Watch, November 2005) <https://www.hrw.org/legacy/backgrounder/eca/uk1105/3.htm > accessed 2 November 2023, 9.
[51] Turner (n 32) 217.
[52] Hunt (n 4) 5.
[53] *R v Gul (Mohammed) [2012] WL 488487,* [62].
[54] *R v Gul (Appellant) [2013] UKSC 64*

these depictions fell within the definition of terrorism in section 1 of the Terrorism Act 2000. The defence argued for a narrower interpretation of section 1, arguing that the concept of terrorism should align with international law, which does not include military acts by non-state armed groups against states or intergovernmental organisations.[55] The defence also argued that the definition should not include acts abroad unless considered criminal under international law.[56]

Although it recognised that the definition of terrorism under section 1 was 'very wide indeed', the Supreme Court upheld Gul's conviction and rejected the arguments for a narrower definition of terrorism on two grounds. First, it was held that there is no 'accepted' definition of terrorism in international law so there was no consensus on whether specific instances could be exempt from the terrorism label. Second, there was no combatant immunity for insurgents who participated in non-international armed conflict.[57] The Court confirmed that domestic legislation can go much further than is required by an international treaty in what is known as 'gold-plating' as long as the state's legislation is not explicitly prohibited by law.[58]

This outcome is unsatisfactory for several reasons. First, gold-plating might be permitted, but it may be objectionable if it extends the definition of 'terrorism' too far, as is the case here. Awan notes that the United Nations for example has not yet accepted a definition of terrorism and Warbrick notes that 'a widely accepted definition of terrorism in international law has proved elusive'.[59] However, this does not mean that it is justified to define terrorism as widely

[55] Ibid [24].
[56] Ibid [24].
[57] Ibid [50].
[58] Ibid [53].
[59] Colin Warbrick, 'The Principles of The European Convention on Human Rights and the Response of States to Terrorism' (2002) European Human Rights Law Review 287.

as it is. Second, the court in *R v Gul* as well as in *Miranda*[60] notes that a wide definition of terrorism may be 'deliberately adopted' to allow for the 'many disparate forms which terrorism may take' to be tackled by law enforcement agents at the forefront of the criminal justice system. This argument risks criminalising activities that do not warrant prosecution and relies too heavily on prosecutorial discretion to set the limits of criminal law, which should ideally be defined by clear principles rather than discretion.[61] Lastly, critics argue that international law has changed so that international regulatory frameworks on terrorism govern what states ought and ought not to do.[62] It flies in the face of international conventions if courts disregard the boundaries of the criminal law set by mutually-signed agreements. However,

a strong counterargument is that the criminal law is solely a domestic matter whose scope is to be decided by the sovereign state.[63]

2.2.3 Indirect Encouragement- Glorification

Section 1 criminalises 'indirect encouragement', but these terms are not clearly defined in the legislation and the case law. This section makes 'oblique' incitement a crime, but the concept of "indirect encouragement" is hard to define clearly. The Act remains largely silent on how to define it, but section 1(3) provides that:

[60] *David Miranda v Secretary of State for the Home Department [2014] EWHC 255 (Admin)*; in this case, the court sought to clarify and narrow the definition of terrorism under section 1 of the Terrorism Act 2000 by concluding, obiter, that Parliament must have intended a mental element to be read into the definition.
[61] *R v Gul (Appellant) [2013] UKSC 64*, [30].
[62] Christopher Harding, 'International Terrorism: The British Response' (2002) Singapore Journal of Legal Studies 16; Steve Peers, 'EU Responses to Terrorism' (2003) 52 International & Comparative Law Quarterly 227
[63] Antonio Coco, 'Crocodile Tears: The UK Supreme Court's Broad Definition of Terrorism in R v Mohammad Gul' (*EJIL: Talk!*, 18 November 2013) <https://www.ejiltalk.org/crocodile-tears-the-uk-supreme-courts-broad-definition-of-terrorism-in-r-v-mohammed-gul> accessed 10 July 2025.

> For the purposes of this section, the statements that are likely to be understood by [a reasonable person] as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include—
>
> (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
>
> (b) is a statement from which...members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.[64]

This provision states that 'glorification' of terrorism can constitute 'indirect encouragement'. The term 'glorification' has generated the most controversy. Under section 20(2), 'glorification' is defined as 'any form or praise or celebration'.[65] However, the scope of 'glorification' is limited as it would only occur if members of the public could reasonably be expected to infer that the glorified conduct should be emulated by them. This partially limits the scope of the offence. This restriction only limits the glorification of terrorism, not other indirect forms of encouragement related to terrorist activities.

A set of issues arise as to the vagueness and uncertainty of the term 'glorification' in the definition of indirect encouragement. Importantly, the Joint Committee on Human Rights argued that:

[64] Section 1(3) of the Terrorism Act 2006
[65] Section 20(2) of the Terrorism Act 2006

> ‘Terms such as glorification, praise and celebration are too vague to form part of a criminal offence which can be committed by speaking. The Home Secretary draws a distinction between encouraging and glorifying on the one hand and explaining or understanding on the other. The last two, he says would not be caught by the new offence, because they do not amount to encouraging, glorifying, praising or celebrating …
>
> In our view, the difficulty with the Home Secretary's response is that his distinction is not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification’.[66]

These concerns are echoed by the many critics who have supported the view that legislation should accord with the principle of certainty and respect human rights.[67] However, Hunt argues that the scope of ‘glorification’ is not as wide as it seems because there is a general understanding of what constitutes ‘glorification’ of terrorism in terms of promulgating praise and celebration.[68] Hunt argues that concepts such as ‘praise’ and ‘celebration’ may be justified grounds for an indirect encouragement offence as they are no less precise than terms such as ‘obscene’ or ‘insulting’, which form the basis of other speech offences. Barendt also supports the inclusion of ‘glorification’ of terrorism among statements that may be understood as indirectly encouraging acts of terrorism, because any speech ‘advocating or urging the use of

[66] Joint Committee on Human Rights (n 14) 18.
[67] Hunt (n 4)
[68] Ibid 6.

force or law violation could be held criminal'.[69] In principle, the use of the term 'glorification' is not objectionable because attributing criminal liability to someone who glorifies terrorism seems fair. The legislation also provides a safeguard in the reasonable test. Hunt rightly argues that the reasonableness test embedded within section 1(3) is an adequate safeguard that allows the court to draw inferences about what is praised or glorified in different circumstances.[70]

The main concern is not about including 'glorification', but about the idea of 'indirect encouragement/incitement' and whether someone can be held liable if their actions are distant and far removed from the actual terrorist harm.[71] This makes the task of giving judicial directions to juries more difficult. Awan notes that a jury will be responsible for 'determining and applying the standards of the community in which it lives' to consider: 1) whether as a matter of fact a statement amounts to indirect encouragement to some members of the public; 2) whether it glorifies the commission of acts and indirectly encourages regardless of whether it glorifies, and 3) the glorification includes any praise or celebration.[72] This convoluted way of defining indirect encouragement as 'glorification' leaves room for debate as to what constitutes 'glorifying' statements and how juries might see the matter. Furthermore, how does the 'reasonable' test operate in practice? And does it limit the scope of the offence?

In response to these questions, courts could provide an even narrower interpretation of 'indirect encouragement'. In *R v Faraz,* the Court of Appeal approved an interpretation of indirect encouragement to require that if encouragement is not expressed in a publication, it must be

[69] Eric Barendt, 'Incitement to, and Glorification of, Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009), 456.
[70] Hunt (n 4) 6.
[71] Ibid.
[72] Awan (n 72).

'necessarily implicated'.[73] This test arguably confines indirect encouragement to its necessary limits. On this interpretation, the offence would include glorification and justification of terrorism, but it would not catch 'mere depictions or discussions of terrorism' if they might have encouraging effects.[74] Cornford notes that this interpretation 'would be consistent with both the wording and purpose of the 2006 Act' and might make the offence consistent with the right to freedom of expression.[75] Unfortunately, the case of *R v Ali (Humza)* (2018) saw the courts reject the 'necessary implication' test in favour of a direct reading of 'indirect encouragement'.[76] The Court of Appeal refused to acknowledge the defendant's request for a direction regarding these terms and doubted whether any explanation for 'indirect encouragement' should be given at all.[77] Cornford rightly argues that the court should be invited to prefer the narrow approach in *Faraz* if the issue arises again.[78]

The fact that the courts have attempted to narrow and then reversed the narrowing of the scope of 'indirect encouragement' is worrying. It leaves the scope of the offence too wide and creates inconsistency in its application. The outcome of this serious offence will largely depend on what others infer about the impact of the disputed statement, which means wrongfulness is again judged from a potentially misleading 'objective' perspective. Other factors further suggest that an offence penalising indirect encouragement through publication is disproportionate and unjustified. These include the breadth of the definition of 'acts of terrorism', discussed above, the weak *mens rea* which will be explored later, and also the fact that there is no requirement

[73] *R v Faraz (Ahmed Raza) [2012] WL 6151907,* [53].
[74] Andrew Cornford, 'Terrorist Precursor Offences: Evaluating the Law in Practice' (2020) Criminal Law Review 663, 8.
[75] Ibid 8
[76] *R v Ali (Humza) [2018] EWCA Crim 547,* [22].
[77] Ibid, [23].
[78] Cornford (n74).

to assess whether there is a 'risk' of anyone being encouraged, which is perhaps the most problematic aspect of this offence.

2.2.4 Indirect Encouragement- Other Inducement

While section 1 identifies 'glorification' as an example of indirect encouragement, it offers no further guidance on what else falls within the scope of indirect encouragement. Section 1(1) extends beyond indirect encouragement to criminalising 'other inducements' to the commission, preparation or instigation of an act of terror or Convention offence.[79]

Much of the parliamentary debate attempted to define the meaning of these terms. During one debate, opponents cited examples of statements that might fall within this offence including statements by Cherie Blair KC,[80] and Liberal Democrat MP Jenny Tonge,[81] expressing views on the motivations of those carrying out suicide bombings. The Joint Committee on Human Rights (JCHR) acknowledged that the government was trying to determine where to draw the line between expressing or explaining a view, and glorification/encouragement on the other hand.[82] The JCHR argued that such a distinction is 'not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification'.[83] This

[79] Section 1(1) of the Terrorism Act 2006
[80] George Jones and Anton La Guardia, *'Anger at Cherie 'sympathy' for suicide bombers' (The Telegraph, 19th June 2002) <https://www.telegraph.co.uk/news/worldnews/middleeast/jordan/1397696/Anger-at-Cherie-sympathy-for-suicide-bombers.html>* accessed 2 November 2023.
[81] Nicholas Watts, 'Lib Dem MP: Why I would consider being a suicide bomber' (The Guardian , 23rd January 2004) <http://www.guardian.co.uk/politics/2004/jan/23/israel.liberaldemocrats> accessed 2 November 2023.
[82] Joint Committee on Human Rights (n 14) [28].
[83] Ibid [28].

means that the breadth of this offence undermines the principle of consistency required by the rule of law constraint as defined in Chapter 4.

The legislation is silent on what constitutes 'other inducements'. Inducement can be defined as leading by 'persuasion or influence' and is somewhat analogous to the term 'incitement'.[84] How does 'inducement' differ from 'encouragement'? Again, the definition is inherently uncertain, and Hunt argues rightly that ultimately, the meaning of what counts as indirect encouragement, other than by way of glorification, will be left to the courts to determine. Hunt also criticises the overlap between the existing law of incitement and indirect encouragement: 'the question arises as to what statements/publications are capable of being encouragement in that sense, even though they would not constitute encouragement for the purposes of common law incitement'.[85] The formal test for what is 'encouragement' is found in *Marlow* and *Invicta Plastics Ltd v Clare,* where the term was defined as anything capable of encouraging another to engage in prohibited conduct, even if it does not contain 'express encouragement' as such.[86] However, this does not define a test with which to draw the line between what is encouragement and what counts as incitement in the traditional sense.

Arguably, a clearer definition of indirect encouragement can be found in the one rejected by Parliament, which states that:

> 'A statement referring to terrorism in such a way that the listener, reader or viewer would infer that he should emulate it'.[87]

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[84] Ibid.
[85] Hunt (n 4) 7.
[86] *Invicta Plastics Limited v Clare [1976] RTR 251*; *R v Marlow [1997] Crim LR 897*
[87] House of Commons, *Votes and Proceedings*, 16 March 2006, [10] <https://publications.parliament.uk/pa/cm/cmvote/60316v01.htm> accessed 10 July 2025.

Hunt argues that this definition is not only more certain but is commendable because it might be more compatible with Article 10 as reflected in the jurisprudence of the European Court of Human Rights that the 'statement incites people to violence or communicates that violence is a necessary and justified measure'.[88] Nevertheless, since Parliament specifically rejected this clear definition of indirect encouragement, it can be argued that the definitions within section 1 and section 2 are not compatible within the Convention, a point that will be explored in a later section.

2.3 Mens Rea

To establish *mens rea* under section 1(2), the prosecution must demonstrate either a deliberate intention to directly or indirectly incite or encourage members of the public to commit, prepare, or provoke acts of terrorism or Convention offences.[89] Alternatively, it must prove the defendant had a reckless disregard as to whether such actions would directly or indirectly encourage such potential terrorist acts or offences.[90] To be considered reckless, it must be proven that the defendant was aware of this risk, and, given the circumstances known to them, it was unreasonable to take that risk.[91]

The *mens rea* of direct intent required is uncontroversial and serves to limit the reach of section 1 appropriately. In cases such as *R v Iqbal*, *Rahman* and *Runa Khan*, the publication of

[88] Committee of Experts on Terrorism (CODEXTER), *Collection of Case Law of European Court of Human Rights Related to "Apologie du Terrorisme" and "Incitement To Terrorism" (CODEXTER)* (Council of Europe, Strasbourg 4th June 2004), 19.
[89] Section 1(2)(b)(I) of the Terrorism Act 2006
[90] Section 1(2)(b)(ii) of the Terrorism Act 2006
[91] Cornford (n 74) 7.

statements with a 'direct intent' was dealt with quickly, and the courts focused more on troubling aspects of the mental element, such as what constitutes recklessness and the defence under section 1(6).[92] The court in *R v Faraz,* citing *R v Brown*, held that specific intent is an essential ingredient limiting the scope of criminalisation in this offence.[93]

Greater concern has been expressed about the recklessness requirement found in section 1(3). Article 5 of CECPT defines a public provocation to commit an act of terrorism as 'intentionally inciting' the commission of a terrorist offence.[94] In implementing its obligations under the CECPT, the UK again went much further than required to do so and (arguably erroneously) allow section 1 and section 2 to be committed recklessly. It is alarming that the offence can be committed recklessly, as this means someone could unintentionally encourage terrorism.[95] Further, allowing recklessness to form the *mens rea* for a pre-inchoate offence such as encouragement goes against the principle that the highest mental element is usually required for inchoate offences such as attempts.[96]

The use of the weaker *mens rea* of recklessness in section 1 and section 2 has been discussed extensively by the Joint Committee on Human Rights. The Committee noted that as originally drafted, section 1 and section 2 only required recklessness instead of intention, so a defendant only has to have knowledge or belief that members of the public were likely to understand the statement as direct or indirect encouragement of terrorism.[97] The then Home Secretary justified this on the ground that it would be difficult to secure convictions for the offence if specific

[92] *R v Iqbal (Abbas Niazi); R v Iqbal (Ilyas. Niazi) [2010] EWCA Crim 3215* ; *R. v Rahman (Abdul) [2008] EWCA Crim 1465* ; *R. v Khan (Runa) [2015] EWCA Crim 1341*
[93] *R v Faraz (Ahmed Raza) [2012] WL 6151907*, [55].
[94] *Council of Europe Convention on the Prevention of Terrorism*, Article 5.
[95] Human Rights Watch (n 50) 4.
[96] Arnold N. Enker, 'Mens Rea and Criminal Attempt' (1977) 2 American Bar Foundation Research Journal 845.
[97] Joint Committee on Human Rights (n 14) 19.

intent was used.[98] This was rightly criticised by the Committee for removing a 'necessary safeguard against the offence being too broad in question', who subsequently proposed a test of subjective recklessness rather than an objective one to narrow the scope of the offence.[99]

The main issue arising from the case law on *mens rea* concerns the question of how 'subjective' the 'recklessness' requirement is. Is it a subjective or objective test? As the offences currently stand, both section 1 and section 2 seem to impose an objective test which, as Barendt notes, does not even require someone to know that the materials they disseminated might encourage others to perpetrate terrorism.[100] This is highly undesirable as a matter of principle. This was addressed in *R v Faraz* and the 2023 case of *R v Deghayes*, which clarified that the test is indeed a subjective one. In *Faraz*, the court explicitly stated that the test was 'subjective recklessness' namely that 'the defendant had knowledge of a serious and obvious risk' of the publication's encouraging effects.

This decision was reaffirmed in *Deghayes*, where the defendant made a spontaneous speech at a mosque that included the phrase 'Jihad, jihad, jihad, jihad is compulsory. Jihad by fighting by sword means jihad is a compulsory obligation upon you'.[101] In assessing the spontaneous nature of the speech, the judge could have applied an objective test in determining the effects of the speech on the defendant's audience. However, the judge examined the subjective behaviour of the defendant and found that he encouraged terrorism recklessly, not intentionally, because he 'did not care' about the effects of his speech on others.[102] This approach is welcome

[98] Ibid 19.
[99] Ibid 64.
[100] Barendt (n 69) 457.
[101] *R v Abubaker Deghayes [2023] EWCA Crim 97*
[102] Ibid [12].

because it significantly narrows the *mens rea*, although some argue that requiring intention is the best way to protect against encroaching on rights.

2.4 Defence

Section 1(6) provides that:

> (6) In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation, or instigation of acts of terrorism or Convention offences, it is a defence for him to show—
>
> (a) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and
>
> (b) that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

This defence is only applicable to 'reckless' encouragement where the defendant was unaware or did not endorse the contents in the relevant statements. However, Cornford argues that this defence is 'nowhere to be seen in the case law, including cases in which one would expect it to have been used such as *Mohammed'* where persons selling books relating to Islamic literature legally before the Terrorism Act 2006 came into force, and had no intention to encourage

terrorism and had not participated in dangerous activities, would arguably still fall outside the scope of this narrow defence.[103] In *Ahmed*, the defence was raised, but the court held that as evidenced by the facts of the case, the defendant foresaw the consequence of their actions.[104] In this case, the repeated posts online were clear evidence that rebutted the defence.[105] This suggests that the defence is more difficult to raise than it appears. It requires one to show the defendant did not endorse the contents, but it must be 'objectively' clear in the circumstances.[106] It also reverses the burden of proof on the key elements of intent, a problem that will be discussed in the next chapter.

3. Section 2- Dissemination

Section 2 creates a more elaborate offence of disseminating a 'terrorist publication'. The first two subsections state that:

> (1) A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so—
>
> (a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;
>
> (b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or

[103] Cornford (n 74) 8.
[104] *R v Ahmed [2018] EWCA Crim 133*, [16].
[105] Ibid [30].
[106] Cornford (n 74) 8.

(c) he is reckless as to whether his conduct has an effect mentioned in paragraph (a) or (b).

(2) For the purposes of this section a person engages in conduct falling within this subsection if he—

(a) distributes or circulates a terrorist publication;

(b) gives, sells or lends such a publication;

(c) offers such a publication for sale or loan;

(d) provides a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan;

(e) transmits the contents of such a publication electronically; or

(f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

3.1 Actus Reus

While section 1 is concerned with the publication of a statement, section 2 is concerned with its dissemination. The *actus reus* is premised on whether a publication qualifies as a terrorist publication.[107] Section 2(3) states that a terrorist publication must contain matter that:

[107] Section 2(3) of the Terrorism Act 2006

(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or

(b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.[108]

Therefore, the publication extends not only to statements that directly and indirectly encourage acts of terror but also to those that may be useful to the commission, preparation or instigation of such acts. However, this is contingent upon the assessment made at the time of the conduct, taking into consideration both the entirety of the publication's contents and the circumstances surrounding the conduct.[109] Section 2, like section 1, considers publications that glorify past or future acts of terrorism as encouraging, if it can be reasonably inferred that others may emulate such acts.[110] Moreover, it is irrelevant to the *actus reus* whether the content of an article actually encourages or influences someone to commit or prepare acts of terrorism, or if it is actually used in the commission or preparation of such acts.[111] Section 2 suffers from the same defects as section 1. The assessment of whether a statement falls within section 2 depends on an objective test. It contains vague definitions of indirect encouragement and broad *actus reus* requirements. It does not matter whether anyone is in fact encouraged by the disseminated statements.

[108] Section 2(3) of the Terrorism Act 2006
[109] Section 2(5) of the Terrorism Act 2006
[110] Section 2(4) of the Terrorism Act 2006
[111] Section 2(8) of the Terrorism Act 2006

Turning to 'dissemination', the term is defined to include giving, lending, transmitting or selling the publication as well as providing a service to others that enables them to read, listen to or look at such a publication, or to acquire it by through a gift, sale or loan.[112] Hunt observes that in principle, some of the conduct capable of constituting 'dissemination' would attract criminal liability under existing common law or statutory incitement offences.[113] However, he argues that 'much of the conduct is likely to be considered too remote from the material to constitute 'encouragement' in and of itself and is therefore unlikely to have been caught applying traditional principles of incitement law'.[114] Arguably, Hunt is right in that the pre-inchoate nature of this offence would not fall under the remit of incitement offences. Unlike section 1, the audience is not limited to the public, but to 'persons'. Thus, giving a terrorist publication to people in a private setting in a way specified under section 2(2) would be caught by the offence.

Possession of a 'terrorist publication' with a view to dissemination is also covered by this offence, as outlined in section 2(2)(f). The use of 'with a view' in the *actus reus* is confusing as it implies that possession of terrorism-related material would be criminalised if an intention to disseminate it is found. This is dangerously wide as it criminalises conduct that is one step removed from the conduct specified in sections 2(a) to 2(e). This also unnecessarily overlaps with the offence under section 58 of the Terrorism Act 2000. Hunt argues that the requirement goes too far, because this conduct would not be caught by the common law offence of incitement. The mere possession of statements, without requiring (as incitement does)

[112] Hunt (n 4).
[113] Ibid 3.
[114] Ibid 3.

communication or attempted communication of the materials to others, would be caught under this provision.[115]

Section 2(1)(b) criminalises dissemination of terrorist statements if 'he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts'.[116] The inclusion of the *actus reus* of 'assistance' is unusual because it extends the scope of the offence beyond direct or indirect encouragement. Under the doctrine of accessorial liability and notably in *Jogee*,[117] 'assistance', and 'encouragement' are often discussed alongside each other. However, the two terms contain different conceptual foundations. Davies notes that there is a weak causal connection between the ultimate harmful act done by another and the assistance of someone whose conduct (and intention) might or might not actually assist the commission of harm.[118] While this section will not discuss the doctrine behind assistance/accessorial liability in great detail, it can be said that section 2(1)(b) does little to narrow the scope of the dissemination offence. It widens the potential reach of the offence since assistance in the 'commission or preparation' of acts of terrorism is arguably more remote than direct or indirect encouragement of such acts.

3.2 Mens Rea

Section 2(2) outlines the *mens rea* elements as intention or recklessness, which have similar flaws to those in section 1, discussed above.[119] However, the *mens rea* requirements in section

[115] Ibid 3.
[116] Section 2(1)(b) of the Terrorism Act 2006
[117] *R v Jogee [2016] UKSC 8*
[118] Paul S Davies, 'Accessory Liability for Assisting Torts' (2011) 70 The Cambridge Law Journal 353.
[119] *R v Brown (Terence Roy) [2011] WL 5828783,* [23]; in this case, the court found that a criminal act of distribution with 'specific intent' required by the offence was difficult to dispute with reference to any defence or human rights claims.

2 is wider than those found in section 1(2), as it covers an intention to encourage as well as 'assistance', intending 'an effect of his conduct to be the provision of assistance in the commission or preparation of such acts'.[120] This extra *mens rea* requirement makes this a broader offence than section 1. Again, there is no requirement for the dissemination to actually assist or encourage another to perform terrorist acts.

The wording of section 2(2)(f) concerning dissemination 'with a view to' suggests that the defendant's primary goal does not have to be intent, but the intent towards a secondary action such as to distribute, give, offer, provide a service to others, or transmit the contents of such publication electronically must be one of their aims regarding the matter. This must be factored into the *mens rea* assessment. However, the scope of the *mens rea* element is extremely vague. A plain reading might lead to an interpretation that a lesser form of *mens rea* is required. However, the court in *R v Faraz* clarified the matter by noting that 'with a view' should be read as 'with intent that', which arguably is much clearer.[121]

Under section 2(6), the references made to the effect on a person's conduct under section 2(1) include the impact of the publication on one or more individuals who have access to it or may obtain access to it because of that individual's conduct. This is an objective test. In *R v Brown*, the court explained that the *mens rea* element is: 'subject to determination on the basis of the facts as they existed at the time of the conduct, in the context of the publication as a whole and to the circumstances in which the conduct occurred'.[122] This runs into the problems discussed in the section 1 offence. The *mens rea* elements of this offence are judged based on the

[120] Section 2(1)(b) of the Terrorism Act 2006

[121] *R v Faraz (Ahmed Raza) [2012] WL 6151907,* [49]; the court noted that 'if the jury were to find that a publication was in the possession of the defendant it would only constitute an engagement in conduct for the purposes of section 2(1) only if the defendant intended that it should be distributed or given or sold etc'.

[122] *R v Brown (Terence Roy) [2011] WL 5828783,* [23].

perspective of a 'reasonable man'[123] determining whether the effect of the publication on one or more persons to whom it is or may become available as a consequence of that conduct, would have an encouraging or assisting effect.[124]

The justification for requiring such an objective test is unsatisfactory. At the Commons report stage of the bill, MP Hazel Blears observed that 'if we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts'.[125] However, this justification runs the risk of creating offences that lack adequate safeguards in terms of stricter *mens rea* requirements. It can be argued that, as the Joint Committee on Human Rights notes, 'such a test actually provides little narrowing of the application of the offence compared to the original wording'.[126]

In practice, cases of purely reckless and unintentional encouragement have led to convictions, raising concerns about the undemanding nature of the recklessness requirement.[127] Critics argue that courts have focused on awareness rather than the reasonableness of the risk, making convictions more likely.[128] During the COVID-19 pandemic, the online spread of terrorist publications increased, making it easier for them to be shared. As a result, the potential for criminal liability grew, especially since section 2 covers a broad range of culpable acts and

[123] Thomas-Symonds, *Counter-Terrorism and Border Security Bill (Fourth sitting) Commons: 3 July 2018, col.95*; Thomas-Symonds observed that 'the changes mean that when we look at dissemination of this material, we can consider vulnerable victims, whether they are adults or children, and not be stuck with the objective test, which means that they cannot be covered'.
[124] Section 2(6) of the Terrorism Act 2006
[125] Hazel Blears, *HC Deb, 9 November 2005, Col. 390*.
[126] Joint Committee on Human Rights (n 14) [32].
[127] *R v Faraz (Ahmed Raza) [2012] WL 6151907*, [33].
[128] Stuart Macdonald and Nuria Lorenzo-Dus, 'Intentional and Performative Persuasion: The Linguistic Basis for Criminalizing the (Direct and Indirect) Encouragement of Terrorism' (2020) 31 Criminal Law Forum 473.

mental states.[129] The internet's vast possibilities for spreading information endlessly and reaching a huge online audience have raised issues, which worsen the problems of culpability under section 2.[130]

3.3 Defence

There is a partial defence under section 2(9) in the case of recklessness dissemination if the defendant proves that the publication 'did not express his views nor had his endorsement' and that this is clear from the circumstances.[131] However, it only applies to the dissemination of publications that are likely to be understood as a direct or indirect encouragement. It is not available if the publication is likely to be useful to the commission or preparation of such acts.[132] Many of the defects discussed in relation to the section 1(6) defence apply and will not be repeated here.

In practice, it is quite difficult to use the statutory defence given that although encouragement might be very indirect and the dissemination might carry little risk of actually encouraging a terrorist act. It is difficult to show that it is 'clear' from all circumstances that there was non-endorsement by the defendant. The courts have refused to narrow the offence under section 2. In *R v Brown*,[133] it was held that the defence of uncertainty concerning section 2 was unfounded

[129] Jonathan Hall, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act 2011* (Independent Reviewer of Terrorism Legislation, UK Government 2021) <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020/the-terrorism-acts-in-2020-report-of-the-independent-reviewer-of-terrorism-legislation-accessible-version> accessed 9 July 2025.
[130] Martin Rudner, '"Electronic Jihad": The Internet as al-Qaeda's catalyst for global terror', *Violent Extremism Online* (Routledge 2016).
[131] Section 2(9) of the Terrorism Act 2006
[132] Section 2(10) of the Terrorism Act 2006
[133] *R v Brown (Terence Roy) [2011] WL 5828783*, [31].

as the elements of the crime are well-defined, requiring deliberate intent or recklessness. Rejecting inadvertence as a defence, the judge remarked that a crime 'cannot be committed by accident'.[134] The court's tough stance and rejection of defences of ignorance or mistake is concerning. Real-world restrictions and the increasing role of online communication and entertainment during COVID-19 lockdowns may well have moved some terrorist activity online.[135] This is evident from prosecutorial data, which show that arrests for sections 1 and 2 are increasing, which is an alarming trend with implications that will be discussed at the end of this chapter.[136]

Since section 2 deals with disseminating publications, it also brings up important questions about whether a defendant could use a 'freedom of expression' defence, as seen in *R v Brown*, which is arguably a stronger argument than the vague statutory defence.[137] Many cases concerning section 2 raise this defence, which will be discussed in the next section.

[134] Ibid [32].
[135] Gary Ackerman and Hayley Peterson, 'Terrorism and COVID-19' (2020) 14 Perspectives on Terrorism 59; Hall (n 129), [2.29].
[136] Data in 2021 show a large growth in the charges for disseminating terrorist publications. See:
Home Office, *'Operation of Police Powers under the Terrorism Act 2000 and subsequent legislation' (June 2021)* <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-june-2021> accessed 6 November 2023.
[137] *R v Brown (Terence Roy) [2011] WL 5828783*

4. Justifications For Criminalising Encouragement

4.1 Encouragement And Wrongfulness- Direct And Indirect Encouragement

Scholars are divided on whether broad offences related to encouraging crime are legitimate. Simester and von Hirsch argue that they are illegitimate by definition.[138] This view holds that we are accountable for our own actions, not those of others. Even if your behaviour raises the risk of someone else committing a crime in the future, it does not mean that your actions are wrong.[139] However, you could be held responsible if you deliberately and directly encourage someone else's actions. As Ashworth notes, this is only justifiable if you have a clear intention to assist or are aware of the consequences of your act.[140] Most commentators agree that a person should not be held responsible merely because they expressed support for something that might encourage terrorism.[141] The Independent Reviewer of Terrorism Legislation Report for 2020 notes that the wrongfulness under section 2 (dissemination) is in the 'attribution' of responsibility by the disseminator to future potential acts of terrorism.[142] However, the wrongfulness in encouraging or disseminating is insufficient grounds to criminalise as it is *prima facie* an innocent act that is not inherently wrong. On this view, criminalising the act of dissemination is difficult to justify even when it involves the celebration or glorification of terrorism.

[138] Andrew P Simester and Andrew von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28 Criminal Justice Ethics 89.
[139] Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in A. P. Simester and A. T. H. Smith (eds), *Harm and Culpability* (Oxford University Press 1996).
[140] Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Criminal Law and Philosophy 237, 247.
[141] Hunt (n 4) 10.
[142] Hall (n 129) [3.16].

By contrast, Cornford has argued that encouragement can be legitimately criminalised: 'you cannot deny responsibility for risks that you create simply because they take the form of harms that I will ultimately cause'.[143] On this view, if your actions increase the 'risk of harm' that I go on to commit a crime then you must be held accountable for that risk to some extent. This is a problematic justification. Section 1 and section 2 criminalise pre-inchoate harms that are remote from the ultimate act. Encouragement and dissemination as conduct increases the risk of harm that someone might commit an act of terror, which is a valid ground for criminalisation according to Finkelstein.[144] However, the remoteness principle applies because the commission of the harm is dependent on wrongdoing by others who might be exposed to the statements, meaning that the encourager or disseminator of terrorist-related information is liable for the potential, and remote, action of third parties. Even on this view, Cornford argues that we should be cautious about creating offences that penalise encouragement as wrongdoing: 'the risk of encouragement involved may be small or illusory, and the social value of the conduct constituting the encouragement such as freedom to express unconventional opinions publicly, may be great'.[145] The potential risks of encouragement should not be ignored, but they must be weighed against the qualified right to free expression, a topic to be discussed later.

A justification for attributing wrongfulness to the encouragement of terrorism can be found in the offence principle, which permits the criminalisation of 'offensive behaviour' stemming from non-harmful conduct to protect the sensibilities of victims of terrorist attacks and the public at large. Feinberg notes:

[143] Cornford (n 74) 6.
[144] Claire Finkelstein, 'Is Risk A Harm?' (2002) 151 U Pa L Rev 963.
[145] Cornford (n 74) 6.

> ‘It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end’.[146]

According to Feinberg, if the outcome of the conduct constitutes an affront to public sensibilities then provided that enough people suffer from this offence, prohibition seems reasonable even though what is protected might not be.[147] However, Simester and von Hirsch argue that the offence has to involve wrongdoing.[148] This argument is persuasive as punishment and censure should only be inflicted upon the perpetrator of a wrongful act. Therefore, even if the offence principle identifies a reason for criminalising the encouragement of terrorism, it is necessary to identify a wrongfulness element. As explained above, it is difficult to identify the precise wrongdoing within section 1 and section 2 as they are drafted in vague terms, capturing a wide range of conduct that might not be equally blameworthy. The core issue in examining wrongdoing is how exactly are direct and indirect acts of encouraging terrorism wrongful.

Worryingly, sections 1 and 2 are drafted to prevent acts by an independent third party, but the ultimate harm is irrelevant to the offender's liability. It does not matter if the statement actually encourages or induces someone to commit, prepare, or instigate acts of terror.[149] The focus of these offences is on the actions of the person doing the encouraging. From this perspective, the offence fits retributive theory- the encourager is punished for promoting a wrongful act that is blameworthy and deserves punishment, regardless of its consequences. This offence prohibits

[146] Joel Feinberg, 'Offensive Nuisances', in *The Moral Limits of the Criminal Law: Volume 2: Offense to Others* (Oxford University Press 1988).
[147] Ibid.
[148] A. P. Simester and Andrew von Hirsch, 'Rethinking The Offense Principle' (2002) 8 Legal Theory 269, 273.
[149] Sections 1 and 2 of the Terrorism Act 2006

morally blameworthy behaviour of encouraging acts of terrorism and punishes the wrongdoing only concerning this behaviour. The question is, why should the publication or dissemination of statements that are likely to be understood as a direct or indirect encouragement to the commission of an act of terrorism be considered blameworthy enough to attract criminal punishment? Even if they are blameworthy, is the extent of these offences and their sentences justified?

It is useful to distinguish between direct and indirect encouragement. Direct encouragement entails strong normative involvement by the accused in the future conduct of others if encouragement can be closely linked to the violent act.[150] Barendt gives the example of a statement that strongly urges someone to detonate a bomb or pull a trigger.[151] He argues that such a speech is so closely linked with the encouraged wrongdoing that it can be characterised as wrongful conduct or action.[152] As Mill famously said:

> 'An opinion that corn-dealers are starvers of the poor, or that private property is robbery . . . may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard'.[153]

Mill's point was that an opinion, expressed under the right circumstances, can be inherently wrongful if it has sufficiently close links with the encouraged wrongdoing. This seems entirely consistent with the normal rules of imputation. Indeed, Mill's scenario provides positive

[150] Ashworth (n 140) 248.
[151] Barendt (n 69) 447.
[152] Ibid.
[153] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press, USA 1998), 53.

reasons for criminalising the encouragement of terrorism by identifying wrongfulness in terms of the real and imminent threat of insurrection or violence. Direct encouragement is analogous to the common law offence of incitement, which is used to refer to messages that are affirmative, clear and directed at inciting violence and that the incitees must be persuaded to participate in criminal acts that are 'particular' or specific.[154] This is relatively uncontroversial. However, the offences under section 1 and section 2 criminalise something more than direct incitement as Charles Clarke told the Commons:

> 'It is already an offence under our law to incite people directly to commit specific terrorist acts. We now want to be able to deal with those who incite terrorism more obliquely, but who nevertheless contribute to the creation of a climate in which impressionable people might believe that terrorism was acceptable'.[155]

Direct encouragement of terrorism differs from direct incitement. The encouragement offences under the Terrorism Act 2006 might be conceptualised as less specific than direct incitement, but more serious than indirect encouragement. To determine wrongfulness properly, direct encouragement of terrorism is defined as a 'direct' call to commit an act of terrorism. Indirect encouragement refers to indirect or oblique forms of advocacy where no specific exhortation of terrorism is proven but might feature the glorification of terrorism. Under these definitions, direct encouragement is a *prima facie* wrong, although it is difficult to pinpoint the degree of wrongfulness without referring to a specific statement.

[154] Response to Q3, Home Affairs Committee, 11 October 2005
[155] *Hansard HC Vol 438 col 334 (26 October 2005)*

As one moves towards indirect encouragement, determinations of wrongfulness become more difficult. There are cases of indirect encouragement that might not appear wrongful, particularly if they are committed recklessly. Without an intention to encourage acts of terrorism, there is a danger that these offences criminalise less serious conduct. Without a requirement of a 'probable connection' between the act and the instigation or a 'clear and present danger' requirement, combined with the wide definition of 'terrorism' under section 1 of the Terrorism Act 2000 and the increased use of online platforms that proliferate information in a diffused way, this becomes even more problematic.[156]

4.2 Encouragement And Culpability- Ulterior Fault And Radicalisation

The culpability constraint is a significant hurdle in justifying the criminalisation of encouragement offences under sections 1 and 2. It is challenging to establish wrongfulness under these offences without requiring intention rather than recklessness as the *mens rea* standard. Otherwise, objectively innocent conduct may be criminalised. In pre-inchoate offences, it is impossible to determine wrongfulness without first identifying the intention behind the relevant conduct. Without this intention, the link between the prohibited conduct and the ultimate harm the offence aims to prevent is too remote to warrant the imposition of criminal liability.[157] Although the CECPT require an 'intention' to incite the commission of a terrorist offence, the offences under section 1 and section 2 can be committed recklessly without requiring proof that the statement gave rise to a danger that an act of terrorism may be committed.[158] Arguably, this enables the unjustified criminalisation of non-wrongful conduct,

[156] Barendt (n 69) 459.
[157] Joint Committee on Human Rights (n 14) 19.
[158] Ibid 21.

particularly in cases of indirect encouragement where the normative involvement in the ultimate harm consists of oblique statements of indirect encouragement.

Requiring intention as grounds for culpability in remote harms like indirect encouragement is not without its problems. Barendt correctly notes that determining whether hardcore pornography is 'obscene' is relatively independent of the artist's intention, instead relying on whether the publication relates to conduct that is morally offensive and lacks merit.[159] This is an objective test, as one cannot claim they intended to encourage terrorism as a joke or didn't think anyone would take them seriously, even if they did..[160] Pinpointing culpability in speech-related offences can be challenging.

Child and Hunt's development of the 'future conduct' ulterior-fault *mens rea* doctrine offers one way to conceptualise the culpability targeted by sections 1 and 2. They argue that 'future-conduct' offences, such as encouragement offences, criminalise acts that occur at a later date (actual or contemplated), requiring actions to be completed by another in the future.[161] Since the *mens rea* 'now spread across distinct future events' beyond the traditional element of present-conduct offences, this 'multi-event structure' of criminal liability requires a reconceptualization of culpability as we know it.[162] This applies to pre-inchoate offences such as encouraging acts of terrorism that *might* be committed or instigated by another.

According to the ulterior fault *mens rea* doctrine, a defendant is considered culpable at T1 rightly if he possesses 'intention as to P's future actions- a conditional commitment at T1 to

[159] Barendt (n 69) 456.
[160] Ibid 456.
[161] J Child and Adrian Hunt, 'Beyond the Present-Fault Paradigm: Expanding Mens Rea Definitions in the General Part' (2021) Oxford Journal of Legal Studies, 440.
[162] Ibid 440.

act at T2'.[163] Culpability can be attributed because a causal link can be established if the defendant, at the time of the commission of the act of encouraging or disseminating, intends to cause P's voluntary actions (or another's circumstances, results and *mens rea*) at a later point in time (T2).[164] There are some advantages to this approach. First, the remoteness constraint is satisfied as the causal link between D's intention or commitment and P's subsequent circumstances, mental state and actions at T2 are established. This is doctrinally justifiable. Second, it rightly attributes culpability to D by tying it to his *present* conduct *at the time* instead of to a *future* mental state, even though the harmful conduct concerns the *future* acts of others. However, as section 1 and section 2's *mens rea* contain recklessness, it might be argued there is less commitment to acts at T2 and that the remoteness of any culpability is still far too great to be justified.

In the Independent Review of Terrorism Legislation's 2020 report, he argued that in cases of reckless dissemination of terrorist publications:

> 'This depends on the content of the publication and the particular circumstances in which the conduct i.e. dissemination, occurs … It is therefore unnecessary to show that the individual intended that any act of terrorism would be carried out'.[165]

The report highlights two key requirements for prosecuting the offence: first, 'proof of attribution' (that the defendant himself was responsible for the dissemination) and secondly, 'proof of knowledge' (that the defendant knew of the terrorist nature of the publication).[166]

[163] Ibid 460.
[164] Ibid 461, 462.
[165] Hall (n 129) [3.16].
[166] Ibid.

Once these are established, the defendant can be held accountable. However, it can be argued that this attribution of responsibility is unfair, as it goes against the principles of remoteness and fair imputation of culpability.

Another problem with dissemination is that it involves sharing information with an audience. This means that factors beyond intention or recklessness should be considered. For instance, recent cases have raised questions about whether a defendant who intentionally shares a smaller amount of information is less culpable than someone who recklessly shares a larger amount with more people. This question was addressed in the cases of *Abdul Rahman and Bilal Mohammed* and *R v Runa Khan*.[167]

In the former, Bilal was sentenced to 3 years' imprisonment for selling Islamist extremist material.[168] Mohammed argued that he had no intention to encourage terrorism but was reckless as to the effects of his dissemination and therefore less culpable.[169] In accepting his appeal, the court held that:

> '…large scale dissemination of extremist material with recklessness or indifference as to its effect is capable of being more serious than a limited dissemination with intent to encourage terrorism'.[170]

The culpability constraint operates here since the court acknowledged 'the difference between recklessness and intent…is likely to have a significant effect on culpability'.[171] But the *mens*

[167] *R v Rahman (Abdul) [2008] EWCA Crim 1465*; *R v Khan (Runa) [2015] EWCA Crim 1341*
[168] *R v Rahman (Abdul) [2008] EWCA Crim 1465*, [34].
[169] Ibid [34].
[170] Ibid [46].
[171] Ibid [46].

rea is not purely based on whether someone is intentional or reckless, it also depends on the effect and volume of the dissemination. This interpretation might lead to the strange case where someone who creates little *actual* encouragement, even though he or she fully intended the encouraging effects of their dissemination, is held to be more culpable despite actually not causing any harm.

This problem occurred in *Runa Khan*, where a woman was sentenced to 7 years imprisonment for the online dissemination of messages relating to extremist groups. Khan posted messages on her Facebook profile, which contained 241 friends. The defendant argued that she had no intention to encourage acts of terrorism.[172] However, the court dismissed the appeal and found that her intent was evidenced through her online activity, which 'adds to the gravity of the offending'.[173] The court emphasised that a direct 'intent' demonstrates the defendant's 'deep commitment to the radicalisation of children…into violent jihadist activities' and therefore is the 'most grave' form of *mens rea* which must be sentenced stringently.[174] *Runa Khan* therefore seems to contradict *Bilal* in that limited dissemination with intent to encourage terrorism was held to be more culpable than reckless distribution to a wider audience. While higher culpability should be attributed to intentional acts, this does make section 2 potentially unfair, as the dissemination might be to a very limited number of people, although it could be argued that a few people could inflict catastrophic harm, a point that was unfortunately not elaborated on in the case. As section 2 contains no requirement of a public audience, private communications between individuals may be caught by this offence.

[172] *R v Khan (Runa) [2015] EWCA Crim 1341*, [12].
[173] Ibid [20].
[174] Ibid [20].

These problems are made worse because sections 1 and 2 primarily target the risk of radicalisation. This makes it difficult to assess by mere intent to disseminate potentially inciting material. The harm caused by radicalisation is difficult to understand because it has many aspects, and it's not strongly linked to actually committing a terrorist act.[175] Sections 1 and 2 mainly aim to reduce the risk of radicalisation in the public, which is the main harm they target. According to the Commission for Countering Extremism report, this goal is justified because it prevents the spread of behaviours, attitudes, and beliefs that can 'incite and amplify hate, or engage in persistent hatred, or equivocate about and make the moral case for violence … And that cause, or are likely to cause harm to individuals, communities or wider society'.[176] In this sense, terrorism encouragement offences aim to reduce the risk of radicalisation, which increases the risk of a terrorist act being committed. The criminalisation of a risk is problematic in criminal law as the culpability element is far removed from the encouragement or dissemination itself.

Criminalising someone for increasing the risk of radicalisation, which may lead to a potential terrorist act, is legitimate and justifiable in the name of prevention and national security.[177] It has been argued that the proliferation of internet platforms that facilitate the easier spreading of terrorist propaganda must be regulated to protect young minds from being indoctrinated.[178] However, the link between encouragement offences and their role in fuelling violent

[175] Alonso et al (n 28).
[176] Commission for Countering Extremism, *COVID-19: How hateful extremists are exploiting the pandemic* (9 July 2020).
[177] Turner (n 32) 204.
[178] Commission for countering extremism , 'COVID-19 How hateful extremists are exploiting the pandemic' (*Commission for Countering Extremism* , July 2020) <https://assets.publishing.service.gov.uk/media/5f2952308fa8f57acebf6794/CCE_Briefing_Note_001.pdf> accessed 15th March 2024

radicalisation is still uncertain.[179] Reviewing the literature on radicalisation, Choudhury identifies several problems with the government's aim of preventing violent radicalisation through these offences. Firstly, the role of terrorism-related statements in the radicalisation process is unclear. Much of the literature notes that radicalisation is largely a 'private process taking place through private communication with acquaintances and mentors that emphasise certain views.[180] As such, public statements that encourage acts of terrorism 'may contribute to the process but are not central to it'.[181] The ambiguous connection between acts of encouragement and radicalisation suggests that these laws may not effectively address terrorism and risk overreach.

Further, studies show that radicalisation is a complex process involving a mix of specific circumstances, interpersonal interactions, pre-existing religious views and a search for identity.[182] It may also be influenced by a person's social, economic and political environment, including the country's anti-terrorism laws and policies.[183] Research on what causes radicalisation is still in its early stages, but one thing is clear, pinpointing the exact reason

[179] Astrid Bötticher, 'Towards Academic Consensus Definitions of Radicalism and Extremism' (2017) 11 Perspectives on Terrorism 73; Hilary Pilkington and Ajmal Hussain, 'Why wouldn't you consult us? Reflections on Preventing Radicalisation Among Actors in Radical (Ising) Milieus' (2022) 30 Journal for Deradicalization; Andrew Silke and Katherine Brown, ''Radicalisation': The transformation of modern understanding of terrorist origins, psychology and motivation', *State, Society and National Security: Challenges and Opportunities in the 21st Century* (World Scientific 2016); Katherine E Brown and Elizabeth Pearson, *Social media, the online environment and terrorism* (Routledge Oxon, UK 2018).

[180] Choudhury (n 28) 479.

[181] Ibid 464.

[182] Jørgen Staun, *Radicalisation, Recruitment and the EU Counter-Radicalisation Strategy*, (COT Institute for Safety, Security and Crisis Management 2008); Peter Neumann and Scott Kleinmann, 'How Rigorous is Radicalization Research?' (2013) 9 Democracy and Security 360; Peter R Neumann, 'The Crime-Terror Nexus in Europe and Its Implication for Jihadist Radicalisation' in Nicolas Stockhammer (ed), *Routledge Handbook of Transnational Terrorism* (Routledge 2025) 151–160; Chamin Herath and Joe Whittaker, 'Online radicalisation: Moving beyond a Simple Dichotomy' (2023) 35 Terrorism and Political Violence 1027; Kurt Braddock, 'Cognition, Emotion, Communication, and Violent Radicalisation' in Joel Busher, Leena Malkki and Sarah Marsden (eds), *The Routledge Handbook on Radicalisation and Countering Radicalisation* (Routledge 2023).

[183] Alex P Schmid, 'Radicalisation, De-radicalisation, Counter-radicalisation: A Conceptual Discussion and Literature Review' (2013) 97 ICCT Research Paper 22.

someone becomes radicalised is extremely challenging and it is a 'complex process that does not follow a linear path'.[184]

Lastly, these offences and the 'discretion needed to enforce the legislation in a climate of distrust and fear between parts of the Muslim community and public institutions will reinforce perceptions of discrimination and unjust enforcement of counter-terrorism laws, which may undermine the broader counterterrorism strategy'.[185] As discussed above, the role that prohibited statements play in violent radicalisation remains unclear. The weak connection between encouragement and an actual terrorist act, which these offences seek to prevent, suggests that they may not be justified unless other less restrictive measures have been exhausted.[186]

In practice, the increasing use of the internet and social media by extremist groups may result in these offences being more widely prosecuted. Indeed, the latest statistics relating to the prosecutions under section 1 and section 2 point towards a disturbing trend. A few years ago, it was noted that section 1 and section 2 are offences that were rarely prosecuted. However, since 2020 after the COVID-19 pandemic, these offences have surged in popularity. Data obtained from the Home Office, covering January 2021 and March 2023, shows that 73 people (out of the total of 160 people since the offences' conception in 2001) were arrested for the

[184] Alison Pargeter, 'North African Immigrants in Europe and Political Violence' (2006) 29 Studies in Conflict & Terrorism 731.
[185] Choudhury (n 28) 464; Braddock (n 182); Guri Nordtorp Mølmen and Jacob Aasland Ravndal, 'Mechanisms of Online Radicalisation: How the Internet Affects the Radicalisation of Extreme-Right Lone Actor Terrorists' (2023) 15 Behavioral Sciences of Terrorism and Political Aggression 463; Davide Dell'Isola, 'Discrimination against Muslims, the Role of Networks and Terrorist Attacks in Western Europe: the Cases of United Kingdom, France, and Italy' (2022) 52 Italian Political Science Review/Rivista Italiana di Scienza Politica 118; Joel David Taylor, ''Suspect Categories,'Alienation and Counterterrorism: Critically Assessing PREVENT in the UK' (2020) 32 Terrorism and Political Violence 851.
[186] Choudhury (n 28) 479.

encouragement or dissemination of terrorist statements under sections 1 and 2, with 33 ultimately convicted.[187] The rising number of arrests and convictions highlights the offence's dangerous implications and potential for misuse beyond the terrorism context.

4.3 Freedom Of Expression

A serious concern with encouragement offences is that they can restrict the right to freedom of expression. Criminalising encouragement or dissemination limits this right. Moreover, the more generalised and indirect the encouragement, the more it restricts freedom of expression.

Article 10 of the ECHR protects the right to freedom of expression, including 'the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[188] However, this right can be restricted 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime'.[189] Article 10 is therefore a limited right, which can be impinged upon if public authorities have a legitimate aim, including the prevention of crime and state security. Free expression is also protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[190] The United Nations Human Rights Committee issued guidance on the interpretation of Article 19:

[187] Home Office, *Operation of Police Powers under the Terrorism Act 2000: Quarterly Update to June 2023: Annual Data Tables* (National Statistics, 2023) <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-june-2023/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-quarterly-u accessed> 10 July 2025.
[188] Article 10(1) of the ECHR
[189] Article 10(2) of the ECHR
[190] Article 19 of the International Covenant on Civil and Political Rights (ICCPR), a treaty the UK ratified in 1976.

> 'Offences as 'encouragement of terrorism'… should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided'.[191]

In *Handyside*, the ECtHR held that Article 10(2) applies not only to information or ideas that were regarded as positive or inoffensive but also to those that offend, shock or disturb society.[192] These are the characteristics and the essential foundation of a 'democratic society'.[193] A key justification for this idea is the concept of personal autonomy- the state should allow individuals to decide what is not appropriate for them to hear, read or see.[194] Indeed, Turner notes that this argument is important in determining the strength of the freedom of expression constraint in limiting the scope of section 1 and section 2.

The Joint Committee on Human Rights considered the issue of whether the encouragement offences are compatible with Article 10 of the ECHR.[195] It held that criminalising incitement or encouragement of terrorism is unproblematic based upon Strasbourg jurisprudence, and that a case for the necessity of a new offence of 'indirect encouragement' was made out.[196] However, they would only be compatible if they were necessary, proportionate and met the requirements of legal certainty.[197] After examining the drafting of section 1 and section 2, it concluded that the offences were incompatible with Article 10. It argued that the term 'glorification' and the definition of 'terrorism' under section 1 of the Terrorism Act 2000 contained too much legal

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[191] United Nations, *'General comment No 34; Article 19: Freedoms of opinion and expression'* (International Covenant on Civil and Political Rights, 29th July 2011, Human Rights Committee, 102nd session) <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accessed 6 November 2023.
[192] *Handyside v United Kingdom (1979-80) 1 EHRR 737, European Court of Human Rights*, [49].
[193] Ibid [49].
[194] Turner (n 32) 207.
[195] Joint Committee on Human Rights (n 14) [20].
[196] Ibid 17.
[197] Ibid 16.

certainty, which meant that the offence captures behaviour that might not be considered to encourage terrorism.[198] In terms of the *mens rea*, using objective recklessness and not requiring that an act of terrorism will result in danger violates the requirement of legal certainty.

The Committee further considered the offences to violate the limits of Article 12 of the CECPT as they require two safeguards to protect freedom of expression: 'first, there must be a specific intention to incite the commission of a terrorist offence. And second, the making available of a message to the public must cause a danger that such offences may be committed'.[199] The Joint Committee on Human Rights concluded that the offences under sections 1 and 2 could face significant problems if challenged under Article 10 of the ECHR. The proportionality and necessity test requires that intrusions be 'necessary in a democratic society'. Determining necessity is difficult, especially without research evidence on whether and how far the risk of radicalisation increases by viewing encouragement statements. As discussed earlier, other offences of general incitement might criminalise the spread of terrorist speech, making their necessity questionable.

It is difficult to raise the freedom of expression as a defence under section 1 and section 2 in practice. This is largely because the proportionality test from *Handyside*, which determines whether limiting expression is proportional to the state's legitimate and necessary objectives, has been interpreted in a way that favours the state over the individual.[200] As a result, Article 10's role as a constraining principle is somewhat limited. Turner notes that courts show a 'double deference' to the state's interests, as the proportionality test from *Handyside* asks

[198] Ibid 18.
[199] Ibid 22 [40].
[200] Turner (n 32) 202.

whether limiting freedom of expression is proportional to the state's aims, including national security and crime prevention.

This can be seen in cases such as *Faraz, Brown* and *Ali Humza*. In *R v Faraz*, the court cited *Brown* and dismissed the defendant's argument that section 2 infringed his right to freedom of expression. The court quoted the judgment of Lord Judge:

> 'It is difficult to see how a criminal act of distribution or circulation of a terrorist publication with the specific intent, or in the frame of mind expressly required as an essential ingredient of this offence to encourage or assist acts of terrorism, can be saved by reference to the principle of freedom of speech, unless that principle is absolute, which, as we have indicated, it is not'.[201]

The reasoning behind this view was that a strict *mens rea* of specific intent is strong enough to safeguard the right of freedom of expression under Article 10. However, this reasoning is weak because the mental element of these offences involves recklessly encouraging acts of terror. The court ruled that these offences should not be 'watered down' and quickly concluded that there is 'no risk' of unlawfully infringing on Article 10.[202] The court arguably failed to consider fully the potential impact of section 2 on Article 10, particularly given the broad mental requirements of the offence.

The court's sharp rejection of Article 10 as a constraint on these offences is clearer in *R v Ali (Humza)*. The court disagreed with the submission that the judge's directions did not

[201] *R v Faraz (Ahmed Raza) [2012] WL 6151907*, [55].
[202] Ibid [57].

sufficiently protect the defendant's right to free expression. Instead, it held that this right can be limited when national security and public safety are at stake, and it is legitimate to criminalise intentional or reckless encouragement of terrorism.[203] Since section 2 was lawful, proportionate, and necessary, the judge's direction to the jury on what constitutes an 'act of terrorism' was enough to protect the defendant's rights.[204] However, one could argue that the UK's definition of 'acts of terrorism' is so broad that it is difficult for many to challenge its scope successfully. These cases indicate that the force of the Article 10 constraint is weaker than expected. If so, how can Article 10 be given more weight?

The UK's state-minded approach to the proportionality test can be contrasted with the approach in the US, where an individual's freedom of expression is better protected by the courts.[205] Turner compares UK and US jurisprudence and observes that the US adopts a 'strict scrutiny' test in assessing any breaches of freedom of expression. This test is comparatively a much stronger test than proportionality:

> 'The question in every case is whether the words used are in such circumstances and are of such nature as to create a clear and present danger and that they will bring about the substantive evils that Congress has the right to prevent'.[206]

Turner notes that protections for freedom of expression are far greater in the US because of the narrower strict scrutiny test, which requires a 'clear and present danger' in assessing violations

[203] *R v Ali (Humza) [2018] EWCA Crim 547*, [17].
[204] Ibid [20].
[205] Turner (n 32).
[206] Ibid 209.

of the right. He notes that the US may be too free, as seen in cases like *Terminello v City of* Chicago, where the accused's free speech is prioritised over public safety concerns.[207]

By contrast, the UK's approach is too strict and fails to protect adequately against intrusions on Article 10. The US approach, on the other hand, tips the balance too far in favour of individual rights. A middle ground is needed. Barendt suggests that the *Brandenburg* principles offer a good compromise between the state's power to ban dangerous speech and the unlimited right to free speech, as expressed in Scanlon's Millian principle.[208] The *Brandenburg* principles consist of four key aspects: the words used by the accused must be assessed in context; advocacy must intentionally incite unlawful actions; the advocacy must be likely produce 'imminent unlawful action' (substantial risk test); and the incitements must be likely to produce unlawful action (likelihood test).[209] By requiring these elements, the principles add significant weight to the proportionality and human rights constraint, which will be discussed in Chapter 8.

These additional requirements create a more comprehensive test for assessing whether an individual's Article 10 rights are breached by sections 1 and 2. The need for extra safeguards for freedom of expression arises because these offences could have a chilling effect on political speech. Human Rights Watch and David Anderson KC, a former Independent Reviewer, have raised concerns that these provisions cast the net of criminal liability too wide, discouraging people from publishing content that might fall within the scope of these offences.[210] Another

[207] Ibid 220.
[208] Barendt (n 69) 449.
[209] Ibid 456.
[210] Human Rights Watch [2005], *Briefing on The Terrorism Bill 2005* (November 2005): 9; David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (Independent Reviewer of Terrorism Legislation, 2012)

concern is that there is a public interest in hearing views that are not part of mainstream ideology, allowing the public and government to understand why these views are held and by whom.[211] Certain controversial views should be heard and subjected to public scrutiny.[212] Lastly, there is a risk that laws that curb free speech and are too broadly drafted might allow the state to punish expressions with which it disagrees.[213]

5. Conclusion

This chapter analysed two offences relating to the encouragement offences against terrorism. It determined the scope of the offences and established whether fundamental legal principles have been met. It suggested that these offences are problematic because they violate fundamental constraints in criminal law. It argued that the expansive *actus reus* of encouragement, particularly indirect encouragement, is problematic, because it includes behaviours that might not be wrongful. The expansive *mens rea* of recklessness also erodes the principles within the culpability constraint, which requires that a person should only be liable for the creation of a risk of harm if they have a justifiable degree of culpability for the ultimate harm risked.[214] The chapter has demonstrated that the problems concerning section 1 and section 2 are exacerbated by the interpretative choices that courts have made (or failed to make) in defining the scope of the offences.

https://assets.publishing.service.gov.uk/media/5a7c6bf540f0b62aff6c18e7/9780108511769.pdf accessed 9 July 2025.

[211] Barendt (n 69) 453.

[212] Ibid 453.

[213] Eric Barendt, 'Threats to Freedom of Speech in The United Kingdom?' (2005) 28 UNSWLJ 895.

[214] Douglas Husak, 'External Constraints on Criminalization' in *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2007).

The idea that violent radicalisation can be stopped by limiting the publication and spread of materials that may not actually encourage terrorist acts deserves scrutiny, as this chapter has argued. There is an unclear link between viewing statements that might encourage terrorism and individuals becoming radicalised, leading to questions about whether the harms targeted by this offence justify criminal liability. This issue will likely become more debated in counter-terrorism literature where the UK's national security agenda is shifting towards preventing online extremism and radicalisation through controlling information spread on the internet and AI-related platforms, which may mark a new trend in terrorism-related speech crimes.[215]

[215] Charles Hymas, *'ChatGPT Could Promote 'AI-enabled' Violent Extremism'* (The Telegraph, 9th April 2023) <https://www.telegraph.co.uk/news/2023/04/09/chatgpt-artificial-intelligence-terrorism-terror-attack/> accessed 6 November 2023.

VII. Associative Offences- Membership, Support And Uniform Offences

This chapter engages with a category of offences that extend criminal liability to people who are associated with, or connected to, a terrorist group or persons involved in terrorist activity. Unlike the offences discussed in the previous chapters that extend liability temporally, these offences extend liability laterally by criminalising participative, associative or supportive acts which are often remote from the causing of harm. These offences criminalise membership of proscribed organisations, funding such organisations, as well as training and failure to report suspected persons involved with any of the above a connection between the individual and a terrorist organisation is found.[1] Such offences have attracted considerable academic debate and critique, as they suffer from the same problems discussed in the previous chapters. The associative offences discussed in this chapter contains unclear *mens rea* elements and overly broad conduct elements, which pose difficulties for imputing culpability and wrongdoing.

This chapter focuses on a significant and lesser-known component of counter-terrorism legislation: the proscription offences, which derive from the UK's power to proscribe terrorist organisations under section 3 of the TA 2000 (referred to as 'section 3'). Proscription is an extraordinary power that allows the Home Secretary to criminalise members and associates of organisations at the stroke of a pen.[2] Described as a 'heavy power' by Lord Bassam and 'at best a fairly blunt instrument' by the former Independent Reviewer of Terrorism Legislation, Lord Carlile of Berriew KC, proscription enjoys large and bipartisan support across UK

[1] For example, see Section 6 of the Terrorism Act 2006 (criminalising training for terrorism), and Part 3 of the Terrorism Act 2000 (criminalising terrorism financing).

[2] Tim Legrand and Lee Jarvis, 'Enemies of the State: Proscription Powers and Their Use in the United Kingdom' (2014) 9 British Politics 450; Lord Carlile of Berriew QC, *Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (Independent Reviewer of Terrorism Legislation, July 2010) 16 <https://assets.publishing.service.gov.uk/media/5a7ca01ced915d6969f46341/9780108509278.pdf> accessed 10 July 2025.

parliamentarians.[3] The consequence of proscription is that 'an organisation is outlawed in the UK and that it is illegal for it to operate here'.[4]

Proscription creates a category of offences that makes it a crime to be a member of, support, wear the uniform of, or publish images related to terrorism-related organisations. It condemns these organisations and their actions as inherently wrong.[5] Deproscription, on the other hand, is 'difficult to achieve with the administrative processes tilted against the proscribed organisation' and there is also a strong political barrier. No political party wants to be seen as soft on terrorism.[6] As a result, this power is controversial and blurs the line between legal and political processes. This chapter follows the same structure as the previous ones. By examining the underlying principles and case law related to proscription offences, this chapter aims to evaluate whether these extended forms of liability are justified.

1. Legislative Background

The UK's proscription regime draws its legal principles from a long history of domestic political insurrection rather than the perceived challenges of a new 'post-9/11' security environment alone.[7] Laws aimed at suppressing or banning various types of associations have been targeted at a range of organisations including the anti-monarchy Yorkists of the 15th Century, trade unionism in the 19th Century, and the British Union of Fascists in the 20th Century.[8] One historical example was the Unlawful Societies Act 1799, 'An Act for the More Effected Suppression of Societies established for Seditious and Treasonable Purposes; and for

[3] Legrand and Jarvis (n 2).
[4] Home Office, *Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2013 No.1746* (The Stationery Office 2013).
[5] Ibid.
[6] Sofia Marques da Silva and Cian C Murphy, 'Proscription of Organisations in UK Counter-Terrorism Law' in Iain Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia 2013), 2.
[7] Legrand and Jarvis (n 2).
[8] Ibid.

Better Preventable Treasonable and Seditious Practices', which aimed to restrict radical societies from operating, spreading their messages, and recruiting members, to regulate and suppress potential rebellions, demonstrating the government's recognition of, and the need to win the 'war of ideas'.[9] The Act operated until 1967, when it was repealed by the Criminal Justice Act 1967.[10] In 1939, a Home Office official observed that the old Act could still be useful against the Irish Republican Army (IRA) and Fascist organisations.[11]

Modern proscription laws have been heavily influenced by legislation created to quell political insurgency in Northern Ireland. As early as 1922, the Government outlawed membership or support for 'unlawful organisations' named in the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 which introduced a new range of offences relating to unlawful organisations including: promoting an unlawful association and wearing the uniform of an unlawful association.[12] These offences criminalised the actions of people associated with unlawful organisations such as the IRA who may not have carried out other criminal acts. At the height of the troubles in Northern Ireland in 1973, the Diplock Report recommended suspending the right to a trial before a jury and enabling the Home Secretary to outlaw organisations involved in terrorism.[13] The resulting Northern Ireland (Emergency Provisions) Act 1973 applied only in Northern Ireland and was superseded by the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA 1974) which introduced proscription into the UK mainland.

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[9] Ibid 8.

[10] Criminal Justice Act 1967

[11] Andrew Prescott, 'The Unlawful Societies Act 1799' (Lecture, Second International Conference of the Canonbury Masonic Research Centre, 4–5 November 2000) <https://www.pglforfarshire.org/Unlawful_Societies_Act_1799.html> accessed 10 July 2025.

[12] Jessie Blackbourn, 'The UK's Anti-Terrorism Laws: Does Their Practical Use Correspond to Legislative Intention?' (2013) 8 Journal of Policing, Intelligence and Counter Terrorism 19, 22.

[13] Legrand and Jarvis (n 2) 8; Kenneth Diplock, *Report on the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (HM Stationery Office 1972).

As early as 1996, Lord Lloyd considered proscription to be one of the key elements of the UK's counter-terrorism weaponry because it would facilitate establishing the burden of proof in terrorist cases. Proscription also enables the creation of criminal offences that can prevent terrorism from occurring. As Blackbourn notes:

> 'When the government opted to enact a new permanent anti-terrorism law, it incorporated the Northern Irish proscription regime and applied it to all types of terrorism. Alongside the power to proscribe terrorist organisations, the Terrorism Act 2000 also recreated the five past proscription offences into three new categories: membership of a proscribed organisation (s.11); supporting a proscribed organisation (s.12); and wearing the uniform of a proscribed organisation (s.13)'.[14]

In the consultation paper that preceded the Terrorism Bill (which later became the TA 2000), the government said that its goal was to use proscription as a mechanism to challenge an organisation's fundraising ability and importantly, its claims to legitimacy:

> 'Whilst the measures may not in themselves have closed down terrorist organisations, a knock on effect has been to deny the proscribed groups legitimate publicity and with it lawful ways of soliciting support and raising funds … perhaps more importantly the provisions have signalled forcefully the Government's, and society's, rejection of these organisations' claims to legitimacy'.[15]

[14] Blackbourn (n 12) 23.

[15] Home Office, *Legislation Against Terrorism: A Consultation Paper* (The Stationery Office 1998) https://assets.publishing.service.gov.uk/media/5a7c26ab40f0b61a825d6c63/4178.pdf [4.7] accessed 10 July 2025.

The third aim of proscription, as stated by Thatcher's government, was to deny terrorist organisations the "oxygen of publicity" and limit the spread of rhetoric that might attract new supporters.[16] These three core policy objectives form the basis of the proscription provisions in the TA 2000. Proscription serves instrumental, preventive and symbolic functions. As then Home Secretary Charles Clarke argued before the House of Commons Standing Committee during the parliamentary debates on the Terrorism Bill in 2000:

> 'First, it has been, and remains, a powerful deterrent to people to engage in terrorist activity. Secondly, related offences are a way of tackling some of the lower-level support for terrorist organisations […] Thirdly, proscription acts as a powerful signal of rejection by Government – and indeed by society as a whole – of organisations' claims to legitimacy […] It is important for society to state that certain activities are simply […] beyond the pale; […] The legislation is a powerful symbol of that censure and is important'.[17]

For the government, proscription acts as a powerful deterrent under the 'Pursue' and 'Prevent' strand of the CONTEST counter-terrorism policy as it deters proscribed organisations from coming to the UK and creates offences that extend criminal liability laterally by tackling membership, support, and other associative acts.[18] Furthermore, proscription serves to condemn terrorist organisations that promote views advocating racial and religious hatred,

[16] Margaret Thatcher, 'Speech to American Bar Association' (15 July 1985) http://www.margaretthatcher.org/document/106096 accessed 29 July 2024.

[17] Charles Clarke, *'Terrorism Bill'* (UK Parliament, 2000) <https://publications.parliament.uk/pa/cm199900/cmstand/d/st000120/am/00120s06.htm> accessed 21st May 2024.

[18] Marques da Silva and Murphy (n 6) 3.

discrimination, extreme violence, killing and destruction of the state.[19] In this sense, a proscription entails that the organisation is inherently wrongful in its purpose and mission. Those who intentionally associate themselves with these organisations are also conducting an inherently wrongful act. Proscription offences also disrupt terrorist activities and those who support them. In 2019, Sajid Javid remarked that 'proscription makes it harder for a banned group to fundraise and recruit, and its assets can become subject to seizure as terrorist property'.[20] These are legitimate policy goals, which make it easier to prosecute those allegedly associated with terrorist activity, although Walker notes that the effect of condemnation may be less effective when dealing with 'decentred, heterarchical 'new' terrorism' where 'any bans seem futile in practical impact'.[21]

This Chapter recognises that proscription is a legitimate and necessary apparatus in countering terrorist organisations and their potentially dangerous activities. However, there is still a danger that proscription and its associated offences remain overly broad in practice as will be discussed later. Jarvis and Legrand's analysis of the parliamentary debates concerning proscription between 2002 to 2014 also sheds light on a troubling discourse. They found a predominant focus on portraying terrorist organizations as 'immoral' bringers of violence, reinforcing antagonistic divisions between a liberal, culturally diverse UK and an 'illiberal', 'irrational' terrorist 'other'.[22] This analysis raises concerns reminiscent of the critiques underlying Jakob's concept of 'enemy criminal law' where such discourse risks broadening the scope of laws,

[19] Hansard, 'Prevention and Suppression of Terrorism Volume 655: debated on Tuesday 26 February 2019', col 289 (2019) <https://hansard.parliament.uk/commons/2019-02-26/debates/41CC81FF-5CD8-43E6-8B0B-19A67B3E709F/PreventionAndSuppressionOfTerrorism> accessed 29 July 2024.
[20] Ibid; see Andrew Percy's remark.
[21] Clive Walker, '"They Haven't Gone Away You Know." The Persistence of Proscription and the Problems of Deproscription' in Lee Jarvis and Tim Legrand (eds), *The Proscription of Terrorist Organisations: Modern Blacklisting in Global Perspective* (Routledge 2020), 238.
[22] Lee Jarvis and Tim Legrand, 'Legislating for Otherness: Proscription Powers and Parliamentary Discourse' (2016) 42 Review of International Studies 558, 558.

potentially leading to unjustifiable criminal liability for individuals who may not fit the intended target, such as the case of Sophie Stephenson discussed later on.

The offences set out in sections 11, 12 and 13 of the TA 2000 (hereafter referred to as 'section 11', 'section 12' and 'section 13') analysed below were explicitly acknowledged by Tom Mcnulty as the consequence of the use of proscription's 'tough power…[which has a] wide-ranging impact' on liberal values such as free speech and association that forms the 'cornerstone of our democracy'.[23] The overt recognition by parliamentarians that there is a tension between the dangers of the broad powers of proscription and the government's goal of increasing, as James Brokenshire MP put it, 'collective security for the country as a whole' is important for it is a balance that is not easily achieved.[24] This is not helped by the fact that, as Walker observes, since 9/11, a 'proliferation of proscription orders against these non-Irish groups has ensued' and the number of proscribed organisations in that category has tripled.[25]

As of March 2023, 79 international organisations are proscribed.[26] A total of 92 people have been charged with proscription-related offences as a primary offence and 56 have been convicted.[27] It is important to acknowledge that proscription is a necessary and legitimate tool in the fight against terrorism as it acts as a powerful and efficient way to tackle low-level support for terrorism and as a deterrent for individuals to join terrorist organisations. However, the subsequent discussion shows that the reach of proscription offences is increasing. As such, the main basis for raising challenges to UK proscription laws revolves around striking a balance

[23] Tony McNulty, 'Hansard HC vol. 478, cols 98–100 (23 June 2008).
[24] Jarvis and Legrand (n 22) 569
[25] Walker (n 21) 236
[26] Home Office, 'Factsheet: Proscription' (Home Office in the Media, 15 September 2023) <https://homeofficemedia.blog.gov.uk/2023/09/15/factsheet-proscription> accessed 8 May 2024.
[27] Ibid.

between safeguarding individual freedoms and liberties while preserving the extensive powers of proscription.

2. Defining The Offences

2.1 Proscription Powers- A Blunt Tool With Severe Consequences

Part II of the TA 2000 sets out the laws surrounding proscription. The list of proscribed organisations is found in Schedule 2.[28] To proscribe an organisation, the Home Secretary has to fulfil a two-part test. The first part of the test is found in section 3(4), which specifies that 'The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.[29] The definition of 'concerned with terrorism' found under section 3(5) is somewhat circular because it specifies that an organisation that commits or participates in acts of terrorism, prepares for, promotes, or encourages terrorism is 'otherwise concerned in terrorism'.[30] Section 21 of the TA 2006 extends the grounds on which proscription may occur to include those organisations which unlawfully glorify the commission or preparation of acts of terrorism.[31] While some definition of what is meant by 'glorification' was made by the courts, the legislation does not define how an organisation might be 'otherwise concerned in terrorism'.[32] The list of actions that can satisfy the first limb of the test is therefore broad and creates too much discretion for officials.[33]

[28] Schedule 2 Terrorism Act 2000
[29] Section 3(4) Terrorism Act 2000
[30] Section 3(4) Terrorism Act 2000
[31] Section 21 Terrorism Act 2006
[32] Ahmed Almutawa and Clive Walker, 'Proscription by Proxy: The Banning of Foreign Groups' (2021) Public Law 377.
[33] Marques da Silva and Murphy (n 6) 6.

While what constitutes 'terrorism' has been challenged in cases discussed in the previous chapter, the courts have attempted to restrict the scope of what it means to be 'concerned in terrorism'. In *Lord Alton of Liverpool*, the court explored the outer limits of the term. The case involved an application to remove the People's Mojahedin Organization of Iran (PMOI), an Iranian dissident organisation, from the list of proscribed organisations in the UK. To give clarity to the legislation, the Court of Appeal examined the provisions under s.3(5)(a)-(c) and s.3(5)(d). Regarding s.3(5)(a)-(c) it found:

> 'In our view the criteria set out in sub-sections 3(5)(a) to (c) are focussed on current, active steps being taken by the organisation. There could be reasonable grounds for a belief that the organisation is concerned in terrorism based on the organisation's past activities, but that material would have to be such that it gave reasonable grounds for believing that the organisation was currently engaged in any activities specified in those three subsections'.[34]

Regarding section 3(5)(d), the court accepted that an organisation retaining an 'inactive' military capacity coupled with the intent to 'reactivate it' if in the organisation's interests could be 'concerned in terrorism', while an 'inchoate' intention alone without any military capacity would be insufficient.[35] The Court made it clear that an organisation is not 'concerned in terrorism' simply because its leaders intend to use terrorism in the future:

[34] *Secretary of State for the Home Department v Lord Alton of Liverpool [2008] EWCA Civ 443*, [31].
[35] Ibid; Nathan Rasiah, 'Reviewing Proscription under the Terrorism Act 2000' (2008) 13 Judicial Review 187

> ‘The nexus between such an organisation and the commission of terrorist activities is too remote to fall within the description ‘concerned in terrorism’.[36]

The court also provided more guidance on what falls under section 3(5)(d). An organisation that has temporarily stopped terrorist activities for tactical reasons is different from one that has decided to achieve its aims through non-violent means. Importantly, the latter cannot be said to be 'concerned in terrorism', even if it might return to terrorism in the future.[37] The court referred to the remoteness constraint in delimiting the scope of section 3(5)(d) TA 2000. The court seems to prioritise an organisation's ability to engage in terrorism over its terrorist intent. This is unlike the interpretation by the courts of other preventive offences examined in this thesis, where evidence of future intent is often raised to hold individuals accountable for their wrongdoing, even if their actions are far removed from an actual terrorist act.[38]

If the first limb of the test for proscription is met, the Home Secretary must consider the factors in the second limb of the test which determines whether to exercise the power to proscribe. These include:

> ‘(a) the nature and scale of the organisation’s activities;
>
> (b) the specific threat that it poses to the UK;
>
> (c) the specific threat that it poses to British nationals overseas;
>
> (d) the extent of the organisation’s presence in the UK; and

[36] Steve Wood, 'Is It Time to De-Proscribe Terrorist Organisations in Northern Ireland?' (2023) 35 Terrorism and Political Violence 1049.
[37] Ibid.
[38] *R v G (Respondent) (on appeal from the Court of Appeal Criminal Division); R v J (Respondent) (on appeal from the Court of Appeal Criminal Division) [2009] UKHL 13*

(e) the need to support other members of the international community in the global fight against terrorism'.[39]

The important point here is discretion. Since there is no need for there to be 'reasonable' belief, proscription remains a subjective decision by the Home Secretary that blurs the line between political and legal processes, with little involvement from other members of the executive. Critics argue that proscription is an executive measure that lacks accountability and scrutiny.[40] While Parliament has a duty to consent to proscription orders, the consent process is flawed because Parliament can only affirm the whole list of proscribed organisations. It cannot reject the listing of any one organisation without rejecting the entire list of organisations.

Furthermore, Parliament often lacks any information about the organisations in question as the evidence used to justify their inclusion is rarely disclosed.[41] In practice, Parliament rarely intervenes to review the initial decision to proscribe an organisation. No orders have been resisted to date.[42] Once the proscription of an organisation is approved, it is added to the list of proscribed organisations found in Schedule 2 of the TA 2000.[43] Proscription of an organisation creates criminal liability for the offences listed in sections 11-13 TA 2000, which criminalises association in various forms, extending criminal liability laterally to those associated with these proscribed organisations.

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[39] Home Office, 'Policy paper: Proscribed Terrorist Groups or Prganisations' <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version> accessed 9th May 2024.

[40] Jessie Blackbourn, 'Accountability, Counter-Terrorism and Civil Liberties' (2018) 29 King's Law Journal 297; Clive Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 Journal of International Criminal Justice 1137.

[41] Marques da Silva and Murphy (n 6) 7.

[42] Legrand and Jarvis (n 2) 7.

[43] Schedule 20 Terrorism Act 2000

Although the government Proscription Working Group reviews proscription orders annually, the process lacks transparency and fails to provide adequate safeguards for those impacted.[44] Moreover, once an organisation is proscribed, it becomes extremely difficult to reverse the decision. Two mechanisms exist for challenging proscription orders. The first is found in section 4 TA 2000, where the applicant may either be the proscribed organisation or any 'persons affected' by the proscription order.[45] The Home Office received 11 applications for delisting between 2001-2012, but all were refused by the Home Secretary.[46]

If an application is refused, the second route is an appeal to the Proscribed Organisations Appeal Commission (POAC) under section 5 TA 2000. The POAC can be used to challenge a proposed order as well as an existing order. Under s.5(3) TA 2000, the POAC shall allow an appeal 'if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review', which as Walker observes, precludes review on factual merits.[47] Schedule 3 of the TA 2000 and the POAC Rules 2007 set out the procedures involved in the review. Notably, the appeals may involve special advocates- an appointed lawyer instructed to represent a person's interests where materials related to their case are withheld from that person and his ordinary lawyers- in closed material proceedings, which preclude evidence from being shared with the organisation or applicant and allows the POAC to exclude persons (including representatives) from proceedings.[48]

Only a few organisations have successfully challenged a refusal for deproscription. In *Lord Alton of Liverpool,* Parliamentarians appealed to the POAC to delist the PMOI, which would

[44] Marques da Silva and Murphy (n 6).
[45] Walker (n 21) 242.
[46] Ibid 242.
[47] Section 5(3) Terrorism Act 2000
[48] Walker (n 21) 242.

allow meetings at which support for PMOI could be encouraged without contravening s.12 TA 2000.[49] The main ground of appeal was that the organisation was no longer concerned in terrorist activity. At the time of appeal, PMOI had ended all military activities and transitioned into a peaceful democratic movement. However, the Home Secretary claimed that the group's potential to 'revert back to terrorism' met the definition in section 3(5), justifying her decision to refuse the deproscription application.[50] The court held that the group was no longer 'concerned in terrorism' and there was no longer a justifiable reason to proscribe the group.[51] Interestingly, the POAC had earlier discussed the applicability of human rights constraints to limit the powers of proscription, noting that proscription is not a disproportionate interference with Convention rights and stating, *obiter*, that 'the provisions of the 2000 Act…represent the least restrictive method necessary to accomplish the aim of circumscribing the activities of a terrorist organisation'.[52] It can be argued that the POAC's proportionality analyses in assessing the merits of the appeal, nonetheless favour the government's stance, given the highly political nature of proscription.[53]

The recent case of *Arumugam (2020)* succeeded on similar grounds.[54] The appeal was brought against the decision to refuse an application to remove the Liberation Tigers of Tamil Eelam (LTTE) from the list of proscribed organisations. The applicants argued that the LTTE was not 'concerned in terrorism' and their proscription was disproportionate, especially considering its negative consequences for the Tamil community. The appeal succeeded because the POAC found that the information presented to the Home Secretary on the risks surrounding the LTTE

[49] *Secretary of State for the Home Department v Lord Alton of Liverpool [2008] EWCA Civ 443*
[50] Ibid [57]
[51] Ibid.
[52] Ibid.
[53] Walker (n 21) 246.
[54] *Arumugam and Others v The Secretary of State for Home Department [2019] PC/04/2019* (Proscribed Organisations Appeal Commission)

was ‘materially misstated’ and contained factual inaccuracies. It concluded that the decision to maintain LTTE on the list of proscribed organisations was flawed.[55]

These rare success cases demonstrate the POAC's role in clarifying the laws on proscription. While the POAC is a good way to appeal proscription, it has problems. For example, Walker argues that the legal costs and the risk of being labelled a sympathiser or terrorist can make the POAC a weak solution to the broad and unclear power of the executive.[56] The lack of transparency and procedural fairness in the deproscription process leads to inconsistent appeal outcomes, increasing legal uncertainty in an area where it is most needed.[57] As a result, some listed groups may be unfairly proscribed, and people associated with them may be wrongly criminalised.

Deproscription faces other significant challenges. Politically, no party wants to risk being labelled as supportive of terrorist organizations. Further, those advocating for deproscription may face prosecution for appearing to support or be active members of the organization. Even the act of making an appeal for deproscription can be regarded as involvement. Only four organizations have been removed from the list of proscribed groups to date.[58] With only two successful appeals to the POAC, it is hard to determine if the process is effective, fair, and has sufficient oversight from the legislature and judiciary.[59] Those involved with terrorist groups must be held accountable for their actions. However, it is doubtful whether the system achieves

[55] Ibid [34].
[56] Walker (n 21) 242.
[57] Lee Jarvis and Tim Legrand, ''I am Somewhat Puzzled': Questions, Audiences and Securitization in the Proscription of Terrorist Organizations' (2017) 48 Security Dialogue 149, 159.
[58] Joy Hyvarinen, 'Time to Update the United Kingdom’s List of Terrorist Organizations' (Just Security, 24 June 2020) https://www.justsecurity.org/70847/time-to-update-the-united-kingdoms-list-of-terrorist-organizations/ accessed 9 May 2024.
[59] Walker (n 21) 251.

'real, if modest gains' if the Home Secretary refuses to deproscribe groups that are no longer engaged in terrorist activity, as stated in section 5 of the TA 2000.[60]

2.2 Membership Offence- Section 11 TA 2000

2.2.1 Actus Reus

The first proscription offence concerns membership of a proscribed organisation. S.11(1) TA 2000 includes two forms of *actus reus* and states that a person commits an offence if he 'belongs or professes to belong to a proscribed organisation'.[61] The definition of 'profess' is uncertain, as Lord Bingham states in *AG's Reference [No.4 of 2002]*:

> 'It is far from clear…whether it should be understood to denote an open affirmation of belonging to an organisation or an acknowledgment of such belonging, and whether (in either case) such affirmation or acknowledgement, to fall within section 11(1), would have to be true'.[62]

In this case, a person 'A' had been indicted under s.11(1) TA 2000 for being and professing to be a member of Hamas IDQ. He made statements including 'I am a member of Hamas' to his acquaintances. Those who heard him were unsure whether he was joking.[63] The uncertainty around the meaning of the term 'profess' led the court to note that 'some of those liable to be

[60] David Anderson noted that the system produces 'real if modest gains' as 17 convictions were secured between 2001-2010 where proscribed offences were the main offences charged. See: David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc Act 2010* (TSO London 2011), [4.15].
[61] Section 11(1) Terrorism Act 2000
[62] *Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division)) Sheldrake (Respondent) v. Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] UKHL 43,* [48].
[63] Ibid [48].

convicted and punished for professing to belong to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions'.[64] Therefore, the conduct element of professing may not warrant sufficient wrongfulness to merit the sanctions imposed under the offence.[65]

Even broader is the *actus reus* of 'membership'. Membership itself is not an act *per se* but a status that is not defined in the legislation.[66] Membership has an 'extraordinarily broad' scope as highlighted in *AG's Reference [No.4 or 2002]*:

> 'It would cover a person who joined an organisation when it was not a terrorist organisation or when, if it was, he did not know that it was…a person who joined an organisation when it was not proscribed or, if it was, he did not know that it was… someone who joined such an organisation abroad in a country where it was not proscribed and came to this country ignorant that it was proscribed here…a person who wished to dissociate himself from an organisation he had earlier joined'.[67]

The extent to which s.11 TA 2000 criminalises persons associated with proscribed organisations is worrying. Much of the interpretation of 'membership' remains open-ended. In *R v Ahmed (Rangzieb* (2011)*)*, the jury was reminded that 'membership does not necessarily involve anything permanent or long-term'[68] and that what amounts to membership is 'likely to

[64] Ibid [47].
[65] Ibid [48].
[66] Liat Levanon, 'Criminal Prohibitions on Membership in Terrorist Organizations' (2012) 15 New Criminal Law Review 224, 240.
[67] *Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division)) Sheldrake (Respondent) v. Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] UKHL 43*, [47].
[68] *R v Ahmed (Rangzieb) [2011] EWCA Crim 184*, [85].

depend on the nature of the organisation'.[69] While *Adams (1978)* restricted membership offences to cases of 'active' association with proscribed organisations, s.11 TA 2000 goes further, covering 'passive' involvement, including remote cases where someone simply expresses support for the organisation, its goals, or its methods.[70] Active and passive membership entail different levels of wrongdoing and culpability and ought to be distinguished. These factors are taken into account at sentencing which makes the offence fairer. For example, *David Musins* (2022) involved an application for leave to appeal against his sentence of 3 years imprisonment after the applicant was convicted of being a member of a proscribed neo-Nazi organisation between 2016 and 2017.[71] The applicant was an active young member who ceased membership in 2017.[72] The judge acknowledged that the applicant's immaturity and cessation of membership were mitigating factors but his extreme views were too great to allow for a sentence reduction.[73] *Musins* affirms that the courts continue to endorse a broad scope of the offence, which ultimately is designed to clamp down the 'oxygen of publicity' for organisations that have, as Nick Price puts it, 'no place in society' due to their risk of perpetuating terrorist beliefs.[74]

Another issue is that S.11 TA 2000 might have extra-territorial reach. *R v Hundal/Dhaliwal* questioned whether it makes any difference whether the International Sikh Youth Federation was not proscribed in the UK at the time the appellants joined but was proscribed after they

[69] Ibid [87].
[70] *R v Adams [1978] 5 N.J.J.B.;* this case restricted the breadth of the membership offence found in the Northern Ireland Emergency Provisions Act 1973 (repealed in 1991) as it limited the offence to cover cases where the person 'actively associates' himself or herself with the proscribed organisation.
[71] *R v Musins (David) [2022] EWCA Crim 1625*
[72] Ibid [4].
[73] Ibid [18].
[74] CPS, 'Member of proscribed group jailed for three years' (*CPS News Centre,* 2022) <https://www.cps.gov.uk/cps/news/member-proscribed-group-jailed-three-years> accessed 10th May 2024.

became involved with the group.[75] It was argued that to answer both questions in the affirmative would mean s.11 TA was cross-jurisdictional and contravene the principle of retrospectivity under Article 7 of the ECHR.[76] The court held that while membership 'alone' does not 'create guilt', the appellants were guilty because they entered into the UK as associates of the ISYF. While the outcome is justifiable not to defeat the object of the legislation, its effect is that s.11 TA 2000 has extra-territorial effect, extending to associations made outside the UK that come within the ambit of the offence when persons subsequently enter the country.

Lastly, s.11 TA 2000 is broad enough to apply to organisations that are not listed under Schedule 2 of the TA 2000. This lack of clarity was challenged in *R v Z*, where s.3(1)(b) TA 2000 was disputed on the grounds that the defendants were members of the non-listed 'Real Irish Republican Army' ('Real IRA') as opposed to the 'IRA', the former is not listed under Schedule 2 and therefore falls outside the scope of the membership offence. The defendants relied on the rule of law and legal certainty constraints to argue that non-listed organisations fall outside the reach of s.11 TA 2000.[77] The courts debated the meaning of s.3(a) and (b) TA 2000, Lord Bingham and Lord Woolf interpreted the two sections as a composite whole, while Lord Brown interpreted the two sections independently so that s.3(1)(b) covers cases only where an 'identical name' to a proscribed organisation (e.g. the Irish National Liberation Army) was used, but it is completely independent of the listed organisation'.[78] This interpretation is curiously narrow, but it gives more weight to the principle of legal clarity and would narrow the scope of the offence. Nevertheless, the courts favoured a 'contextual' approach and dismissed the appeal, stating that the purpose of s.11 TA 2000 was to criminalise groups within

[75] *Regina v Atvar Hundal, Kesar Singh Dhaliwal [2004] EWCA Crim 389,* [2]-[3].
[76] Ibid [3].
[77] *R v Z [2005] UKHL 35,* [16].
[78] Ibid [68].

the 'extended family' of any groups found in Schedule 2 TA 2000.[79] While Walker argues that this is the only outcome that accords with Parliament's intention to cover all manifestations of IRA paramilitary groups, it is unfortunate that the principle of legal certainty is so quickly overlooked in favour of practicality;[80] other cases may infringe on Article 7 of the ECHR even though this case held otherwise.

2.2.2 Mens Rea

S.11 TA 2000 does not include a *mens rea* requirement and is therefore a strict liability offence in a narrow sense. Membership is thus criminalised without any reference to intention, knowledge, or other mental elements. A person might be guilty of 'professing' to belong to a proscribed organisation if he merely has the intention to join an organisation and expresses that intention. Since the drafting of the offence is so unclear, much of the interpretation of any *mens rea* element is left to the courts. The court tried to distinguish between 'active' and 'passive' membership in *David Musins* which provides some guidance on attributing culpability for sentencing purposes. However, the UK offence of membership under s.11 TA 2000 is unclear as compared to other jurisdictions such as Israel. In Israel, the Military Court of Appeal has ruled that the 'mere intention to join an illegal organisation' is sufficient for a conviction of membership offences.[81]

The term 'membership' contains both a conduct and mental element .[82] The case of *R v Ahmed (Rangzieb)* dissected the meaning of 'membership'. One of the key issues was whether the trial

[79] *R v Z [2005] UKHL 35*, [20].
[80] Ibid [20].
[81] Levanon (n 66) 242.
[82] Paul H. Robinson, 'Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?' in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action And Value In Criminal Law* (Oxford University Press 1993).

judge was right to tell the jury to construe 'membership' as simply an 'ordinary' meaning of the word in the English language without further definition.[83] In agreeing with the trial judge, the appeal court held that:

> '…what will frequently be the core elements of membership within the meaning of section 11, namely *voluntary* and *knowing* association with others with a view to furthering the aims of the proscribed organisation…the jury may need to consider whether there is the necessary element of acceptance or reciprocity which will be involved in belonging'. [84]

According to this interpretation, membership requires a voluntary and knowing association with others to further the terrorist group's aims. This implies that s.11 TA 2000 demands at least intent or knowledge, along with what Robinson terms 'present-conduct intention'. [85] This means the defendant must act voluntarily and have sufficient knowledge to be considered a member of the organisation, a voluntary element which should be explicitly stated in the offence's drafting.

2.2.3 Defence

A lack of knowledge about the proscribed organisation's status is not a defence.[86] However, S.11(2) TA 2000 provides for a defence which could reduce the breadth of s.11(1).

> It is a defence for a person charged with an offence under subsection (1) to prove –

[83] *R v Ahmed (Rangzieb) [2011] EWCA Crim 184*, [82].
[84] Ibid [89] (emphasis added).
[85] Robinson (n 82) 204.
[86] *Regina v Atvar Hundal, Kesar Singh Dhaliwal [2004] EWCA Crim 389*

(a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and

(b) that he has not taken part in the activities of the organisation at any time while it was proscribed.

The scope of the defence was addressed by the court in *AG's Reference [No. 4 of 2002]* in which the issue was whether s.11(2) places a legal rather than evidential burden on the defendants and if so, whether the burden is compatible with Article 6 of the ECHR or whether it would contravene the presumption of innocence.[87] Lord Bingham noted that Parliament intended s.11(2) to impose a legal burden as s.11 TA 2000 is not included in the list of offences creating an evidential burden under s.118 TA 2000.[88] The question was, therefore, whether it is proportionate and justified to impose a legal burden on the accused. The Court of Appeal decided that s.11(3) does not infringe the presumption of innocence as it does not require the accused to prove they were not a member of a proscribed organisation – which is not a necessary part of the offence.[89] However, the House of Lords held that imposition of a legal burden is disproportionate and unjustifiable as a person who was innocent of any blameworthy conduct might fall within s.11(1):

[87] *Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division)) Sheldrake (Respondent) v. Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] UKHL 43*

[88] Ibid; Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) Criminal Law Review 901.

[89] *Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division)) Sheldrake (Respondent) v. Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] UKHL 43*, [26].

> ‘There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under section 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission’.[90]

The House of Lords identified six reasons to interpret the legal burden as an evidential burden under s.3 of the Human Rights Act 1998 (‘HRA’). These reasons included the fact that s.11(2) requires the defendant to prove an organisation was not proscribed when they last became or claimed to be a member, a task that is nearly impossible to accomplish effectively.[91] Lord Bingham highlighted the ‘extraordinary breadth’ of s.11 TA 2000, noting that the consequences of a defendant failing to establish a defence would be severe.[92] This judgment correctly limits the application of the offence by upholding the presumption of innocence. Notably, the courts refused to let the demands of counter-terrorism override human rights. However, this case is less than satisfactory as it fails to provide clear guidance on interpreting terrorism offences that impose a reverse burden of proof on the defendants.[93]

[90] Ibid [51].
[91] Ibid [51].
[92] Ibid [51].
[93] Nicola Padfield, 'The Burden of Proof Unresolved' (2005) 64 The Cambridge Law Journal 17.

2.3 Support And Advocacy Offence -S.12 TA 2000

2.3.1 Actus Reus

S.12 of the TA 2000 criminalises support for a proscribed organisation by targeting people who assist with the working of the organisation in several ways. First, a person commits an offence if he 'invites support for a proscribed organisation'.[94] Support is not restricted to the provision of money or other property within the meaning of section 15 TA 2000.[95] Second, an offence is committed if a person 'expresses an opinion or belief that is supportive of a proscribed organisation' and 'in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation'.[96] Third, it is an offence if a person 'arranges, manages or assists in arranging or managing a meeting' which he knows is- '(a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation'.[97] Lastly, a person commits an offence 'if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities'.[98] Under s.12(5) TA 2000, a meeting is defined as a gathering of three or more persons, whether or not the public are admitted.[99]

The key case that defines the scope of s.12 TA 2000 is *Anjem Choudary*. Here, the judge noted that s.12(1) is aimed at prohibiting conduct that promotes or assists that organisation, 'whether

[94] Section 12(1)(a) of the Terrorism Act 2000
[95] Section 12(1)(b) of the Terrorism Act 2000
[96] Section 12(1A) of the Terrorism Act 2000 as amended by the CTBSA 2019
[97] Section 12(2) of the Terrorism Act 2000
[98] Section 12(3) of the Terrorism Act 2000
[99] Section 12(5) of the Terrorism Act 2000

or not the support of all is manifested in practical or concrete ways'.[100] The judge's statement refers to the preventive nature of the offence and notes that the offence penalises conduct remote from the commission of actual harm. It is not surprising, therefore, that 'invite' and 'support' are left undefined in the TA 2000 to capture different forms of support and advocacy for terrorism-related organisations.

In this case, the appellants supported the Islamic State by publicly speaking about the group and attending protests where banners were displayed. They were charged with inviting support under s.12(1) TA 2000. The appellants argued that 'invite' and 'support' ought to be construed narrowly to mean an 'invitation' by a defendant to one or more persons to join the defendant by providing 'practical or tangible support' to the group, which should be distinguished from them merely expressing intellectual or moral support for the organisation.[101] In rejecting this narrow interpretation, the court adopted a common-sense approach and held that:

> 'The criminality in short lies in inviting support (from third parties) for the proscribed organisation, not in inviting those third parties to join with the defendant in providing it'.[102]

The 'support' in question may be practical or tangible but it need not be:

> 'The Oxford English Dictionary's definition of the noun 'support' includes the provision of assistance, of backing or of services to keep something operational … But the

[100] *R v Choudary (Anjem) [2017] EWCA Crim 1606,* [40].
[101] Ibid [6].
[102] Ibid [45].

> dictionary definition also includes encouragement, emotional help, mental comfort, and the action of writing or speaking in favour of something or advocacy…
>
> From the point of view of the proscribed organisation, both types of support are valuable. An organisation which has the support of many will be stronger and more determined than an organisation which has the support of few, even if not every supporter expresses his support in a tangible or practical way'.[103]

Because the definition of support is very broad, the appellant's argument that s.12(1) TA 2000 is too vague to let individuals know whether their actions are lawful or not was rejected. The judgment seems to ignore the principle of legal clarity, favouring a broad interpretation of the statute to achieve Parliament's goals. As a result, the scope of s.12(1) is too wide as 'support' includes many remote acts that may be innocent, especially when combined with a lack of *mens rea,* as will be discussed later in this chapter.

Anjem Choudary predates the addition of s.12(1A) TA 2000 by the CTBSA 2019, which criminalises expression. However, s.12(1A) does not prohibit the holding of opinions or beliefs supportive of a proscribed organisation, rather it criminalises the 'expression' of those opinions if someone is 'reckless' as to whether others would be encouraged to support the proscribed organisation. This is dangerously broad because such expressions might constitute an offence under s.11 of professing membership, and may breach freedom of expression under Article 10 of the ECHR.[104]

[103] Ibid [46].
[104] Ibid [35].

What constitutes valid expression of an opinion and a wrongful/culpable 'endorsement' or 'approval' of a dangerous organisation was considered in *Anjem Choudary,* where the appellants raised an Article 10 challenge and argued that inviting another to share such an opinion or belief falls outside the *actus reus* of s.12 TA 2000.[105] While the latter claim is no longer valid after the introduction of s.12(1A), the court found that there was no breach of the right to freedom of expression in terms of legality:

> '…in our view the requirement that the interference must be prescribed by law is met. Further, section 12(1)(a), like section 11, is a measure that is clearly directed to a number of legitimate ends: preserving national security, public safety, the prevention of disorder and crime and the rights and freedoms of others'.[106]

The bite of the proportionality constraint was relatively weak:

> '…the section only prohibits inviting support for a proscribed organisation with the requisite intent. It does not prohibit the expression of views or opinions, no matter how offensive, but only the knowing invitation of support from others for the proscribed organisation. To the extent…we consider that interference to be fully justified'. [107]

The persuasiveness of the above reasoning is doubtful after the extension of this offence's scope under s.12(1A), which criminalises the reckless expression of offensive views. However, the human rights argument was unsuccessful again in the 2017 appeal of *Anjem*, where the court ruled that the appellants went beyond reasonably expressing opinions by deliberately 'courting'

[105] Ibid [6].
[106] Ibid [68].
[107] Ibid [70].

the public with their statements, which did not result in disproportionate interference with their Article 10 rights.[108]

Finally, s.12(2) and s.12(3) criminalise other supportive acts such as addressing arranging, managing or assisting in arranging or managing a meeting to further the support of a proscribed organisation. These involve conduct that is broader than 'mere' practical support, which can be seen by the use of the words 'to further the activities of a proscribed organisation' for the offence under s.12(2)(b) or 'further its activities' in s.12(3).[109] Little guidance is given as to what arranging or 'addressing' a meeting means. In *R v Alamgir*, the court applied a literal approach in interpreting the offences by adopting a literal approach, noting that support entailed making supportive remarks for the proscribed organisation.[110]

2.3.2 Mens Rea

The mental requirements for each sub-offence under s.12 vary. The offence of inviting support for a proscribed organisation under s.12(1) contains no specific *mens rea*. Therefore, a person will be criminalised simply for any act of support even if they were not aware that their actions may lead to support for the proscribed organisation. However, the court in *Anjem Choudary* interpreted s.12(1)(a) to require someone to 'knowingly invite support' for a proscribed organisation. This means the prosecution must prove 1) the defendant knew the organisation was proscribed at the time of his support, and 2) knowledge that he was inviting support (with proof of an invitation of support required).[111] This interpretation of s.12(1) incorporates the

[108] Ibid [29].
[109] Ibid [55].
[110] *R v Alamgir (Mohammed) [2018] EWCA Crim 1553,* [11], [19].
[111] *R v Choudary (Anjem) [2017] EWCA Crim 1606*, [49]-[51].

mens rea element of knowledge, a welcome change that ensures individuals are held accountable for their culpable actions.

The offence of expressing an opinion of support under s.12(1A) requires 'recklessness' as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.[112] Arguably, this extends the boundaries of this expression offence beyond the principled limits of criminal law. Recklessness is a weaker *mens rea* than knowledge, which is normally required for terrorist offences as serious as those under s.12 TA 2000. This is troubling as the *mens rea* under s.12(1A) requires only that the defendant be reckless as to whether a third party (or stranger) would be 'encouraged' to 'support' a proscribed group- ascribing culpability to an individual for the acts of others who may be far removed from their actions.[113] 'Encouraged' to 'support' is already a doubly-inchoate attribution of liability. Therefore s.12(1A) is unjustifiably wide as those expressing an opinion without guilty intent may be found guilty.

S.12(2) stipulates a *mens rea* of knowledge, while s.12(3) requires the individual to address a meeting with the 'purpose' of encouraging support or furthering the activities of a proscribed group. The defendant's state of mind becomes more relevant here, which is a welcome distinction from the above two subsections which contain weaker *mens rea* elements. In *Alamgir* the courts discussed the requirements of *mens rea* in detail. They noted that s.12(2) required proof that a defendant arranged a meeting with 'knowledge' that the 'purpose' of the meeting was to support or further the activities of the group.[114] Purpose under s.12(2) and 12.(3)

[112] Section 12(1A) Terrorism Act 2000
[113] Larry Alexander and Kimberly D. Kessler, 'Mens Rea and Inchoate Crimes' (1997) 87 The Journal of Criminal Law and Criminology (1973-) 1138.
[114] *R v Alamgir (Mohammed) [2018] EWCA Crim 1553*, [9].

was determined by whether the defendant knew that the purposes of the terrorism-related speeches in question were to encourage support for ISIS.[115] This interpretation means that knowledge can be used to construct a culpable 'purpose' of a willingness to support a proscribed organisation. The court held that 'mindset material' (extremist material which is accepted as evidence of pre-existing extremism) was admissible to enable consideration of the defendant's 'actual views and willingness to espouse such views'.[116] The court stressed that a defendant's 'state of mind' is important in distinguishing between simply expressing an opinion and encouraging or supporting a terrorist group. However, it is not the defendant's actual belief that matters most, but rather the knowledge and purpose that can be inferred from their words, which the jury uses to decide if the *mens rea* was met.[117] It did not matter whether the defendant argued that his subjective purpose was not to support ISIS. The judge ruled that multiple factors can be used to determine knowledge through an objective test.[118] This approach significantly broadens the scope of the offence, as it allows knowledge and purpose to be inferred from the defendant's actions, even if they claim a change of heart, as *Alamgir* did.[119]

2.3.3 Defence

A defence is available under s.12(4) TA 2000 in respect of the offence under s.12(2)(c) which criminalises arranging, managing or assisting a meeting that the offender knows is to be addressed by a person who is (or professes to be) a member of a proscribed organisation. It is a defence for a person to prove that he had no reasonable cause to believe that the address would support a proscribed organisation or further its activities. The defence is intended to

[115] Ibid [11].
[116] Ibid [14].
[117] Ibid [12].
[118] Ibid [16].
[119] Ibid [15].

protect the arrangement of 'genuinely benign meetings' such as those between government officials and members of a proscribed group aimed at achieving an end to violence.[120] However, the defence only applies to private meetings as Charles Clarke affirmed during Parliamentary debate:

> 'We accept that there could be a genuinely benign private meeting to be addressed by a member of a proscribed organisation … However, we cannot accept the arranging of public meetings to be addressed by members of proscribed organisations, even when the person arranging the meeting does not think that the address will support the organisation'.[121]

The aim of the offence is to prohibit any public expressions of support for proscribed organisations whether or not the person arranging the meeting had specific intent that the address would *in fact* support an organisation. While criminalising public support would indeed limit the publicity for proscribed organisations, this is not what the offence criminalises. S.12(2) punishes the person arranging the meeting, whether or not he has the intention to support the organisation in question. The ultimate harm may be far removed from the accused's actions, illustrating how criminal liability can extend to cover the actual harm that the offence seeks to prevent.

[120] Joanna Dawson, *Proscribed Terrorist Organisations* (House of Commons Library, 27 June 2025) https://commonslibrary.parliament.uk/research-briefings/sn00815/ accessed 10 July 2025.
[121] Charles Clarke, 'Terrorism Bill Volume 353: debated on Monday 10 July 2000, Column 656' (2000) <https://hansard.parliament.uk/Commons/2000-07-10/debates/f8cd8c18-0fdc-4eb4-949e-a531f943ca0f/TerrorismBill> accessed 20 May 2024.

2.4 Wearing or Carrying of Uniforms and Articles Offence- S.13 TA 2000

2.4.1 Actus Reus

Section 13 of TA 2000 contains two separate offences. Under s.13(1), it is an offence if a person wears an item of clothing, or wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation. Under s.13(2), as amended by the CTBSA 2019, a person commits an offence he or she publishes an image of an item of clothing, or any other article, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.[122]

S.13(1) can only be committed in a public place, which is defined in s.121 TA 2000 as a place 'to which members of the public have or are permitted to have access, whether or not for payment'. It does not criminalise the wearing or displaying of articles in private. There is no definition of what conduct is required to be a 'supporter' of a proscribed organisation. An objective test of whether a reasonable person would consider the wearing or publication of an image was in such a way or in such circumstances as to 'arouse reasonable suspicion' that the person was a member or supporter of a proscribed group is sufficient to convict.[123]

Like other proscription offences, section 13 of the Terrorism Act 2000 aims to criminalise displays of power or support by associates of a proscribed organisation. Wearing certain items could 'provoke disorder' or cause fear, as suggested in *Maguire v UK*.[124] The underlying wrong

[122] Section 13(1A) Terrorism Act 2000
[123] *Maguire v United Kingdom [2015] 60 E.H.R.R. SE12*, [8]-[9].
[124] Ibid [9].

is the significant impact such displays can have on individuals and communities. For instance, wearing a Nazi or fascist uniform can directly harm and instil fear in viewers, especially Holocaust survivors and their descendants. This is evident in the national uproar and fearful responses when Prince Harry wore a Nazi armband to a party in 2005.[125] In this context, 'terror' can encompass the psychological distress and fear experienced by those confronted with symbols associated with present or past atrocities.

Therefore, the offence under s.13 TA 2000 can be justified as a means of preventing not only potential public disorder but also the profound psychological harm caused by such displays. Arguably, this offence serves a preventive function by discouraging the display of symbols associated with proscribed organisations, which could normalise extremist ideologies and contribute to individual radicalization. The offence helps maintain public order and prevent the spread of hate speech and incitement, leading to violence and societal unrest. However, the offence is drafted broadly to cover cases where individuals can be prosecuted for wearing or displaying symbols or articles without a clear intent to support or promote a proscribed organization. While recognizing the potential for harm, it is crucial to consider the principles of proportionality and certainty in the applying the law. The challenge lies in ensuring the offence is not overly broad, leading to the penalization of conduct that does not intend to cause harm or support banned organizations. It is essential to distinguish between conduct that genuinely poses a threat or incites fear and expressions that fall within the realm of legitimate expression.

[125] BBC News, 'Harry Says Sorry for Nazi Costume' (2005) <http://news.bbc.co.uk/1/hi/4170083.stm> accessed 1 August 2024.

In *Rankin v Murray,* the defendant was convicted after wearing jewellery with the initials 'UVF' which prompted the police to suspect that he was a member of the proscribed group Ulster Volunteer Force (UVF).[126] The defendant appealed on the grounds that there was no 'reasonable suspicion' that he was a member of UVF since 'there had to be more than an indication of an interest in the organisation' for the word 'supporter' to be construed.[127] He argued that 'foolish' acts of wearing apparel or 'as a display of bravado' ought to fall outside the scope of s.13 TA 2000.[128] The court dismissed the appeal and upheld the objective 'reasonable suspicion' test, noting that it was possible to construe reasonable suspicion by an 'objective observer'.[129] Lord Hamilton noted that wearing a ring, although at the less serious end of the spectrum of conduct covered by s.13 TA 2000, still falls within the legislative intent to condemn support for a proscribed organisation.[130]

The court in *Joseph Patrick Barr* took a similar position regarding an appellant charged with s.13 TA 2000 for wearing a paramilitary uniform at a public funeral. The defence submitted that the charge was defective because the proscribed organisation was not specified in the charge. This was rejected by the court:

> 'The legislation does not require the suspicion to be precise in relation to factions. If it were otherwise it would be extremely difficult to utilise the Act to prevent public displays of paramilitary power…The legislation targets activity which would generate a reasonable suspicion of support for or participation in prohibited groups. That is the

[126] *Rankin v Murray [2004] S.L.T. 1164*, [4].
[127] Ibid [5].
[128] Ibid [5].
[129] Ibid [6].
[130] Ibid [9].

mischief it is designed to address. It would be wrong to require a degree of specificity in the charges which would prevent the legislation from achieving its purpose'.[131]

The statement above affirms that one of the main legislative intentions behind s.13 TA 2000 is to prevent public displays of paramilitary power against the state, stretching the prevention of harm to its limits. While the offence penalises conduct that can cause harm (such as provoking terror) it is important to refine its scope to prevent overreach and maintain a fair balance between protecting the public and upholding fundamental freedoms. In some cases, wearing an item of clothing or privately publishing an image may not be closely linked to causing terrorist harm or intentionally provoking or inciting terror. It can be argued that s.13 of the TA 2000 also aims to condemn a proscribed organisation, rather than just preventing harm.

Finally, s.13 TA 2000 is an offence that raises significant concerns by encroaching on the private realm. The public-private distinction is crucial, as criminal law principles state that liability should not interfere with private acts unless absolutely necessary.[132] However, s.13(1A) TA 2000 makes it a crime to publish images, including posting a privately taken picture to a small group of people, which arguably pushes the boundaries of criminal law beyond its usual limits. Mendelsohn notes that before the addition of s.13(1A) by the CTBSA 2019, this offence had a 'social media loophole' where 'public' displays of articles done in 'private' settings were not captured by the offence. This was evident in the case of Sophie Stephenson, a student who posted a picture of herself wearing a t-shirt with the Shia Islamist group Hizballah on Twitter in 2018.[133] At the time, Scottish authorities declined to prosecute her due to (amongst other

[131] *Joseph Patrick Barr v Public Prosecution Service [2020] NICA 46,* [36].
[132] Stephen Riley, 'The Public–Private Divide: Which Side is Criminal Justice On?' in Cowburn, M., Duggan, M., Robinson, A., & Senior P. (Eds.), *Values in Criminology and Community Justice* (Policy Press 2013).
[133] James Mendelsohn, 'T-Shirts, Twitter and the Terrorism Act 2000' (2018) 182 Criminal Law & Justice Weekly 100.

reasons) the lack of certainty as to whether Stephenson displayed the shirt in a 'public' place or just paraded it on Twitter when she got home.[134] While Mendelsohn recommended that the offence's *actus reus* should be amended to include 'uploading an image to a publicly accessible social media account' to capture these cases, the 2019 amendment is drafted broadly by criminalising any publication of images without specifying when and where someone may fall within the ambit of the offence.[135] Although s.13 TA 2000 is a summary offence that can only be tried in the magistrates' court with a maximum sentence of 6 months' imprisonment, it still raises concerns about restricting freedom of expression and depriving liberty, especially since it is a strict liability offence that is difficult to justify for terrorism-related crimes, which have serious consequences for the accused.

2.4.2 Mens Rea

The central issue in the Supreme Court case of *Akdogan* was whether the offence involved strict liability. The appellants argued that imposing strict liability for uniform offences was unjustifiable and breached Article 10 of the ECHR. In *Akdogan*, the appellants were convicted of s.13 TA 2000 after carrying a flag of the proscribed organisation the Kurdistan Workers Party (PKK) during a demonstration against the Turkish state in 2018. The Crown Court found that the appellants carried the flags in a way that 'aroused reasonable suspicion' that they were members or supporters of PKK due to circumstantial factors such as the duration of the flag carrying, visibility and gestures by the appellants.[136]

[134] Ibid.
[135] Ibid 101.
[136] *PWR v DPP [2022] UKSC 2,* [15].

In 2019, the appellants appealed on the basis that the prosecution failed to prove any *mens rea* (knowledge/intention) concerning the support for PKK.[137] The appeal failed as the High Court held that s.13 created a strict liability offence. An appeal by way of case stated was heard by the Divisional Court in 2020, which decided on two questions:

> '(1) If section 13 of the Terrorism Act 2000 creates an offence of strict liability.
>
> (2) If section 13 of the Terrorism Act creates an offence of strict liability, is that compatible with article 10 of the European Convention of Human Rights?'.[138]

The Divisional Court refused permission to appeal but certified the two questions as points of public importance, which were heard by the Supreme Court in 2020. On the first issue, the Supreme Court held that there is a 'limited' form of *mens rea* in the sense that the defendant must know that he or she is wearing, carrying or displaying the relevant article, which implies that these acts must be deliberate and not inadvertent.[139] The court emphasised the safeguards upheld by the presumption of *mens rea* which was the starting point for interpreting an offence with no clear mental element.[140] The court noted that the presumption of *mens rea* can be rebutted by the express words and by necessary implication of Parliament's intent to create a strict liability offence.[141] The test for necessary implication:

[137] Ibid [16].
[138] Ibid [6].
[139] Ibid [25].
[140] Ibid [27].
[141] Ibid [30].

> '…turns on the words used in the light of their context and the purpose (or mischief) of the provision in question'.[142]

The court's reasoning is logical but leads to unsatisfactory results. The Supreme Court referred to two factors that led to the conclusion that s.13 TA 2000 is an offence of strict liability. First, the words 'to arouse reasonable suspicion' includes an objective test that did not require the defendants to 'knowingly' arouse suspicion.[143] Subjective knowledge is irrelevant to whether a third party forms the suspicion reasonably, and this language is clear and unambiguous in the statute.[144] Secondly, s.13 TA 2000 creates a strict liability offence since its maximum sentence is 'less serious' than other terrorism-related offences, and none of the amendments made to s.12/13 TA 2000 by the CTBSA 2019 added *mens rea* to the offence.[145] It could be argued that section 13 of the Terrorism Act 2000 is too serious an offence to have strict liability, considering the maximum penalty is six months' imprisonment. The offence is deliberately very broad to deny a proscribed organisation publicity, a preventive goal that arguably stretched too far beyond the just limits of the criminal law.

On the question of whether strict liability offences breach Article 10 of the ECHR, the court's argument is unsatisfactory. It held that preventing proscribed organisations from achieving legitimacy is a necessary aim in a democratic society, making the offence proportional.[146] However, one might argue that wearing a uniform or carrying articles that could be seen as supporting a group is far removed from actual terrorist harm, posing only a 'speculative' danger

[142] Ibid [34].
[143] Ibid [37].
[144] Ibid [41].
[145] Ibid [49].
[146] Ibid [60].

that does not meet a pressing social need.[147] The court insisted that s.13 TA 2000 strikes a fair balance between freedom of expression and its limits, citing less serious sentences and the deproscription procedure.[148] However, the latter has been heavily criticised by academics for being ineffective. *Akdogan* highlights the tensions between the rule of law, human rights, and proportionality constraints, and the broad reach of s.13 TA 2000, with the constraints having a weaker impact than expected. Although the court emphasises the importance of 'proportionality' in its ruling, it seems that the deterrence function of s.13 takes precedence over procedural safeguards. The prevention of violence and terrorism appears to be a trump card in human rights arguments raised by challenges to proscription offences.

2.4.3 Defence

S.13 TA 2000 offers no defence to individuals prosecuted for the offence. However, ignorance might absolve liability if it can be proven that the individual was genuinely unaware of what the uniform or article represents.[149] Scholars have asserted that the proscription offences impermissibly limit freedom of expression.[150] Offences as broad as s.13 TA 2000 tend to involve the restriction of the freedom to express or display articles, and problems could potentially arise from the qualified exceptions under Article 10 of the ECHR.

A case in point is *Maguire,* where a Celtic Football Club supporter attended a match wearing a shirt that displayed the text 'INLA' as well as phrases referring to the Bloody Sunday civil rights march in 1972. 'INLA' referred to the Irish National Liberation Army, a proscribed

[147] Ibid [67].
[148] Ibid [68].
[149] *Maguire v United Kingdom [2015] 60 E.H.R.R. SE12*, [17]
[150] Roger Douglas, 'Guilt by Association', *Law, Liberty, and the Pursuit of Terrorism* (University of Michigan Press 2014), 136.

organisation listed under Schedule 2. The accused was arrested and charged with s.13 TA 2000. His charge was subsequently dropped and changed to the offence of breach of peace. The applicant appealed, arguing that his Article 10 rights were breached and his arrest was 'disproportionate to the legitimate aim of preventing disorder'.[151] Although the court's discussion of Article 10 relates to the new charge, it is nonetheless relevant. The court agreed that the protection of Article 10 extends to 'the form in which [ideas and information] are conveyed', including the right to express ideas through modes of dress.[152] However, the court held that legislation aimed at preventing violence in a democratic society was a legitimate need .[153] The court emphasised that Article 10 comes with a duty to avoid expressions that are 'gratuitously offensive' and therefore certain forms of dangerous expressions met the necessity test.[154] The court therefore found the interference with Article 10 to be proportionate:

> '…due deference must be given to national authorities' assessment when the expression in question might have many levels of meaning which could only fully be understood by persons with a full understanding of the historical background'.[155]

In respect of terrorism-related offences, it is unsurprising that the right to freedom of expression is often limited in the interests of national security. Successful arguments relating to freedom of expression have been rare and, on the whole, the courts have taken a highly deferential stance in upholding the proportionality of this offence. The outcome of *Maguire* is unsatisfactory. The court admitted that the applicant was not convicted for expressing his views in strong language but criminalised because of the particular conduct 'at a particular time and in a particular

[151] *Maguire v United Kingdom [2015] 60 E.H.R.R. SE12* [21]
[152] Ibid [45].
[153] Ibid [47].
[154] Ibid [49].
[155] Ibid [50].

place'.[156] This leaves the state of s.13 TA 2000 highly uncertain and context-dependent because the legislation does not specify what types of expression might be excluded from the scope of the *actus reus*. Yet, we live in 'an age of protest',[157] and many governments are using laws to criminalise expression that is 'insulting to the ruling authorities'.[158]

3. Justifying Associative Offences

3.1 *Proscription And Wrongdoing*

The power of proscription has been described as 'severe' and 'heavy' during parliamentary debates, with fears expressed over the power's potential to intrude on rights and freedoms as well as its potential to criminalise remote harms.[159] Theoretically, proscription can be understood as a series of legal instruments which permit the state to 'prohibit the presence of, or support for, an identified organisation within its jurisdiction'.[160] As then Home Secretary Charles Clarke noted, proscription demonstrates the state's disapproval of the group's ideas and actions and suppresses the group's ability to promote its agenda in society through the creation of association offences.

Proscription is therefore a key aspect of the UK's counterterrorism framework, which enables the criminalisation of membership of specific groups, as well as manifestations of support for

[156] Ibid [55].
[157] Erica Goldberg, 'Competing Free Speech Values in an Age of Protest' (2017) 39 Cardozo L Rev 2163.
[158] Amal Clooney and Philippa Webb, 'The Right to Insult in International Law' (2016) 48 Colum Hum Rts L Rev 1.
[159] Lee Jarvis and Tim Legrand, 'The Proscription or Listing of Terrorist Organisations: Understanding, Assessment, and International Comparisons' (2018) 30 Terrorism and Political Violence 199, 207.
[160] Ibid 201.

proscribed organisations that occur before the advent of any terrorist risk.[161] Under this preventive logic, associates of proscribed groups are assumed to increase the risk of a terrorist attack. However, establishing causation is problematic because membership, acts and displays of support may be far from the risk of a terrorist attack. Joining a terrorist organisation is not remote from harm if members, for example, engage in terrorist atrocities and fight after their membership. However, in other cases, the link between joining a terrorist organisation and the infliction of harm can be uncertain. If proscription is conceptualised as a form of 'imposed' wrongdoing (through the exercise of executive power) then it formally does not constitute evidence of criminal wrongdoing. As de Goede rightly argues, 'its precautionary and temporary nature renders it distinct from criminal punishment'.[162]

To give another example, it is unclear how being a member of a non-violent anti-government association is wrongful as compared to an 'organisation concerned in terrorism', or how that is distinct from a 'violent' criminal organisation. Levanon argues that it is unclear how proscription differentiates between these organisations in terms of pinpointing wrongfulness, since terrorist organisations contain many forms and being 'concerned in terrorism' means that the organisation's specific objective must include the commission of a terrorist act.[163] Levanon argues that attributing a terrorist wrong to 'ancillary' organisations is imputing 'nothing more than a remote and indirect form of mere potential complicity', therefore lacking sufficient wrongfulness and blameworthiness to justify criminalisation.[164]

[161] Ibid 201.
[162] Marieke De Goede, 'Proscription's Futures', *The Proscription of Terrorist Organisations* (Routledge 2020), 341.
[163] Levanon (n 66) 228.
[164] Ibid 228.

Proscription is said to be justified on the grounds that it protects four main interests, three of which are preventive. They are all valid justifications, but some are too extensive and will be critiqued. First, a key goal of the proscription regime, as Charles Clarke noted in *Akdogan* is to deny terrorist groups publicity which could attract more attention to the organisation and its cause- a phrase first used by Margaret Thatcher in the media context.[165] However, even if we accept the goal of 'suffocating' proscribed organisations, it is unclear what wrongdoing is targeted by proscription policy. What wrongs have proscribed organisations committed to justify denying them oxygen? Davies argues that terrorist actions can be divided into immediate and continuing.[166] If a terrorist action is in progress, a paternalistic view of the state justifies intervention and censorship of that incident. However, censoring past or future incidents is rarely justified. The wrongfulness here is lies in the organisation's past actions and history of violence, not necessarily its present actions- a problem seen in the deproscription of terrorist organisations no longer actively promoting extremism and violence, the grounds for proscription, as discussed later.

Second, proscribing an organisation is said to protect against harm by targeting activities that indirectly and substantially benefit the organisation.[167] While this reasoning applies to prohibitions on terrorist financing, it is less straightforward to say that prohibiting acts like support or wearing a uniform meaningfully disrupts the organisation's threat. Although such prohibitions may deter individuals from publicly associating with the group, it is it is unclear whether the decrease in visible support affects the organisation's capacity or influence. Interestingly, De Goede argues that the 'mechanisms of time, temporality and temporariness

[165] Michael Tracey and Christian Herzog, 'Thatcher, thatcherism and British broadcasting policy' (2014) 40 Rundfunk und Geschichte 63.
[166] Rodney Tiffen, 'Contested Narratives, Ambiguous Impacts and Democratic Dilemmas: The Western News Media and the "War on Terror"' (2006) 25 Policy and Society 99.
[167] Brice Dickson, 'Law Versus Rerrorism: Can Law Win?' (2005) 1 European Human Rights Law Review 11.

are core to how proscription works as a unique and complex security measure'.[168] Concepts of attributing wrongfulness and culpability to individual actors are therefore stretched and challenged because proscription blurs the distinction between present measures and potential future violence, undermining the remoteness constraint.

Third, case law on proscription highlights how these organisations threaten peace or security.[169] For instance, the prohibition on wearing or displaying an article showing support for a proscribed organisation reduces the likelihood of others being influenced to support terrorist groups. However, this argument wrongfully accuses individuals who associate with these groups of being a threat, even if they do not pose one, due to the group's wrongdoing. The argument that there is a 'special dangerousness' to the collective, and that terrorist organisations pose additional danger to public safety than an individual actor or a small terrorist cell is not always persuasive, as individual terrorists have committed some of the most serious terrorist crimes.[170] It is debatable whether proscription is necessary to reduce the risk of terrorist acts. A report on 133 individuals convicted of 'Islamism-related terrorism offences' in the UK between 1999 and 2010 found that 66% had no direct link to any proscribed organisations.[171] This finding reflects the reality that many terrorists act without any association or membership with a proscribed organisation.[172]

[168] De Goede (n 162).
[169] Manuel Cancio Melia, 'The Wrongfulness of Crimes of Unlawful Association' (2008) 11 New Criminal Law Review: An International and Interdisciplinary Journal 563, 584.
[170] Ibid 584.
[171] David Anderson, The Terrorism Act in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 (2011) https://assets.publishing.service.gov.uk/media/5a7c6bf540f0b62aff6c18e7/9780108511769.pdf accessed 9 July 2025, 42.
[172] Ibid 42.

Ultimately, the strongest justification for proscription is that association with these organisations is inherently wrongful, as it 'assumes an attack on the state'.[173] Cancio Melia argues that they 'presuppose an attack on the state's legitimate exercise of its coercive power' by violating the state's monopoly on violence. This interesting concept originated from Berner in 1847 who argued that the existence of these autonomous associations attacks the state's interest directly:

> 'In the same manner that vices introduce disorganisation into the microcosm of the psyche, a criminal band brings disorganisation into the life of the state. The band attempts to generate an organism as impervious to outside influences as possible within the organism of the state'.[174]

Max Weber argues that one of the core features of the modern state is that the state is the exclusive wielder of the power to exert violence:

> 'A state is that community…that (successfully) pretends to possess the monopoly of physical violence within a particular territory… [The state] is considered the only source of the "right" to use violence'.[175]

The wrongfulness embedded within proscription offences comes from what Cancio Melia calls an 'arrogation' of the state's monopoly on violence, where an organisation challenges the status quo of power that the state has over who can occupy a place in public life. [176] Cancio Melia

[173] Cancio Melia (n 169) 584.
[174] Ibid 584.
[175] Ibid 585.
[176] Ibid 585.

contends that the certain organisations try to attribute themselves to the 'right that belongs to the sovereign state', and it is this element that makes their proscription offences wrongful, due to the increased risk they pose.[177]

It might be argued that this conception of the wrongfulness of crimes of terrorist association confuses what the law ought to be with what the law is. However, I would argue that it accurately reflects what the wrongfulness of proscription is about. The test for proscription is based on the dangerousness and threat of an organisation to the UK, although it is highly discretionary and vague. Only dangerous organisations can challenge the state successfully, which is why deproscription exists to remove organisations that no longer pose a threat. Some argue that associative terrorism-related offences punish acts that are inherently wrongful and harmful in themselves, such as being part of a terrorist organisation or displaying its symbols. However, Cancio Melia warns against defining the reach of these offences too widely. He argues that in the Internet age, the concept of 'monopoly of violence' has taken on new meaning, as the definition of 'terrorism' has expanded to include terrorism as a 'strategical form of communication'.[178] This means that the war on terrorism has become a war on communication, where the state prevents terrorist organisations from spreading fear and political messages, rather than focusing on the concrete harm they might cause to individual interests.[179] In an attempt to redraw the boundaries of state power, the state proscribes threatening organisations by expanding the criminal liability of those who associate with or support them, and stretching the scope of these offences beyond principled limits.

[177] *Maguire v United Kingdom [2015] 60 E.H.R.R. SE12* [25]
[178] Cancio Melia (n 169) 587.
[179] Ibid 587.

Despite the growing use of proscription in counter terrorism in the UK, there has been little academic focus on the full extent of these powers. Four key concerns about proscription will be explored, each with implications for how we assign blame and responsibility for associative offences. First, Legrand and Jarvis argue that modern terrorist groups often lack a fixed institutional structure despite the 'new terrorism' thesis.[180] Goldsmith argues that jihadist organisations are formed through 'shared values, common socialisation' and modern technologies rather than formal organisational structures.[181] Organisations frequently operate under different names or employ different names when conducting their activities.[182] An example is in *R v Z,* which showed that offshoots of the IRA may not easily be identifiable. The offences of belonging, supporting and wearing the uniform of a proscribed organisation are highly visible to the public.[183] Yet, some contemporary terrorist organisations, particularly international ones, do not operate visibly. Some do not have uniforms or hierarchal structures, although some organisations have made effective use of social media to publicise their atrocities and recruit members in recent years. The inability of associative terrorism-related offences to account for different types of associative activities results in proscription failing to accurately identify wrongdoing and culpability.

Second, Legrand and Jarvis note that domestic and international political considerations impact proscription decisions.[184] Since one of the functions of proscription and associative offences is to express a rejection of the organisation's values, Almutawa and Walker argue that the power is often used legitimately as a 'proxy' to ban an organisation in the interest of another state.[185]

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[180] Legrand and Jarvis (n 2) 10.
[181] Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in E. MacDonald, G. Williams & A. Lynch (eds), *Law and Liberty and the War on Terror* (Federation Press 2007).
[182] Legrand and Jarvis (n 2) 12.
[183] Blackbourn (n 12) 23.
[184] Legrand and Jarvis (n 2) 15.
[185] Almutawa and Walker (n 32).

Marques and Murphy also argue that proscription of organisations on foreign policy grounds affirms the state's vested interest in 'opposing self-determination movements' and is a political weapon against threats that 'though real, are far from existential'.[186] While these justifications for proscription are legitimate in international politics, they are less justifiable because proscription did not apply to all groups concerned in terrorism. The test for proscription is highly discretionary, and not all groups fitting this description are subject to it. This leads to uncertainty, inconsistency, and a lack of procedural safeguards for those associated with such organisations.

Third, the process of deproscription is fraught with difficulties. Deproscription is the mechanism by which organisations which are no longer 'concerned in terrorism' would be removed from Schedule 2 TA 2000. It removes criminal liability for those associated with the organisation. Walker argues that deproscription serves to enhance the 'rule of law' constraint by ensuring that proscription 'does not become so disconnected from reality that a banning order can no longer be justified as lawful'.[187] This also underpins the culpability constraint, as it is right to deproscribe any organisation that is no longer harbouring terrorist goals. Only four organisations have succeeded to be de-listed.[188]

Finally, the question remains whether banning terrorist groups deters people from joining them and if it lowers the risk of terrorism. One could dismiss the above concerns if evidence shows that proscription reduces the risk of terrorism.[189] However, Walker notes that proscription powers were of 'marginal utility' in reducing political violence.[190] In practice, the

[186] Marques da Silva and Murphy (n 6) 11.
[187] Walker (n 21) 241.
[188] Jarvis and Legrand (n 57) 156.
[189] Jarvis and Legrand (n 159) 206.
[190] Legrand and Jarvis (n 2) 21.

government's main claims to effectiveness is not easily measured or demonstrated.[191] Marques and Murphy argue that proscription is a weak deterrent in preventing radicalisation.[192] Legrand argues that proscription could actually make these organisations more legitimate or appealing to people drawn to extremism and illegal activities, and also have a chilling effect on freedom of expression and association.[193] Furthermore, proscription powers potentially creates what Hillyard calls 'suspect communities' in which various groups are 'othered' and seen as requiring surveillance and investigation. For instance, Pantazis and Pemberton claim that the TA 2000 has enabled the targeting of British Muslims as the new 'suspect community'.[194] This reflects that these laws unfairly and unjustly target specific groups of people.

What reforms are needed to rein in the reach of proscription powers? Some have argued that the UK should abandon proscription entirely.[195] However, this is unlikely due to its deep roots in the UK's anti-terrorism framework. On the other hand, Walker and others propose amendments to strengthen executive, judicial and legislative oversight.[196] This would safeguard legitimate political dissent and limit proscription on political grounds. This approach is correct. Strengthening procedural fairness ensures a more proportionate use of this power, with more checks on executive power. This prevents the criminalisation of associations that are too remote or seemingly innocent. As proscription is a preventive tool to reduce the risk of social violence, it is essential to consider its exceptional nature. Groups must be targeted proportionally for reasons which take account of due process and human rights, although

[191] Walker (n 21) 239.
[192] Marques da Silva and Murphy (n 6) 9.
[193] Ibid 9.
[194] Christina Pantazis and Simon Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation' (2009) 49 British Journal of Criminology 646.
[195] Legrand and Jarvis (n 2) 23.
[196] Ibid 24.

reforming the proscription regime has 'not enjoyed a high priority in Ministerial thinking or activity'.[197]

3.2 Association And Wrongdoing – Participatory Criminal Liability Or Guilt By Association

Associative terrorist offences expand the scope of criminal law significantly. But what are the mechanisms by which this expansion occurs and is it justifiable? To answer these questions, it is important to first explore the interests protected by membership, support and uniform offences. Out of all the offences examined in this thesis, associative terrorist offences are the most expansive in terms of imposing pre-inchoate liability on individuals. Since the association is ancillary to the commission of a terrorist attack, its main purpose is to prevent the risk to public safety. Levanon argues that the rationale of protecting 'public wellbeing', commonly suggested in the case law, is insufficient and argues this line of argument is too remote from membership, support and uniform offences.[198] A better suggestion is that the protected legal interest is the public's emotional well-being and freedom of action and the 'right to live one's day-to-day life undisturbed'.[199]

The key issue in justifying associative offences is how criminal law holds individuals liable simply because they are associated with a proscribed organisation. Cancio Melia puts the question aptly: 'how can the emergence and recognition of an organisation as an autonomous agent be reconciled with the attribution of wrongdoing to a particular actor?'[200] The two competing theories concern how associative offences connect to complicity and attempts,

[197] Marques da Silva and Murphy (n 6) 18.
[198] Levanon (n 66) 236.
[199] Ibid 237.
[200] Cancio Melia (n 170) 578.

versus whether the concept of the autonomous collectives' wrongdoing better explains the offences outlined in s.11-13 TA 2000.[201]

The first theory draws on the parallels between associative offences and the doctrines of complicity and attempts. Levanon notes that membership can be conceptualised as 'relatives' of conspiracy offences and an expansion of the attempts doctrine, which subsequently allows for the wrongdoing attributed to the associative offences to be understood in a more meaningful way.[202] Levanon argues that membership offences are similar to conspiracy doctrine because English law prohibits two or more people from accomplishing an unlawful act or a lawful act by unlawful means through conspiracy.[203] Similarly, membership offences criminalise a 'prohibited relationship' between the perpetrator and others since 'the underlying assumption is that the prohibited relationship is directed towards an illegitimate future conduct and this conduct should be prevented by way of early intervention'.[204] The connection between membership offences and conspiracy doctrine shows how the law takes a proactive approach to prevent harm by dealing with the risks that come with certain relationships, and how important it is to act early to keep society safe.

Associative offences can also be seen as an extension of the complicity and attempt doctrine, helping us to identify the wrongdoing these offences aim to target. Levanon suggests that complicity and conspiracy offences punish preparation towards the commission of a future offence, broadening the scope of a criminal attempt by stretching liability backwards in time.[205] While it is easier to regard the support offence under s.12 TA 2000 as preparatory, it is more

[201] Ibid 579.
[202] Levanon (n 66) 245.
[203] Ibid 246.
[204] Ibid 248.
[205] Ibid 252.

difficult to discern what preparatory conduct is punished by membership offences. To do this, different types of membership must be defined. Levanon argues that the nature of the conduct and the status of a member affects its characterisation as (wrongful) preparation.[206] She distinguishes between 'passive-nominal' and 'active' membership, where the former is less culpable than the latter as active conduct has a clearer preparatory nature.[207] Being a 'passive-nominal' member of a terrorist organisation brings someone closer to it, but it is not the same as being an active member. While joining the organisation can make it easier to commit a crime, it does not necessarily mean they will do so. Levanon notes that 'ancillary' or 'dual-purpose' organisations (organisations that do not solely have a terrorist aim) complicate the attribution of wrongdoing as membership does not automatically imply an intention to commit a terrorist offence.[208] Nonetheless, the pre-preparatory nature of the conduct criminalised by s.11-13 TA 2000 demonstrates that prohibitions on terrorist associations expand the scope of complicity and attempt law.

The hierarchy of wrongfulness above can also be analysed with reference to the 'attempted aid' doctrine. Offences related to membership and support can have a remote yet credible impact, aiding and soliciting others, which makes them wrongful because they can influence individuals to cause terrorist harm. Levanon argues that some forms of active membership and active support fall within the doctrine of attempted aid, though it is important to examine the exact manifestation of this conduct when ancillary, dual-purpose or passive membership occurs.[209] Being a member of a terrorist organisation, which supplies aid to the group, creates a complicitous relationship that increases the risk of terrorist harm. This wrongdoing is

[206] Ibid 252.
[207] Ibid 252.
[208] Ibid 252.
[209] Ibid 254.

punished under s.11 TA 2000 and the related support offence under s.12 TA 2000. The distinction between 'active' and 'passive' membership helps to distinguish between different degrees of wrongfulness. Active membership is closer to attempted aid than 'passive' membership. By viewing membership and support offences as preparatory acts defined by the type of group one joins, we can assign blame based on one's level of involvement or encouragement in committing a terrorist act. Harding suggests redefining criminal liability based on the preparatory nature of involvement in a criminal organisation, rather than focusing on specific wrongdoing within it. [210] This approach may not cover the wide range of conduct punished by these offences.

It is difficult to apply the above discussion to the uniform offence under s.13 TA 2000. The wrongdoing targeted by s.13 TA 2000 may not be linked to involvement with a terrorist organisation, except for the weak claim that someone wearing a uniform or publishing images might intend to be a member or is a member of a dangerous group and thus poses a risk of inciting a terrorist act. However, the reasonable suspicion requirement in the offence makes it difficult for us to identify any subjective wrongdoing. One does not need to be a member to wear a uniform or display images. SS.13 TA 2000 greatly broadens criminal liability by deeming that wearing an extremist organisation's uniform or publishing images of their atrocities are wrongs and harms in their own right. Wearing clothing or publishing images associated with proscribed organizations can directly cause emotional distress and psychological harm. The recognition of this inherent harm is crucial, as such acts damage both subjective security and the public's broader sense of societal safety. Ramsay's work on vulnerability shows that the criminalisation of low-level offences overextends the perceived

[210] Christopher Harding, 'The Offence of Belonging: Capturing Participation in Organised Crime' (2005) Criminal Law Review 690.

threat to security, as subjective security can be compromised merely by symbols of display from individuals with harmful intentions.[211] Section 13 is a symbolic offence aimed at expressing 'society's revulsions at violence as a political strategy as well as its determination to stop it'.[212]

A better way to explain why people view associations with proscribed groups as wrong is guilt by association. Since sections 11-13 TA 2000 express condemnation of a proscribed organisation and their values, it may be argued that individuals engaging in such acts implicitly endorse or underwrite the organisation's aims and activities. Another way to understand associative offences is to see them as a way to build individual criminal liability by linking someone to a proscribed organisation. Although the organisation itself can't be held morally or legally responsible for a crime, the law views affiliation with it- through membership, showing support, or symbolic acts like wearing a uniform- as a sign of backing or helping its terrorist goals. When the government proscribes an organisation, it is implying the group is a threat based on what it says it wants to do or has done in the past. This becomes the basis for holding individuals associated with the proscribed group responsible. Where an organisation is concerned in terrorism with aims to commit or further a terrorist aim, demonstrated by past conduct or stated intentions, then the organisation is deemed to be engaging in certain forms of wrongdoing.[213] The proscription offences attribute criminal liability to individuals associated with the organisation because people who join a group, support its activities or wear uniforms display sufficient normative involvement to justify the imposition of liability. This

[211] Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012).
[212] Clive Walker, *Terrorism and the Law* (Oxford University Press, 2011).
[213] David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds) (ed), *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008).

conception explains why associates of such groups are punished simply on their remote *actus reus* and lack of intentions about future terrorist conduct.

This conception of liability results in punishing guilt by association as wrongfulness is contingent on the wrongfulness of the group with which a person associates. Guilt by association is a criminal law concept typically applied to joint enterprises and has often been justified on the basis that it acts as a deterrent to gang violence.[214] Guilt by association is an attractive principle for the police and government in preventing future harm. Cole rightly suggests that without this concept, governments must carry out expensive investigations to catch individuals who are committing, or about to commit a terrorist act.[215] This concept explains how associative offences laterally expand criminal liability to capture a wider net of individuals. The membership and support offences under s.11 and 12 TA 2000 punish guilt by association to varying degrees, as the actions required to commit these offences can be relatively passive, although it can be argued that wearing a uniform related to a terrorist organisation under s.13 TA 2000 is inherently wrongful and harmful.

Guilt by association, however, contains limits.[216] Cole notes that guilt has two key limitations: it must be personal, and that 'legitimate associations should not be sacrificed in the name of deterring illegitimate associations'.[217] Examine US case law, Cole observes that due process principles are important to limit the application of guilt by association and to prevent morally

[214] Justice Committee, 'Written evidence from Joint Enterprise: Not Guilty by Association' (7 September 2011) <https://publications.parliament.uk/pa/cm201012/cmselect/cmjust/1597/1597we02.htm> accessed 15 May 2024, [2.2].
[215] Cole (n 214) 233.
[216] David Cole, 'Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association' (1999) 1999 The Supreme Court Review 203, 251.
[217] Ibid 219.

innocent individuals from being penalised for acts of associations.[218] This does not apply to all cases covered by the proscription offences as currently drafted. To hold individuals that associate with a proscribed organisation liable for offences, certain conditions must be fulfilled. For example, their membership must be active and ongoing, and they must have intentionally taken steps to support the terrorist organisation's goals. The offender would therefore have to take active steps with intent to further the goals of the terrorist organisation. Harding argues that guilt by association has a 'presumptive' character where a wrongful purpose is imputed to an accused's association.[219] But there is no such requirement in s.11-13 TA 2000 as they stand, and even less so for the broad offence under s.13 TA 2000. To impute wrongdoing on the people associated with terrorist organisation, at least some criteria would need to be met to ensure that offences do not unjustly capture people associated with such groups with no terrorist intent.

3.3 Association And Culpability –Preventing Remote Harms

A key issue with pre-inchoate offences is deciding exactly what someone is liable for and how far that liability extends. If associative offences require no harm or wrong, what are they based on? Although scholars are divided as to which view is more plausible, this section argues that associative offences- like all of the offences examined in this thesis- are not primarily rooted in the defendant's intention. [220] Cahill observes:

> 'Inchoate offenses demand not only proof of the purpose or intent that the offense's requirements should come to pass, but also proof of the actor's resolve- his dedication

[218] Ibid 217.
[219] Harding (n 210).
[220] Michael T Cahill, 'Defining Inchoate Crime: An Incomplete Attempt' (2011) 9 Ohio St J Crim L 751, 754.

> to ensuring that the offense will come to pass, by his hand or with his active support. It is this particular form of culpability, demonstrating both the actor's dangerousness and his ill-desert, that justifies punishing conduct that does not itself generate the harm, wrong, or risk demanded for substantive liability'.[221]

According to this view, the culpability elements for inchoate offences are defined by two key features: the inchoate conduct leading up to the ultimate act, and the accused's strong commitment to carrying out the ultimate act that was never completed. While this represents a temporal shift in the *mens rea* element as compared with non-terrorist crimes, this does not accord with the culpability elements found under s.11-13 TA 2000. The *mens rea* element for s.11 and 13 TA 2000 is non-existent. Cahill notes that attributing culpability for reckless endangerment can be regarded as a consummated offence if the defendant's conduct creates a sufficiently serious risk that was not there before.[222] This is premised on the idea that it is legitimate to impose culpability for an *attempt* to endanger. Seen this way, s.12 TA 2000 contains the clearest and most legitimate culpability requirement out of the three proscription offences.

But what about s.11 TA 2000? The attribution of culpability to membership offences is relevant to our previous consideration of wrongdoing, as the two concepts share some common ground. The membership offence is a 'status' offence, meaning it criminalises someone not just for what they do, but for who they are. As de Goede points out, this blurs the lines of criminal liability, where proscription offences target a general threat or potential for future violence, rather than a specific imminent attack.[223] In particular, membership offences take the wrongdoing from a

[221] Ibid 755.
[222] Ibid 758.
[223] De Goede (n 162) 325.

'group' (a proscribed organisation) and imputes liability to its associates in a backwards-looking manner, blurring the line between past and present responsibility.

Associative offences blur the line between wrongdoing (the prohibited act) and culpability (a blameworthy mental state) as no *mens rea* is attached to s.11 and 13 TA 2000. Cancio Melia argues that if one assumes a coherent definition of 'organisation' and conduct required to gain membership of that organisation, then the fact that someone joined the group makes 'an inquiry into the internal or subjective plans or thoughts unnecessary'.[224] This seems like what the membership and uniform offences are doing. Culpability is attributed based on an individual's choice to align with and associate themselves with a particular political group, a decision that carries moral implications and brings responsibility. The *actus reus* of these offences is capable of imputing an 'objective' culpability without an examination of such, violating the culpability and remoteness constraint at the same time. It is argued that strict liability should be reserved for regulatory or less serious offences. Yet, s.11 TA 2000 and s.13 TA 2000 attract a maximum penalty of 14 years and 6 months imprisonment respectively. Cahill argues above that inchoate (and pre-inchoate) offences punish a special type of culpability as to the '*performance* of conduct that will satisfy the elements of the crime'.[225]

3.4 Article 6- Reverse Burden Of Proof

S.3 of the HRA 1998 states that courts must interpret legislation in a way that is compatible with the European Convention on Human Rights as far as possible.[226] If not, the legislation

[224] Cancio Melia (n 170) 583.
[225] Cahill (n 220) 755.
[226] Section 3 Human Rights Act 1998

will still be enforced, but the court will declare it incompatible under s.4.[227] This raises the question of how compatible the associative offences are with the Convention. Legrand and Jarvis note that proscription offences violate the presumption of innocence because a proscribed organisation is outlawed 'before it has a chance to protest innocence before the POAC or Home Secretary'.[228] Similarly, the defences outlined in s.11(2) TA 2000 and s.12(4) TA 2000 feature a reverse burden of proof, which Legrand and Jarvis argue violates Article 6(2) of the Convention.[229] The potential incompatibility of these offences with Article 6(2) is clear as Article 6(2) provides that: 'everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law'.[230] Instead of the prosecution proving guilt beyond reasonable doubt, a reverse legal burden is placed on the defendant to prove his innocence on the balance of probabilities.

Cases concerning s.11-13 TA 2000, as well as non-terrorist cases, have grappled with this issue of reversed burdens. In *Woolmington v DPP*,[231] Lord Sankey famously described the prosecution requirement to prove guilt beyond reasonable doubt as the 'golden thread' running through the criminal law.[232] However, Fitzpatrick notes that the law is filled with reverse burden provisions and statutory exceptions,.[233] Some of these reverse burdens have been held by the court to be compatible with the presumption of innocence, but others have been declared incompatible.[234] In *AG's Reference (No. 4 of 2002)*, the court held that proscription offences

[227] Section 4 Human Rights Act 1998
[228] Legrand and Jarvis (n 2) 23.
[229] Ibid.
[230] Article 6(2) ECHR
[231] *Woolmington v DPP [1935] AC 462*
[232] David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 The Cambridge Law Journal 142,142.
[233] Ben Fitzpatrick, 'Reverse Burden and Article 6 (2) of the European Convention on Human Rights: Drunk in Charge; Terrorism Offence: Sheldrake v DPP; Attorney-General's Reference (No. 4 of 2002)[2004] UKHL 43' (2005) 69 The Journal of Criminal Law 478, 4.
[234] Hamer (n 232) 143.

were compatible with Article 6(2) ECHR only by straining to interpret them as reverse 'evidential' burdens.[235] Unless the presumption of innocence under Article 6(2) can be qualified, it requires the prosecution to prove all the elements of the offence comprising the guilt of the defendant.[236] However, the ECHR has held that Article 6(2) is not absolute and is qualified if certain conditions can be filled: first, whether the reverse burden is imposed to achieve a legitimate aim and secondly, whether it is proportionate to that aim.[237] In this case, the necessity of attacking terrorist organisations was a legitimate aim which enabled a reverse evidential burden to be read into s.11 TA 2000.

Clear guidance on how the courts should interpret a reverse burden of proof is essential to limit the reach of associative offences. However, the courts have not reached a consensus on how to interpret reverse onuses, and their decisions have fluctuated between procedural and substantial approaches to decide when to uphold or read down the reverse burden.[238] Tadros and Tierney argue that substantive approaches enable courts to review reverse burden defences by interpreting the purpose of the law, which respects parliamentary sovereignty by upholding parliament's intention through a purposive approach.[239] However, Ashworth and Dennis argue that this approach is unrealistic, pointing out that cases often have unclear or conflicting principles for interpreting reverse burden, which raises the question of whether the 'search for principle should be abandoned'.[240] This lack of clarity is unsatisfactory and violates the principle of legal certainty. Reverse onuses carry serious consequences and undermine long-

[235] *Attorney General's Reference No 4 of 2002 (On Appeal from the Court of Appeal (Criminal Division)) Sheldrake (Respondent) v. Director of Public Prosecutions (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] UKHL 43,* [44].
[236] Dennis (n 88) 2
[237] Ibid 2.
[238] Hamer (n 232) 144.
[239] Ibid 145.
[240] Ibid 146.

established principles of criminal law by creating a presumption of guilt. As Lord Tomlinson said:

> 'A presumption of guilt seems to be assumed without available evidence being tested prior to the chance to prove innocence. That is extremely difficult when no one has stated explicitly what one is alleged to have done so that one can proceed to absolve oneself'.[241]

Although Dennis argues that the domestic courts have 'rejected any general rule on reverse onuses and said that each case has to be decided according to its particular circumstances',[242] he examines the s.11 TA 2000 case of *AG's Reference (No. 4 of 2002)* and extracts principles that guide judicial decision-making in this area. This offers some guidance on how the courts respond to reverse onuses and what constraints are applied. According to Dennis, whose work was later developed by Hamer, the judicial approach tends to follow three stages. Taking s.11(2) TA 2000 as an example, the court first interprets whether the defence places an evidential or legal burden of proof on the defendant. The former is compatible with Article 6(2). But in *AG's Reference (No. 4 of 2002),* it was held that s.11 was excluded from s.118 TA 2000 and therefore imposed a legal burden.

The second stage is to examine whether the legal burden is justified – does it serve a legitimate aim and is it proportional to the aim? The justifying criteria for reversed onuses include the classification of the offence, elements of the offence, maximum penalty and whether the defendant is required to disprove any essential elements of the offence. These factors influence

[241] Legrand and Jarvis (n 2) 22.
[242] Dennis (n 88) 2.

whether judicial deference is given to Parliament's aim. However, the most important constraint in terrorism legislation is the proportionality of the reverse burden of proof. The court's interpretation of s.11(2) TA 2000 arguably gave significant strength to this proportionality constraint. From a preventive perspective, s.11(2) would provide the prosecution with ease of proof to secure a conviction. The court held that the offence's high maximum penalty and broad scope could ensnare people whose conduct was not sufficiently 'blameworthy', breaching the presumption of innocence and lead to a 'real risk of unfair conviction'.[243]

Therefore, the proportionality constraint plays a key role in determining how courts interpret a reverse onus defence. Lord Bingham explicitly referred to the unfairness of requiring a defendant to prove his lack of blameworthiness, demonstrating the strength of the culpability constraint in informing the proportionality constraint to delimiting this defence. In his dissent, Lord Rodgers argued that it was a legitimate aim for Parliament to prohibit a person from being a member of a proscribed group and therefore the burden was not unreasonable.[244] In one sense, Lord Rodgers may be right that wide-ranging offences might be reasonable to prevent the risk of terrorist harm. However, given the seriousness of terrorism offences and their remote nature, it is clear that Lord Bingham is correct in using s.3 HRA 1998 to 'read down' the legal burden in s.11(2) to an evidential one, to prevent parliament from making the offence even broader.

Dennis has criticised the third stage of the court's decision-making process, reading down legislation, for being more suitable for laws that existed before the HRA.[245] Fitzpatrick suggests that the courts' willingness to apply the provision to offences committed after 1998,

[243] Ibid 13.
[244] Ibid 14.
[245] Ibid 15.

such as those under s.11 TA 2000, shows that they are prepared to challenge Parliament's understanding of what is convention-compliant.[246] The courts' application of the culpability and proportionality constraints limited the scope of reverse onus defence, highlighting the importance of these principles and the human rights constraint in Article 6(2) ECHR. However, as Hamer points out, the law in this area remains plagued by complexity and controversy, resulting in significant uncertainty.[247]

4. Conclusion

This chapter provides a theoretical and doctrinal analysis of associative terrorism offences, which criminalise certain associative ties believed to increase support and preparatory steps towards future terrorism-related conduct, aiming to prevent harm. As such, they are best characterised as distant relatives of conspiracy offences and expand the scope of the aid doctrine by operation of their *actus reus* requirement and minimal *mens rea* requirements that do not include specific intent or criminal purpose to aid, except limited elements of knowledge and recklessness in the s.12 offence. The offences under s.11-13 TA 2000 prohibit a broad range of association-based and pre-inchoate conduct, making them difficult to justify if one accepts the criminal law constraints identified in Chapter 2 of this thesis. As strict liability offences, both the membership and uniform offences do not attribute liability based on the offender's culpability. Instead, these proscription offences punish the individual's association with 'terrorist' organisations, which are seen as posing a threat to the state in itself, as well as threatening the state's monopoly of violence.

[246] Ben Fitzpatrick (n 234).
[247] Hamer (n 232) 146.

Legislating against activities such as the membership of, support for, and wearing/displaying articles of these groups justifiably criminalises wrongs relating to the support of violence and extremism. These offences target acts that directly contribute to violence and extremism or create environments that support these dangerous ideologies. the law aims to prevent the escalation of violence and protect public safety. However, these offences also risk infringing on liberal freedoms, including the right to be presumed innocent, freedom of expression, and freedom of association. This tension is not unique to proscription offences; all pre-inchoate offences explored in previous chapters also threaten the balance between liberty and security. The scope of associative proscription offences has widened in recent years to capture conduct such as expressing an opinion or belief that is supportive of a proscribed organisation and publishing an image in such a way as to arouse reasonable suspicion that the person is a member or supporter of such a group. These expansions capture associative conduct even in the private realm, targeting digital glorification or support for 'dangerous' groups across social media, although proscription or the designation of terrorist organisations arguably are sometimes 'out of place in the unstructured world of online communication whose penetration, convenience and persuasiveness allow violent ideologues to advertise their brand and beliefs to millions'.[248]

A common concern among these questions is that the effectiveness of proscription offences in reducing terrorism has not been shown.[249] The absolute nature of proscription which allows crimes to be created at the 'stroke of a pen', oversteps key criminal law principles such as culpability, wrongfulness and remoteness. This weakens fundamental safeguards that protect

[248] Jonathan Hall, *The Terrorism Acts in 2020: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act 2011* (Independent Reviewer of Terrorism Legislation, UK Government 2021) <https://www.gov.uk/government/publications/the-terrorism-acts-in-2020/the-terrorism-acts-in-2020-report-of-the-independent-reviewer-of-terrorism-legislation-accessible-version> accessed 9 July 2025, [2.31].
[249] Jarvis and Legrand (n 159) 200.

individuals from excessive criminal liability. Proscription remains a popular political tool in the 'war' against terrorism.[250] Associative offences might be necessary for gathering information to prevent terrorist acts by allowing pre-emptive intervention, which reduces the risk of terrorism. However, these offences must be proportionate to the potential harm they aim to prevent. Otherwise, the public may be left without adequate protection, and their rights to freedom of expression and association may be compromised by overly broad legislation

[250] Jenny Hocking, 'Terrorism and Counter-Terrorism: Institutionalising Political Order' (1986) 58 The Australian Quarterly 297.

VIII: Lessons Learned: Re-Drawing the Boundaries of Criminal Law For Pre-Inchoate Terrorism-Related Offences

Providing security is a crucial function of the state. The government has an imperative to protect its citizens against threats such as terrorism and prevent them from harm.[1] Yet, at the heart of this thesis lies the question of how to best protect individual interests against unjustified intrusions on freedoms in the pursuit of security. Chapters 5, 6, and 7 examined three categories of pre-inchoate terrorism-related offences. These allow for early intervention by police before a terrorist attack. In doing so, they extend the criminal law vertically and horizontally through 'the criminalisation of acts taken well before, and further removed from harm, than that which is traditionally accepted…in criminal law'.[2]

It is clear that the UK prefers a 'prosecution approach' in dealing with terrorism-related pre-inchoate activities.[3] Ashworth, Zedner and Tomlin argue that this approach 'may provide the justification for a wide range of preventive measures'.[4] However, relying solely on utilitarian justifications for pre-inchoate offences fails to define their boundaries, leaving the question of how to re-draw the boundaries of the criminal law unanswered. The core argument made earlier in this thesis is that retributivist, liberal principles of restraint are necessary to ensure pre-inchoate terrorism laws are applied justly, safeguarding against overreach and preserving individual liberties within a framework that respects the rule of law. This chapter elaborates on this claim by assessing the constraining principles discussed in Chapter 4.

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[1] Jessie Blackbourn, 'Security Measures and Preventive Measures' in Pedro Caeiro and others (eds), *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar Publishing 2024).

[2] Tamara Tulich, Rebecca Ananian-Welsh, Simon Bronitt & Sarah Murray (Eds.) *Regulating Preventive Justice: Principle, Policy and Paradox* (1st ed. Routledge 2007).

[3] Blackbourn (n 1).

[4] Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013).

In light of the prevalence of pre-inchoate terrorism-related offences and questions about constraining the ever-growing preventive state, this Chapter asks how constraining principles apply in light of the specific offences analysed in this thesis. The first part of this Chapter asks what constraints are appropriate for different categories of pre-inchoate offences in a table that outlines the problems these offences pose. A weight is given to each constraining principle that should limit the reach of these offences. This assessment not only clarifies the doctrinal analysis conducted in earlier chapters but also underpins a normative model for assessing the substance and legitimacy of these pre-inchoate offences.

This next section discusses the specific constraints outlined in Chapter 4 in light of the doctrinal analysis conducted in the previous chapters. Referring to the main elements of these pre-inchoate offences reveals the problems they pose for the limits of criminal law. Furthermore, it shows how the offences do not align with traditional criminal law principles such as harm, wrongfulness, and their rationales. This chapter ends by discussing how constraints redraw the boundaries of the criminal law for pre-inchoate terrorism-related offences and some limitations. The need to constrain the ever-growing scope of pre-inchoate terrorism-related offences require that well-developed constraining principles limit the reach of criminalisation. A number of scholars recognise the need to develop a 'preventive' jurisprudence in response to the expansion of criminal law.[5] Therefore, the following discussion situates constraining principles by first identifying the main problems posed by the three types of pre-inchoate terrorism-related offences on the limits of the criminal law through identifying their most salient features, then asking how they challenge the limits of criminal law. I evaluate what constraints are appropriate

[5] Tulich (n 2); James Edwards, 'Theories of Criminal Law' (*Stanford Encyclopedia of Philosophy*, Fall 2021) <https://plato.stanford.edu/entries/criminal-law> accessed 9 July 2025.

for different categories of pre-inchoate offences. Constraining principles play a key role within this burgeoning jurisprudence. They identify conditions that permit justified criminalisation, so that it is only permissible to do X if it satisfies condition Y.

I will give a weight to each constraint. A strong constraint means the constraint *presently*, *ought* to, and *could* play a strong role in delimiting the reach of the offence. A weak constraint means that there are more hurdles and barriers for the limiting principle to carry more weight on the offence, for various reasons explored in the doctrinal chapters. It does not mean that they carry no weight or that they might carry more force in constitutional challenges such as judicial reviews. This Chapter will discuss the unique role of human rights and how their force depends on whether the right is absolute or qualified, which determines their ability to constrain the reach of these offences. 'Neutral' constraints mean that it may or may not carry much weight in clarifying the limits of the offence in its current state. The next section discusses how these constraining principles might be brought into play and how they interact with each other.

1. Classifying And Understanding The Offences And Their Constraints

The three pre-inchoate terrorism-related offences discussed in the previous chapters and the problems they pose for the rightful limits of the criminal law will not be repeated in the next section. Instead, I will analyse important constraining principles to explore how these offences depart from established principles of criminal law. The aim is to subject these vague and broad pre-inchoate terrorism-related offences to a deeper investigation and develop a theory of what constraints ought to limit the boundaries of preventive terrorism-related offences.

Although I do not claim to develop a completely new framework for analysing preventive pre-inchoate terrorism offences, this analysis is 'unified' in the sense that it puts three far-reaching terrorism-related precursor offences- possession, encouragement, and associative acts- into a single analytical framework. It considers the extent to which various constraints such as necessity, wrongfulness, culpability, remoteness, proportionality and human rights ought to apply to these offences. It identifies where the law has encroached too far in criminalising pre-inchoate acts and what can be done to limit their reach. Undoubtedly, there are limits as to what one framework alone can do to change the preventive jurisprudence in the field of terrorism. However, the importance of this analysis is that it brings pre-inchoate terrorism offences to the forefront of the discussion, which invites further questions of how best to tackle the tensions between prevention of the risk of terrorism and security without undermining principles such as certainty and proportionality, in light of constraining principles of a liberal theory of criminal law.

2. Redefining The Limits Of Pre-Inchoate Terrorism-Related Offences

2.1 Constraining Risk-Based Possession Offences

I have shown that Sections 57 and 58 of the TA 2000 depart from several criminal law principles. Therefore, a normative discussion of what legal constraints ought to apply to these offences is important to 're-draw' the boundaries of the criminal law.

First, the necessity principle is engaged. Sections 57 and 58, as Zedner observes, contribute to the larger problem of 'overcriminalisation' because of their overlapping nature, which means

that in practice they are often charged alongside each other.[6] Offences such as encouragement and dissemination are already terrorism offences that also apply to social media activity and internet companies, which means that section 58(1)(C) might be considered unnecessary.[7] It could be argued that section 58 already covers terrorist 'propaganda' that can fall under materials 'likely to be useful' to further a terrorist act. That said, applying the necessity principle is unlikely to have much weight because of the political imperative to 'defend up the field'[8] by enacting more pre-inchoate terrorism offences is too strong. This can be seen in the growing number of proposed terrorism offences that seem similar to sections 57 and 58, such as the proposal to legislate for a new criminal offence relating to the 'possession of the most serious material glorifying or encouraging terrorism' in 2020.[9]

Second, the broad act requirements in both offences violate the legal certainty requirement under the rule of law. The requirement that possession must give rise to a 'reasonable suspicion' of a terrorist purpose is vague and expansive. As Zedner rightly notes, the viewing or accessing requirement under section 58(1)(C) is insufficiently precise to satisfy the principle of maximum certainty. [10] Imposing more safeguards and clarity would better enable individuals to guide their conduct in a way that is within the bounds of such offences.

The legal certainty requirement must be discussed alongside the need to strengthen the wrongfulness constraint under section 57 and section 58. The third argument is that these

[6] Lucia Zedner, 'Countering Terrorism or Criminalizing Curiosity? The Troubled History of UK Responses to Right-Wing and Other Extremism' (2021) 50 Common Law World Review 57.
[7] Ibid.
[8] David Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law' (2013) Available at SSRN 2292950.
[9] Sapan Maini-Thompson, *'Criminalising the Possession of "Terrorist Propaganda": a Human Rights Analysis'* (UK Human Rights Blog, 21st January) <https://ukhumanrightsblog.com/2020/01/21/criminalising-the-possession-of-terrorist-propaganda-a-human-rights-analysis/> accessed 31 October 2023.
[10] Zedner (n 6).

offences violate the wrongfulness principle. Because of the complicated nature of risk-based possession offences, they do not target possession of any specific objects even if control or a terrorist purpose can be deduced convincingly. The drafting of these offences is so vague that the creation of a 'reasonable suspicion' of a terrorist-related state of affairs is deemed to be wrongful. An application of the wrongfulness constraint would require a strengthening of the 'control' element within the *actus reus* of these offences and removing some of the presumption found in section 57(3)- such as an assumption that the accused possessed the article if it is proved that the article was on the premises at the same time as the accused, or was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public- which increases the risk that seemingly innocent possession would be prosecuted within the proof of further wrongdoing. Simester and von Hirsch also suggested that the addition of a 'material assistance' requirement enables the court to assess whether the defendant's normative involvement merits criminalisation.[11]

The wrongfulness constraint might apply to section 58(1)(C) differently. Since this offence penalises a single viewing of terrorist-related information online, it can be argued that little actual 'wrongdoing' is found in cases where an individual exposes himself once to violent materials. As such, an improvement would be to rephrase the offence to include a tighter definition of what counts as 'wrongful' or risky viewing.

Fourth, sections 57 and 58 contravene the harm principle in that they target possession of information 'unconnected to an interest in, or intention to commit, acts of terrorism- obvious

[11] Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Bloomsbury Publishing 2011).

examples are curiosity or seeking to be more informed'.[12] The harm principle permits the state to criminalise conduct if it prevents harm to others. Since section 57 and section 58 should be conceptualised as punishing the creation of a 'risk of harm', which Finkelstein argues is a legitimate form of harm that ought to be captured by criminal laws, then it must be shown that possession under these offences actually causes or risks harm to others.[13] Possession in and of itself, even if the circumstances or nature of the information *might* be useful to the commission or preparation of a terrorist act alone is insufficient. Implementing clearer intent requirements within the offence, as well as clearer sentencing criteria, would tighten the boundaries of these dangerously broad offences.

If the harm principle ought to apply to risk-based terrorist possession offences, what standard should apply? Some scholars note that *mens rea* operates in a hierarchy- dishonesty, intention and knowledge set a higher standard of culpability than recklessness or negligence.[14] For offences as serious as section 57 and section 58 which attract long sentences of imprisonment, a strong culpability requirement such as intent or subjective knowledge is essential. Injecting an element of subjective belief under the defences under s. 58, for example by removing the 'had no reason to believe' limb under section 58(3A)(a) TA 2000 would enable 'action-oriented intention' to be rightfully punished and impose a subjective test on the scope of this defence.

In relation to the single viewing offence under section 58(1)(C) TA 2000, Zedner, citing Simester and von Hirsch, argues that 'the online viewing offence appears to be predicated on the idea that exposure even to non-violent extremist ideas is sufficiently causally-related to an

[12] Kajsa E. Dinesson, 'Preventing Harm: The "Collection of Information" Offence in Commentary, Case Law and Data' (2022) Criminal Law Review 469.
[13] Claire Finkelstein, 'Is Risk A Harm?' (2002) 151 U Pa L Rev 963.
[14] Winnie Chan and Andrew P Simester, 'Four Functions of Mens Rea' (2011) 70 The Cambridge Law Journal 381.

identifiable resulting harm to justify criminalisation'.[15] Yet, Neumann refutes the link between viewing terrorist material online and radicalisation.[16] It is submitted that the harm principle is not satisfied by simply viewing or accessing information. Introducing safeguards such as the 'three clicks' rule or other methods that indicate a risky pattern of behaviour might strengthen the harm constraint, ensuring that the grounds for criminalisation reach a satisfactory level.

Fifth, the remoteness constraint is violated by many aspects of section 57 and section 58. Possession under these offences is linked to the 'risk' of a future, unmanifested harm by a more 'complex chain of conduct' than in traditional possession offences.[17] These offences target acts that are pre-inchoate, so the nexus between the ultimate harm and a defendant's actions are much more attenuated. Ashworth notes that this distance creates two problems. First, a person may change their mind; and second, a person might decide to use the information possessed for a non-risky, legitimate purpose (e.g. education or research).[18] Allowing someone to change their mind is a fundamental right under liberal theories of autonomy.[19] Therefore, under the remoteness constraint, there are strong normative arguments as to why these offences as unjustifiable.

Ashworth, however, argues that pragmatic justifications also exist for the criminalisation of remote risk-based possession harms. Certainly, the counter-terrorism and security agenda must not be undermined by an inability to target these offences at an early stage. But constraining

[15] Zedner (n 6); Andrew P Simester and Andrew von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28 Criminal Justice Ethics 89.
[16] Peter R Neumann, 'The Trouble with Radicalization' (2013) 89 International affairs 873.
[17] Dinesson (n 12).
[18] Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Criminal Law and Philosophy 237.
[19] Gabriel S Mendlow, 'Why is it Wrong to Punish Thought?' (2021) The Law and Ethics of Freedom of Thought, Volume 1: Neuroscience, Autonomy, and Individual Rights 153; Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Bloomsbury Publishing 2007).

principles such as remoteness and proportionality (as a general constraint that will be discussed next) must be kept in the foreground. The Law Commission has argued:

> 'Fault elements in criminal offences that are concerned with unjustified risk-taking should be proportionate. This means that the more remote the conduct criminalised from harm done, and the less grave that harm, the more compelling the case for higher-level fault requirements such as dishonesty, intention, knowledge or recklessness.'[20]

Therefore, the remoteness constraint could be implemented by imposing a stronger harm constraint onto sections 57 and 58 through the use of a stronger *mens rea* element. This would enable individuals to be convicted only if they show stronger normative involvement in possessing information that might lead to harm. Amendments to these offences might include drafting them to criminalise when someone fails to 'take reasonable steps' to ensure that the information is divested or not misused. Ashworth also rightly suggests that these offences should be subject to a defence of 'reasonable mistake' or ignorance of the law, to protect individuals who were reasonably ignorant of the circumstances of their possession.[21]

Sixth, a note on the proportionality constraint. Proportionality operates as an overall 'benchmark' for courts to review anti-terrorism offences against other important values such as human rights and civil liberties. However, it has also an important role in sentencing. Zedner notes that a maximum sentence of 15 years' imprisonment under s.58 of the TA 2000 is disproportionate and such penalties 'risk undermining the legitimacy of the law and foment

[20] Law Commission (2010), Proposition 10, [4.61].
[21] Ashworth (n 18) 253.

grievance'.[22] A re-evaluation of maximum sentences may be necessary, particularly after the enactment of the single-viewing offence which does not justify a sentence of this length.

Lastly, the presumption of innocence enshrined in Article 6 of the ECHR is a fundamental principle of criminal justice.[23] However, the distinction between the 'legal' and 'evidential' burden of proof in the interpretation of case law under section 57 undermines the strength of this human rights constraint. By placing a burden on the accused to prove their innocence regarding their possession, this distinction dilutes the presumption of innocence and shifts the burden of proof onto the defendant. This approach weakens the protection afforded by Article 6 ECHR, raising concerns about the fairness and integrity of the risk-based possession offences that are drafted with presumptions (such as those under section 57(3) of the TA 2000) that seem unjustified.

2.2 Constraining Encouragement Offences

We have seen that section 1 and section 2 of the TA 2006 depart from several criminal law principles. Therefore, a discussion of what legal constraints ought to apply to these offences is important to 're-draw' the boundaries of the criminal law through a normative exercise and to accord with fundamental rights and legal principles.

First, the necessity principle is engaged. Offences for incitement to violence (including terrorist violence), incitement to commit acts of terrorism overseas,[24] soliciting murder and incitement

[22] Zedner (n 6).
[23] Antony Duff, 'Presuming Innocence' in Julian V Roberts and Lucia Zedner (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012); Victor Tadros, 'Rethinking the presumption of innocence' (2007) 1 Criminal Law and Philosophy 193.
[24] Section 59 of the TA 2000

to racial hatred already exist under legislation that likely captures the conduct prosecuted under sections 1 and section 2.[25] As such, it is questionable whether new offences of encouragement of terrorism, including by its glorification, are necessary or justified. It is often argued that these offences close the gap in the legislation by criminalising a generalised form of indirect incitement. However, the ill-defined conduct elements and expansive mental elements of these offences mean that they arguably fail to meet the criterion of 'necessary in a democratic society' since pre-existing offences can be used alongside these offences.[26] Arguably, the encouragement offences contribute to the larger problem of overcriminalisation by adding to the growing number of terrorism-related crimes of risk prevention.

Second, the legal certainty requirement under the rule of law is violated by the broad act requirements in both offences. The requirements that indirect encouragement requires a statement that includes 'glorification' as well as 'other inducements' are vague and expansive. As the Joint Committee rightly notes, the definition of 'glorification' to include 'any form of praise or celebration' under section 20 is insufficiently precise to satisfy the principle of maximum certainty.[27] Another source of legal uncertainty is the breadth of the definition of 'acts of terrorism' under section 1 of the Terrorism Act 2000 which is incorporated into the encouragement offences. Imposing more clarity into both definitions, such as including a requirement that statements need to 'furnish practical information', a list of specified crimes

[25] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters (Third Report of Session 2005–06)*, HL Paper 75-I/HC 561-I (The Stationery Office 2005) <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf> accessed 10 July 2025, 17.
[26] Imran Awan, 'The Problem with Defining Terrorism and the Impact on Civil Liberties-Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper' (2008) 1 J Pol & L 2, 7.
[27] Joint Committee on Human Rights (n 25) [26].

that can be glorified and narrowing the meaning of 'terrorism', would better enable individuals to guide their conduct within the bounds of the law.[28]

Third, criminalising indirect encouragement violates the wrongfulness constraint, as it is difficult to identify what wrongdoing is associated with publishing or disseminating something that potentially encourages a remote act of terrorism. Directly encouraging violence against a minority group is surely wrongful and may be harmful even if no further harm occurs. However, indirect encouragement is not clearly defined by section 1 and section 2. Arguably, incorporating a clearer definition such as the one rejected by Parliament during the passing of the Terrorism Bill- that indirect encouragement should apply to statements 'referring to terrorism in such a way that the listener, reader or viewer would infer that he should emulate it' – is more precise and is anchored in the wrongfulness of encouragement as traditionally understood.[29]

Further, not only do sections 1 and 2 go beyond the scope of wrongs specified in the CECPT, but they criminalise encouragement without a requirement of danger that an act of terrorism will result.[30] The Joint Committee raised this concern and noted that there must be a public interest or 'reasonable excuse' defence to protect the right to freedom of expression without any unnecessary interference.[31] These are not present in the offences. Reforming the defences, as well as incorporating requirements of a 'probable connection' between the act and the

[28] S Chehani Ekaratne, 'Redundant Restriction: The UK's Offense of Glorifying Terrorism' (2010) 23 Harv Hum Rts J 205.
[29] Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) The Criminal Law Review 441.
[30] Joint Committee on Human Rights (n 25) 20.
[31] Ibid 3.

instigation or a 'clear and present danger'[32] would allow more room for individuals to argue that their statements did not create a genuine risk and therefore are expressions for legitimate reasons, which would limit the reach of the offences considerably.

Fourth, criminalising encouragement contravenes the harm constraint in that the *mens rea* for both offences risks criminalising those who encourage or disseminate statements that might encourage terrorist-related acts, but who lack any intention to commit harm. Recklessness is too broad for remote terrorism offences such as sections 1 and 2 and can capture innocent conduct that is tenuously related to the commission of actual harm. As such, it is suggested that the *mens rea* requirement should be intention, as the CECPT requires.[33]

Further, interference is permissible under the harm principle to prevent harm to others. For direct or indirect encouragement of terrorism, it is therefore necessary to establish that the conduct causes or risks harm to others; the creation of a 'risk of a harm' might legitimately fall within the harm principle if causation and remoteness are satisfied.[34] To justify criminalising the encourager or disseminator of the statement, the risk of harm must result from their actions. The harm that is targeted by sections 1 and 2 is the risk of radicalisation of private individuals or members of the public, which is arguably too wide a group to whom to attribute the exact 'harm'. Further, the link between viewing an encouraging statement relating to terrorism and actually being radicalised is weak and remains unproven.[35] Therefore there is a weak causal link between the conduct (encouraging/disseminating) and the future harm in the individual

[32] Amnesty international, *'Submission from Amnesty International on the Draft Terrorism Bill' (Joint Committee on Human Rights - Written Evidence , 5th December 2005)* <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75we07.htm> accessed 7 November 2023
[33] Joint Committee on Human Rights (n 25) 22.
[34] Finkelstein (n 13).
[35] Tufyal Choudhury, 'The Terrorism Act 2006: Discouraging Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press 2009), 478.

case. As such, the harm principle is not satisfied by mere encouragement, particularly in cases of indirect encouragement.

Fifth, the remoteness constraint is engaged because, like all of the offences examined in this thesis, the act of encouragement terrorism can be far remote from future decisions or actions by members of the public who might be exposed to statements of encouragement. The risk of remote acts being criminalised is discussed extensively in this thesis. Sections 1 and 2 raise the risk that individuals will be held liable for acts that are too weakly causally linked to the harm to be prevented. Providing that intention and an increase in dangerous risks can be shown through, for example, evidence of an increase in the risk factors relating to radicalisation, harm can be fairly imputed to the accused. However, when encouragement does not in itself cause harm and the risk of harm arguably arises only if someone is affected or radicalised by seeing these statements, it is more difficult to impute criminal liability although encouragement can be a harm in itself irrespective of further action if done with intention.

Adding an 'imminence' requirement, where the statement must provoke immediate violence or create a 'substantial risk' of such a risk might reduce the remoteness problem in section 1 and section 2. However, this is not easy to implement in practice. Publications might or might not have encouraging effects on the commission of a terrorist act and the effects might take a long time to result in terrorist conduct. This is particularly the case in the age of the Internet, where online platforms permit the instantaneous, inexpensive, fast and anonymous transmission of information that might have negative effects on those who read them.[36] In these circumstances, who is responsible for the creation of a risk of harm through these types of

[36] Ian Turner, 'Limits to Terror Speech in the UK and USA: Balancing Freedom of Expression with National Security' (2019) Series 2 Vol 1 Amicus Curiae 201, 204.

dissemination? Some terrorism scholars believe that the onus should be put on internet providers and platforms to 'clean up' the internet and take down inflammatory content.[37] However, this arguably puts a great burden on such providers to moderate and regulate information which leads to other practical problems, as well as questions of the extent of responsibility with which they should be attributed. The encouragement offences therefore continue to raise questions about the fair attribution of criminal liability when the causal distance between actors and ultimate perpetrators of crime is too great to bring it within the reach of the harm principle.

Lastly, the human rights constraint of the right to freedom of expression has the potential to act as the strongest constraint on the expansive offences under section 1 and section 2 because it has a wide scope and protects speech that fundamentally shocks or disturbs members of the public even if it goes against the ideologies of the state.[38] However, Article 10 is not an absolute right due to the qualifications set out in Article 10(2) discussed above, and the case law under section 1 and section 2 shows that the courts often interpreted the proportionality test in favour of the state at the expense of the individual's right to freedom of expression.[39] This weakens the effect of the right to freedom of expression considerably.

To ensure the right to freedom of expression, the proportionality constraint must be strengthened. These two constraints are interrelated and interdependent. The proportionality

[37] Branislav Todorovic and Darko Trifunovic, 'Prevention of (Ab-)Use of the Internet for Terrorist Plotting and Related Purposes' in Alex P Schmid (ed), *Handbook of Terrorism Prevention and Preparedness* (ICCT Press Publication July 2021) 594 <https://icct.nl/sites/default/files/2023-01/Chapter-19-Handbook.pdf> accessed 10 July 2025.

[38] Turner (n 36) 206.

[39] Lucia Zedner, 'Ends and Means: Why Effective Counter-Terrorism Requires Respect for Proportionality and Rights' in Emmanouil Billis, Nandor Knust, Jon Petter Rui, (Eds), *Proportionality in Crime Control and Criminal Justice* (Oxford, Hart Publishing 2021).

constraint is important to rein in the reach of encouragement offences as it entails a 'weighing' of the defendant's conduct and the government's legitimate objective to prevent harm. Article 10 requires a proportionality assessment of whether the government's aim of reducing the risk of terrorism is proportionate to curtailing rights of expression. Indeed, arguably criminalising expression ought to be tied to its tangible effects and the accused's intent as far as possible.[40]

Unfortunately, these requirements are not found in the drafting of sections 1 and 2 as they stand. Encouragement offences feature a broad *actus reus* that captures a large range of publications since the legislation only requires a potentially encouraging effect as well as recklessness to the consequences.[41] It therefore limits a range of freedoms including the freedom to discuss offensive or controversial topics openly or to share controversial moral, religious or political opinions. Therefore, to strengthen the right to freedom of expression it is recommended that a stronger focus on individual rights should be adopted. The *Brandenburg* principles discussed in Chapter 6 should be incorporated into the interpretation of these offences: the speech must be directed to inciting or producing imminent unlawful action with intent, and there is a 'likelihood' that the incitement will produce or 'practically assist' unlawful action. These elements allow proportionality to carry more weight as the scope of liability is sufficiently narrowed down to 'ensure a strict relationship of proportionality between the danger that individuals will be encouraged by the publication to engage in terrorism, and the need to protect the right to freedom of expression'.[42]

[40] Ekaratne (n 28) 218.

[41] Andrew Cornford, 'Terrorist Precursor Offences: Evaluating the Law in Practice' (2020) Criminal Law Review 663, 7.

[42] Hunt (n 29) 9; this right is qualified under Article 10(2) which states that 'the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime.'

2.3 Constraining Associative Offences

From its original goal to suppress the power of the IRA and other paramilitary groups in Northern Ireland, the law on proscription has been amended and widened to enable law enforcers to protect against the risk of terrorism in the UK. Proscription and associative terrorism-related offences have enjoyed wide political support as a method to discourage supporters of terrorist organisations. Proscription is intended to outlaw organisations that espouse extremist and hateful ideologies and that are determined to commit acts of violence against minority groups or the public as a whole. But this raises the question as to whether its detrimental effects in terms of extending criminal liability so widely outweigh its deterrent effects.

Several key principles of criminal law are eroded by the proscription offences. First, the proscription-related offences discussed in Chapter 7 lack legal clarity violating the rule of law constraint on certainty. Proscription is an opaque executive power that lacks transparency as to why the Home Secretary decide to proscribe an organisation to be listed under Schedule 2. Reform is necessary, although the following list of reforms is not exhaustive. A clear guide on what features an organisation must possess to fall within the proscription regime is needed. Cancio Meliá argues that it is necessary that an organisation has a 'particular degree of potency and internal structure', and that there must be a limit on the types of activities that have to be committed by an organisation for it to be designated 'terrorist'.[43] David Anderson rightly recommended that proscription orders should lapse after a certain period and be renewed only if there is sufficient evidence to do so, as well as setting a time limit for when a group may be

[43] Manuel Cancio Meliá, 'The Wrongfulness of Crimes of Unlawful Association' (2008) 11 New Criminal Law Review: An International and Interdisciplinary Journal 563, 589.

considered for deproscription.[44] The rarity of deproscription might contravene the principle of non-retrospective punishment as proscription penalises member of the organisation for their past actions. Hall suggests that 'if the historic involvement of proscribed groups in terrorist activity means that deproscription can never be countenanced the wording 'is concerned in terrorism,' the basis for proscription, could be changed to 'is or has been concerned in terrorism'. [45] Further, full reasons should be given if the Home Secretary denies a deproscription application to increase legal certainty and allow organisations to conduct their activities within acceptable bounds and conform to the law.

The legal certainty principle is intertwined with the wrongfulness constraint, both of which require that associative terrorist offences clearly specify the wrongs they target. For example, the term 'membership' is extremely vague, and it is unclear what type of behaviour constitutes membership.[46] It is also unclear when membership ceases and other activities such as support or participation in activities of a proscribed organisation start.[47] This vagueness violates the principle of advance fair warning. For example, the membership offence is a 'status offence' which criminalises people for who they are rather than what they have done. Concise and well-defined offences should be formulated. If we base our concept of the wrongfulness of associative terrorist offences on the idea that proscribed organisations challenge and threaten the state's monopoly of violence, as discussed in Chapter 7, then we need to constrain the

[44] David Anderson, *The Terrorism Acts in 2015: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (Independent Reviewer of Terrorism Legislation, December 2016) <https://assets.publishing.service.gov.uk/media/5a7c6b2ded915d74e25bcd33/2016_Terrorism_Acts_report_print.pdf> accessed 9 July 2025.

[45] Jonathan Hall, *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (Independent Reviewer of Terrorism Legislation, March 2020) https://assets.publishing.service.gov.uk/media/5e74abb4d3bf7f467b5b82b4/CCS001_CCS0320303768-001_Terrorism_Acts_in_2018_Web_Accessible.pdf accessed 9 July 2025, 53.

[46] Liat Levanon, 'Criminal Prohibitions on Membership in Terrorist Organizations' (2012) 15 New Criminal Law Review 224, 271.

[47] Ibid 272.

potential reach of these offences. Membership cannot include 'passive' modes of joining as discussed previously, and requires 'active' acts of membership that demonstrate the person's desire to align themselves with the organisation's goals. Support and uniform offences should also require more active acts of wrongdoing (e.g. 'material support' instead of mere 'support'[48]) to justify imposing criminal liability. However, this is difficult to require for extremely remote offences such as the uniform offence in s.13(1A) TA 2000. Similarly, Cancio Meliá advocates restricting the type of 'peripheral behaviours' that do not demonstrate strong associations to the organisation as the extension of responsibility to the individual who 'interact with the association' is otherwise too remote, though this restriction is difficult for vague offences such as the uniform offence under s.13 TA 2000.

The necessity constraint has been raised in several cases relating to associative terrorist offences. The rationale behind s.11-13 TA 2000 is to deprive terrorist organisations of the 'oxygen of publicity', which is said to decrease the risk of supporters taking part in activities that may increase the risk of a *potential* future terrorist attack. Interestingly, the necessity principle is used to justify proscription and the creation of associative terrorist offences based on the prevention of a remote risk. Hence, the remoteness and necessity constraints must be discussed together. An interesting paradox is that while it is necessary to prevent a remote risk due to the potential risk that these 'peripheral' associative activities may pose, the remoteness principle serves to constrain the reach of these offences, so the two constraints are not necessarily compatible in this regard.

Proscription is justified by the necessity of risk prevention as discussed in Chapter 7. Practically, proscription measures offer a means to reduce the risk that proscribed organisations radicalise

[48] Ibid 239.

individuals by recruiting new members and disseminating online materials. Requests to internet providers to remove online propaganda are more legitimate if the government has exercised its power to proscribe under section 3 of the Terrorism Act 2000. Proscription measures also enable authorities to prosecute individuals for membership and support of a proscribed terrorist organisation. However, MP David Heath questioned the worth of proscription given the availability of less serious alternatives: 'why are so few prosecutions brought? Prosecuting for incitement could be more effective than the heavy-handed approach of proscription'.[49] Further, Jupp questions whether the proscription measures are an effective means of reducing radicalising influences on those connected to the organisations, arguing that their impact may be marginal or even counterproductive. He lists several reasons, including that media attention to proscribed organisations may bring more publicity for the propaganda that they are trying to promote, and that the banning of organisations can drive extremists underground, making their detection more difficult for authorities to investigate.[50] Even if it is necessary to proscribe organisations 'concerned in terrorism', once they are no longer engaged in terrorist-related activity, they must be deproscribed to respect the necessity constraint, a power that is rarely exercised for political reasons such as the fear of appearing 'soft' on terror.

In terms of the remoteness constraint, the pre-inchoate nature of associative offences violates this principle due to the expansive range of acts that they target, which drastically extends the criminal law laterally to cover those merely associated with a proscribed organisation. As shown in this chapter, associative terrorist offences are mainly symbolic and serve to express censure and rejection of the values embodied by terrorist organisations rather than targeting the prevention of actual harm *per se*. The issue that acts such as wearing a uniform that merely

[49] David Heath, *HC Deb* 6 February 2006, vol 442, col 502.
[50] John Jupp, 'From Spiral to Stasis? United Kingdom Counter-Terrorism Legislation and Extreme Right-Wing Terrorism' Studies in Conflict & Terrorism 1.

raises suspicion of membership or support may be subjected to criminalisation is worryingly broad, for the 'necessity' reasoning behind proscription is so strongly engrained politically. It cannot be said that harm is fairly imputed to individuals who are associated with such organisations unless evidence of wrongdoing, intention and culpability can be demonstrated, which is often difficult.

This leads us to the culpability constraint. Identifying culpability is difficult for many associative offences, in particular the membership and uniform/publication offences because they include no *mens rea* and are strict liability offences. Although the courts have attempted to insert a requirement of knowledge into these offences, this is a weaker *mens rea* than required under doctrines of complicity and attempts. Levanon argues that criminalising membership, for example, should require intent to participate in the commission of a terrorist attack even if the details of such a plan were not clear at the time of the act, an element which evidences sufficient guilt in light of the remoteness of the *actus reus* of membership.[51] Overall, s.11-13 TA 2000 fails to differentiate between different levels of culpability concerning active and passive membership, and the degrees of support required to be guilty, or what guilty mindset is required for wearing a uniform or displaying an image of an article relating to a terrorist organisation for culpability to be attributed easily. As these offences often impose a reverse burden of proof, they violate the culpability constraint by imposing guilt by association through their presumptive character.

Finally, how well can the proportionality constraint and human rights delimit the reach of these offences? To set the maximum sentence at 14 years imprisonment for s.11-12 TA 2000 and 6 months' imprisonment for s.13 TA 2000 seems disproportionate. If the goal of criminalising

[51] Levanon (n 46) 274.

associative conduct is to allow the security services to prevent terrorism earlier , and express disapproval of the proscribed organisation, rather than prevent future crimes, then less serious penalties should be imposed. When considering proportionality in human rights arguments, Article 6 has significant importance in limiting the scope of associative offences when read in conjunction with s.3 HRA 1998, which enabled courts to read down the legal reverse burden of proof under s.11 TA 2000 into an evidential one as discussed in Chapter 7. It is unsurprising that many terrorist-related cases analysed in Chapter 7 result in disagreements about the scope and proportionality of offences given the proliferation of reverse burdens, and how the courts balance competing moral or pragmatic factors that underlie the specific offence.

However, Articles 10 and 11 of the ECHR offer little protection as a defence against the offences examined in this chapter. These fundamental rights enable interpersonal relations, political debate, ideological disagreement and dialogue in society.[52] Tocqueville calls the right to freedom of association 'a necessary guarantee against the tyranny of the majority', because it allows individuals to voice their shared concerns, and counterbalance dominant political or social influences, creating a link between citizens and the state and protecting minority viewpoints from being overlooked.[53] It is difficult to imagine a democracy without a right of association. However, because 'virtually all conduct is at least potentially associational' the right of association, if not regulated, is something that societies cannot live without.[54] The paradoxical and political nature of the right to freedom of assembly makes it difficult for courts to draw the line between the types of association which are protected by the right and those that fall outside it.[55]

[52] Ibid 268.
[53] David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008), 229.
[54] Ibid 204.
[55] Levanon (n 46) 270.

3. Some Thoughts On Redefining The Boundaries Of Pre-Inchoate Terrorism-Related Offences

This Chapter has reflected on how the boundaries of criminal law relating to terrorism-related offences might be redrawn. The previous section discussed how these principles might restrain specific broad and vague terrorism-related offences. This section situates the idea of constraining principles in a broader landscape by referring to some theoretical insights as to how these principles operate, what their limitations are, how rights differ from principles and policy, and how they might fit with a larger theory about how the criminal law's expanding reach might be limited. However, this thesis does not undertake the ambitious task of suggesting how the boundaries of the entire field of criminal law might be redrawn, nor is it focused on reforming all the problematic elements of these three offences (though that has been briefly discussed in the previous Chapters). I offer a few thoughts below.

3.1 Constraining Principles Carry Unequal Weight

Whatever the strength of the constraining principles identified above, it is clear that different constraining principles operate differently. Not only do they differ in function and their restraining effect, but they are unequal in terms of their weight. Therefore, we must first delve briefly into the jurisprudence behind principles, rules, and policies.

An important feature of Ashworth's seminal body of work on criminal law and the criminal justice system is the emphasis on the importance of *principles*.[56] A theme common in Ashworth's writings is the desire to achieve a principled criminal law:

> '[My] main purpose has been to develop two lines of argument. The first is that the criminal law is indeed a lost cause, from the point of view of principle…The second line of argument is more constructive, in seeking to identify a principled core of criminal law. The core consists, it is submitted, of four interlinked principles…it is not claimed that they should be regarded as absolute rules, and indeed at various points above some possible qualifications to them have been discussed'.[57]

Gardner criticises a lack of clarity as to what constitutes a principle, noting that Ashworth defines principles as a concept connected 'with rules, values, policies, doctrines and interests and various other things' but 'never spells out the criteria for something to qualify as a principle, or for someone to qualify as principled.'[58] The question of what a principle is and how it differs from a rule or policy is important if we are to ensure the impact of constraining principles on redrawing the boundaries of criminal law. The principles discussed in this Chapter (and the doctrinal Chapters) could easily be interpreted to provide reasons by any person who supports them.[59] The fact that the courts or an academic philosopher *endorses* these principles might, in this sense, make them valid and principled. Indeed, if one analyses principles in this way, then,

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[56] Gardner draws on a large body of Ashworth's works such as: Andrew Ashworth, 'Towards a Theory of Criminal Legislation' (1989) 1 Crim LF 41; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013); and Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 Criminal Law and Philosophy 21.
[57] Andrew Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225.
[58] John Gardner, 'Ashworth on Principles' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012), 3.
[59] Ibid 4.

as Gardner pointed out, every principle is essentially worthy or deserves endorsement even if the principle is flawed or bizarre.[60]

In considering how principles might operate to constrain specific offences, it is therefore important to define how exactly principles differ from rules or policy. According to Gardner, Ashworth defines principles through four characteristics: generality, special force in an argument, non-instrumentality and categoricality.[61] But some of these characteristics, such as the claim that principles carry special force, overlap with Dworkin's conceptualisation of rules and policy. What distinguishes a principle from a rule, and how can principles 'shape' the boundaries of criminal law? Dworkin famously defines principles, which include legal canons of statutory interpretation as well as some of the constraints discussed above, as differing from rules in their application to legal situations. As Tapper summarises:

> 'They do not necessarily determine, as rules do, the outcome of a dispute in which they are applied. They merely incline the decision one way or the other and for this have a dimension of weight which rules lack. Rules apply in an all-or-nothing way…rules can not conflict with each other and may at most be subject to exceptions. Principles may however be applied, in the sense of being taken into consideration by the judge, but still not succeed in swinging the decision in the way they indicate, perhaps because other, and weightier principles point to the opposite conclusion'.[62]

The crux of the Dworkinian concept of principles is that they carry different 'weights' depending on the situation. However, Gardner argues that rules also carry weight or importance

[60] Ibid 4.
[61] Ibid 3.
[62] Colin Tapper, 'A Note on Principles' (1971) 34 Mod L Rev 628.

and that the dimension of 'weight' tells us little about the force of the principle in question.[63] I argue that rules do carry weight, but in a more 'absolute' manner than principles, which rely on their relative weight to show their effect. They also have a special importance 'in kind' as argued by Gardner given their status as rules which should be followed.[64]

Consider an example from the above discussions: the *mens rea* element of the uniform offences of terrorism is unclear, and defendants have argued that the offence ought to incorporate a more robust mental requirement before criminal liability is imposed.[65] In *PWR v DPP*, the court held that the strict liability interpretation of s.13 TA 2000 was supported by the purpose, mischief or policy, behind the offence, namely to suppress the oxygen of publicity for proscribed organisations.[66] This type of 'social' reasoning conflicts with the idea that the principle of *mens rea* cannot be defeated by the increases in the weight of security considerations.

Why did the principle of *mens rea* get 'defeated' by countervailing concerns of policy? And given the utilitarian policy-based thinking behind the enactment of the pre-inchoate terrorism-related offences, *should* principles triumph over policy considerations? To answer this, the distinction between principles and policy needs to be addressed. Dworkin argues that judges choose the best arguments of principle or policy to provide the best justification in light of the legislature's responsibilities.[67] Policies are characterised by their instrumental, goal-oriented rationale. In respect of 'weighing' policy and principles, Dworkin argues that principles (enforced consistently) should outweigh similar arguments of policy.[68] Therefore, 'when

[63] Gardner (n 58) 13.
[64] Ibid 15.
[65] Florence Lee, 'Terrorism Act 2000: Strict Liability: Pwr v DPP' (2024) 4 Criminal Law Review 277.
[66] PWR v DPP [2020] EWHC 798 (Admin) [52].
[67] Michigan Law Review, 'Dworkin's "Rights Thesis"' (1976) 74 Michigan Law Review 1167, 1182.
[68] Ibid 1181.

political aims come into conflict, it is relatively more difficult to outweigh a right than it is to outweigh a goal'.[69] While some have critiqued Dworkin's distinction, Ashworth agrees, arguing that utilitarian-based social reasons ought to be defeated 'by kind' rather than by weight so that these types of laws are 'objectionable in principle'.[70] Thus, as Gardner sees it, 'principled objections have a built-in advantage in their conflict with other considerations. They do not need to rely on their weight alone to prevail'.[71]

If we follow Dworkin, it seems that the normative weight of principles is therefore important, although it is a moral judgement that is unequally applied across different constraining principles – and it is dependent on judicial discretion, as we saw in the doctrinal Chapters. Gardner also criticises Ashworth for assuming that the principles limiting criminal law 'fit naturally together'.[72] This Chapter shows that this claim is untrue. Principles do not apply with equal force, and some lose out to instrumental considerations, evident in the case law which permits the expanding reach of pre-inchoate terrorism-related offences. Nonetheless, my view is that the boundaries of criminal law relating to terrorism ought to be constrained by principles that carry relatively stronger weight than policies driven by penal populism because of the severity of the impact of a terrorism conviction and their disproportionately long sentences. Principles *should* carry different weights depending on to which offences they are being applied, especially if we are to measure their supposed or potential restraining effect.

3.2 Constraining Principles Are Often Conflicting, Interdependent and Incommensurate

[69] Ibid 1176.
[70] Gardner (n 58) 15.
[71] Ibid 15.
[72] Ibid 23.

My second thought concerns how some of the principles identified can be conflicting, interdependent and incommensurate with each other. Often, these principles come into conflict when put into practice, especially within the complex machinery of counter-terrorism law. They do not operate in a vacuum and work in tandem with one another. However, this does not mean that they are contradictory. The exercise of weighing principles does not tell us how each principle works in competition with other principles and whether one principle's restraining force is diminished or amplified when it collides with others.[73] Ashworth believes that 'arguments of principles cannot be easily overridden' but places less importance on how principles may be overridden or derogated from, especially when faced with conflicting principles.[74] Ashworth does, however, point out that there may be a 'battle' amongst competing principles and values. For example, he writes:

> 'In certain spheres there may be other values and interests that are regarded as so strong as to displace the general principle of equal treatment'.[75]

What goes in on this battle is vague. What interests and values might displace general principles? How should the 'weighing' process factor in competing claims of principle? Ashworth does not answer these questions straightforwardly. But he notes that possible qualifications to principles exist.[76] This observation accords with Dworkin's distinction between rules and principles discussed above. Rules, so defined, cannot conflict with each other but can be subjected to exceptions. On the other hand, principles operate in a sphere of 'relative weight'

[73] Martina Rifve, 'Rights as Principles of Adjudication-Ronald Dworkin´s Model of Principles as a Legal Interpretation Device Applied to the Problem of Self-Incrimination in Community Competition Law Procedures' (2001) LUP Student Papers, Lund University Libraries, 11.
[74] Gardner (n 58) 12.
[75] Andrew Ashworth, *Positive Obligations in Criminal Law* (Bloomsbury Publishing 2013), 245.
[76] Gardner (n 58) 13.

in the sense of being considered by the courts during their decision-making (but might not swing the decision one way or another), and judicial decisions may be affected by weightier principles (or policies) that point to another outcome. Therefore, 'principles may thus conflict, and still survive in their pristine form unencumbered with exceptions'.[77] As Rifve notes, 'duelling principles are if anything part of life'.[78]

In analysing what principles apply to analyse terrorism-related offences, principles do conflict with each other, and incompatible principles engage in a theoretical 'duel' in a competition for influence and adherence. This does not contradict the model of principles discussed in this Chapter. In this sense, the 'all-or-nothing' rule does not apply to principles; principles apply 'more' or 'less', which makes sense because they provide reasons of general application in a given situation.

Some of the principles discussed in this Chapter are interdependent and interrelated. Given what Wolff calls the 'flexibility' of the law in terms of applying legal rules and principles, it is not surprising that any discussion on constraining principles which attempts to analyse them separately must acknowledge that some of these principles work together.[79] One can go so far as to say, in some cases, that they all *overlap* with each other in one way or another, depending on how far one takes it. Consider Macdonald and Dus's writing on possible reforms to the encouragement offence under s.1 TA 2006.[80] After analysing the act of 'encouragement' through a linguistic lens, the authors propose a series of amendments that address the

[77] Tapper (n 62) 629; Rifve (n 73) 11.
[78] Rifve (n 73) 12.
[79] Lutz-Christian Wolff, 'Law and Flexibility- Rule of Law Limits of a Rhetorical Silver Bullet' (2011) 11 J Juris 549.
[80] Stuart Macdonald and Nuria Lorenzo-Dus, 'Intentional and Performative Persuasion: The Linguistic Basis for Criminalizing the (Direct and Indirect) Encouragement of Terrorism' (2020) 31 Criminal Law Forum 473.

intentional and performative nature of encouragement to reform the offence. These include, amongst others: 1) amending the reference to how the statement is likely to be understood and instigation of acts of terrorism (thereby improving legal clarity), 2) requiring evidence that the statement was published with intention of encouraging the commission or preparation of acts of terrorism (thereby strengthening the *mens rea* requirement and allowing proper attribution of culpability), 3) providing a list of acts that constitute 'direct encouragement' (thereby improving clarify and the rule of law constraint) and 4) making it clear in the drafting that 'the statement in question encourage a specific type of terrorist act' (thereby improving the wrongfulness constraint by clarifying what is the wrong targeted by the offence).[81] Their revised version of the first five subsections of s.1 TA 2006 is excellent and tightens up the *actus reus* and *mens rea* elements considerably through additional clarifications of the meaning of encouragement.[82] It is interesting that their proposed reform touches upon all of the constraints mentioned in this Chapter. Revising the wording of the offence can improve its restraining effects, particularly for inter-related principles like culpability and remoteness, or legal certainty and wrongfulness, where strengthening one principle strengthens another.

Interdependent principles seem to amplify the constraining effects of each individual constraint. Raz suggests that a coherent legal system requires mutually interdependent principles and policies that justify each other, a point which contradicts Dworkin's position yet arguably applies favourably in the context of constraining pre-inchoate terrorism-related offences.[83] Thus, interdependent principles contribute to a more robust framework for identifying potential limits on criminal law. Balkin however argues that this view is too strict, as principles and policies that rise and fall together would fail to create strong restraining effects on legal

[81] Ibid 37.
[82] Ibid 37.
[83] Joseph Raz, 'The Relevance of Coherence' (1992) 72 BUL Rev 273.

dilemmas as their individual effects are diminished.[84] Instead, he argues that the consistent application of principles is what matters.[85] Nevertheless, principles should interact in ways that are 'mutually supportive to the extent that they are consistent with each other, and any potential conflicts among them must be resolved in a consistent and principled manner'.[86]

Lastly, a word on incommensurability. Another critique often raised rebuts the idea that principles can be commensurate with one another in the weighing process.[87] This criticism states that different principles might be so different that they simply cannot be balanced against each other. As an example, Böök writes that 'while proportionality assessments are frequently made with relative ease in our daily lives, we struggle when we cannot directly measure the opposing sides with each other…as we are unable to either 'translate' one to assimilate the other, or to determine a third element which can represent both'.[88] Arguably, for principles to be weighed in the Dworkinian sense entails that principles must be not only comparable but also commensurable. But how is it possible in relation to principles such as proportionality and legal certainty that fundamentally do different things? How do you assign a common denominator to these principles? While this debate is outside the scope of this thesis, it is important to note that scholars have agreed that some cardinal and ordinal ranking of principles can exist, but that no single hierarchy where all possible conflicting principles can be positioned

[84] Jack M Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) Yale Law Journal 105.
[85] Ibid.
[86] Ibid 117.
[87] Birte Böök, *International Norm Conflicts Through the Lens of Alexy's Principles Theory* (PhD thesis, European University Institute 2018) <https://cadmus.eui.eu/entities/publication/b0ed0ada-9da0-5cbb-b71c-1b5710a210de> accessed 1 August 2024, 184.
[88] Ibid 184.

is possible.[89] After all, Dworkin himself rejects the idea that a 'meta-principle' exists to govern the way different principles are assessed.[90]

3.3 Distinguishing Rights From Principles: The Power Of Human Rights?

The human rights discussed in this thesis do not play a strong role in reining in the reach of the three types of pre-inchoate terrorism-related offences discussed. Proportionality analyses tend to be sidelined if faced with a strong preventive rationale. For example, in cases concerning associative terrorism-related offences, successful arguments relating to the freedom of expression have been rare and, on the whole, the courts have taken a highly deferential outlook in upholding the proportionality of such offences.[91] It seems inevitable that the deterrence function of section 13 of the Terrorism Act 2000 triumphs over the procedural safeguards offered by theoretical constraints.[92] The doctrinal analyses suggests that, in practice, most of these rights cannot effectively limit the overreach of criminal law in the state's pursuit of security.

The relationship between rights and policies, such as national security, has been contested and debated.[93] However, the relationship between rights and the pursuit of counter-terrorism is complex. A good example that Zedner points out is that rights give rise to corresponding

[89] Rifve (n 73) 14.
[90] Edward J. McCaffery, 'Ronald Dworkin, Inside-Out' (1997) 85 California Law Review 1043.
[91] See Chapter 7 for more.
[92] Lee (n 65).
[93] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds.), *Security and Human Rights* (Hart Publishing 2007); Liora Lazarus, 'The Right to Security- Securing Rights or Securitising Rights' (2010); Benjamin J Goold and Liora Lazarus, *Security and Human Rights* (Bloomsbury Publishing 2019); Lucia Zedner, 'Security, Rights, and Positive Obligations to Protect: Correlative duties or coercive licence?' in George Andreopoulos & Carsten Momsen (eds), *New Challenges-New Rights?* (Edward Elgar 2025).

negative and positive obligations for the state to safeguard these rights.[94] It follows that one person's sword is another's shield. This thesis observes 'the tendency of the majority interests to prevail over those of the individual tends to prioritise national security and public safety over individual and minority rights'.[95]

Another tension is the difference between absolute and qualified rights. Although absolute rights might be conceptualised as constraints that effectively hinder the pursuit of security, qualified rights lack this effect.[96] Qualified rights permit interference when certain exceptions are met in the interests of security, public good or other interests.[97] This explains the finding in this thesis that qualified ECHR rights such as Articles 10 and 11 carry little force in restraining the three offences examined, given the margin of appreciation employed in respect of limiting these rights.[98] Furthermore, Ashworth notes that 'human rights tend to be drafted in a broad manner that leaves much to interpretation and development during adjudications' and this gives rise to a lack of consensus in their proper definition.[99] Qualified rights such as Article 10(2) contain peculiarities in terms of how the courts determine them. Letsas argues that 'naturally, the reasoning that figures in the interpretation of qualified rights (e.g., the principle of proportionality) will often differ from that of absolute rights'.[100] The proportionality constraint, therefore, functions as a principle of the court's reasoning in cases concerning qualified rights, which may explain why the constraint also plays a weaker role in reining in the criminal law

[94] Zedner (n 93); Lazarus (n 93).
[95] Zedner (n 93).
[96] EU seldom support absolute rights- see Rifve (n 73) 13: 'Ronald Dworkin´s model of principles as a legal interpretation device applied to the problem of self-incrimination in Community competition law procedures'.
[97] Zedner (n 93).
[98] Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Human rights files No 15. Council of Europe Publishing 1997).
[99] Ashworth (n 93).
[100] George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 European Journal of International Law 509, 510.

than expected.[101] Proportionality is a principle that sits 'precisely in the middle space between foundational principles and concrete application' and should be strengthened and refined if it is to play a greater role in redrawing the limits of criminal law on terrorism offences.[102]

Regardless of whether a right is qualified or absolute, security is still a 'trump card' against all ECHR rights.[103] Article 15 of the ECHR contains a derogation clause that allows states to derogate from the Convention in 'exceptional circumstances'.[104] Ultimately, this thesis found that human rights lack a meaningful restraining effect on the pursuit of security in times of terror. The findings in this thesis, along with the speed at which the UK government enacts far-reaching new terrorism legislation, strengthen the claim that rights do little to constrain the ever-expanding reach of security powers.

4. Conclusion

Pre-inchoate offences are commonplace in the criminal law of anti-terrorism and national security. Such vague and broad forms of criminality lead to a discussion of some of the most important principles which can restrain criminal law and how these can be applied specifically to selected terrorism-related offences. As argued in Chapters 2 and 3, the state's duty to prevent harm through the pursuit of security is not, in principle, objectionable as it is a crucial function of the state.[105] But Melander rightly notes that the 'criminal justice system is part of a political community and the design of the criminal justice system is always a subject of political

[101] Jeremy Letwin, 'Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights' (2023) 23 Human Rights Law Review.
[102] Kai Möller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 The Law & Ethics of Human Rights 281.
[103]Zedner (n 93).
[104] Article 15 ECHR
[105] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2015).

choice…the design of the criminal law and criminal justice does not totally fall under the sphere of entirely free political discretion but is a combination of legal and political considerations, goals and restraints'.[106] The key issue is, therefore, how this duty might be subjected to restraining principles and how these principles work, whether in stronger or weaker ways, for different types of terrorism-related offences. As the distance between the criminalised act and the harm to be prevented increases, the more important it is to discuss what principles ought to operate to redraw and rein in the boundaries of an expanding criminal law.

This Chapter draws together a variety of constraining principles which have been discussed in the earlier Chapters. The purpose is to show that the principles should, in a Dworkinian sense, be allocated different weights and strengths depending on the type of terrorism-related offences in question and how certain principles impact the restraining reach of pre-inchoate terrorism-related offences. The last section of this Chapter sought to identify some illuminating insights into how constraining principles and human rights operate, as well as their relative restraining effects.

To focus on how to rein in the reach of criminal law requires states and officials to consider the principles in this thesis as fundamental to effective counter-terrorism. As Zedner notes, 'it acknowledges that the protection of fundamental rights is integral to the very legal order that counter-terrorism laws are designed to protect'.[107] But the interplay between rights and security is complex and not straightforward, as rights, policies, and principles compete in a battle with winners and losers. Striking a balance between seeking security and individual liberties is

[106] Sakari Melander, 'Preventive Turn in Criminal Law' (2023) 11 Peking University Law Journal 11, 20.
[107] Zedner (n 39).

therefore not 'the task of locating the perfect, finite point on a continuum'.[108] Rather, it is about understanding how the patchwork of principles that ought to play a role in delineating the boundaries of the offence operate, and how their restraining effects could, be strengthened through pre-legislative and post-legislative reform.

[108] Carol W. Lewis, 'The Clash Between Security and Liberty in the U.S. Response to Terror' (2005) 65 Public Administration Review 18, 27.

IX. Conclusion

The thesis has demonstrated how the pursuit of security has led to a pre-crime logic where the state intervenes at an earlier point in time before inchoate liability arises.[1] In the last 25 years, terrorism legislation has hastened the enactment of pre-inchoate offences such as possession, collection of information, encouragement and dissemination of terrorist publications, and membership, support or wearing the uniform in support of a proscribed organisation to criminalise acts further removed from the ultimate terrorism harm than is traditionally endorsed in criminal law. Seeking security is a core function of the state, but the issues surrounding broad and vague pre-inchoate offences, which this thesis examines, have taken on greater importance due to the growth of wider-ranging terrorism-related offences and the increasing severity of sentences.[2] The key research question posed in this thesis was whether the boundaries of the criminal law relating to pre-inchoate terrorism-related offences can be redrawn and to what extent. This question led my research to undertake two main tasks. First, it critically analysed the three types of pre-inchoate terrorism-related offences in question and the constraining principles that restrain their effects. Secondly, it examined the application and weight of these different principles and rights as applied to these offences. This examination of the boundaries of pre-inchoate terrorism-related offences has not only shed light on the complexities of the legal framework but has also highlighted the case for a nuanced approach that balances the need to prevent terrorism with the protection of individual rights, thereby contributing to a more informed and effective response.

[1] Lucia Zedner, 'Pre-crime and Post-criminology?' (2007) 11 Theoretical Criminology 261.
[2] Florence Lee and Clive Walker, 'The "Counter-Terrorism and Sentencing Act 2021" and the Advance of Intensified Terrorism Punishment' (2022) Criminal Law Review 864.

The first section summarises the two key contributions made by this thesis. First, it provides a comprehensive doctrinal study of three types of pre-inchoate terrorism-related offences. Secondly, it developed a fuller framework of constraining principles and rights that could, and should, limit the preventive state in criminalising terrorism-related acts. The thesis has contributed to the field by rethinking and weighing these principles, and by establishing that not every principle or right operates similarly, while exploring the relationship between them. The next section assesses the wider implications of the findings of this thesis for criminal law doctrine and practice, and for the wider field of criminal justice. The last section offers some final thoughts on the broader significance of this thesis for criminal law theory and the importance of developing principles to constrain the outer limits of criminal law.

1. Key Contributions

1.1. Doctrinal Study Of Pre-Inchoate Terrorism-Related Offences

The detailed doctrinal examinations of individual offences undertaken in this thesis were necessary for several reasons. First, they provided significant insight by examining the legislative history and case law that formed the bedrock of these offences to illustrate their contours and how they operated. Secondly, they explored how constraining principles and rights could apply to each specific offence. The existing literature analysing 'precursor' or pre-inchoate terrorism-related offences outlines their development and implications in different jurisdictions and their role in international terrorism. However, few studies focus exclusively on specific offences in UK legislation and delve deeply into the offences to analyse their

detailed structure, extent, and implications.[3] This thesis has provided the first in-depth doctrinal examination of three distinct categories of pre-inchoate terrorism-related offences which were chosen because they illustrate how terrorism leads to criminalisation at the very limits of legitimacy. If academic scholarship is to suggest realistic reforms and restraints to such offences, it also needs to recognise the key differences between different types of pre-inchoate terrorism-related offences and develop principles of constraint in a practical and normative sense.[4]

Focusing on these categories of offences has allowed for deeper insights into the different problems posed by and justifications made for particular offences. It has also furthered our understanding of the appropriate boundaries of these offences and established the grounds for arguments of principle in the later chapters. To examine the phenomena and contours of pre-inchoate offences, Chapter 3 set out the wider legislative context for legal developments relating to pre-inchoate terrorism-related offences. This allowed me to answer the question of why there is an increasing emphasis on precursor crimes of terrorism. Chapter 3 demonstrated that penal populism and a 'hyper-legislative' political landscape, coupled with an expanding criminal law due to the perceived changing nature of terrorism and the need to intervene to pre-empt it at the earliest stages, underlie but cannot justify the UK's ever-broadening anti-terrorism agenda the erosion of criminal law safeguards.[5]

In the central Chapters 5-7, I conducted doctrinal analyses of three specific types of terrorism-related pre-inchoate offences to assess their troubling foundations, their legislative structure,

[3] Clive Walker, Mariona Llobet Anglí and Manuel C Meliá, *Precursor Crimes of Terrorism: the Criminalisation of Terrorism Risk in Comparative Perspective* (Edward Elgar Publishing 2022); Joanna Simon, *Preventive Terrorism Offences* (DPhil thesis, University of Oxford 2015).
[4] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2015).
[5] Clive Walker (n 3).

content, and implications. Because the articulation of these offences is so broad and vague, police, prosecutors and judges have extensive discretion about when to apply, investigate, and prosecute them and how to interpret and apply criminal liability to a very wide range of ill-defined conduct. Analysing the terrorism-related offences of possession and collection, Chapter 5 found that these offences flout the basic tenets of criminal law, not least due to the difficulty of justifying 'risk-based possession' as sufficiently wrongful and harmful to justify criminalisation. It was argued that the creation of extremely broad offences such as the online viewing offence under s.58(1)(C) TA 2000 was unjustifiable. Offences like these should be subject to closer judicial oversight to maintain core criminal liability principles.

Examining encouragement and dissemination terrorism-related offences, Chapter 6 argued that the harms of encouragement and dissemination are too remote from an ultimate terrorist act and that the link between such conduct and the risk of radicalisation is unclear and insufficiently evidenced by existing research. My analysis revealed that the current legal framework inadequately defines these offences, and I identified the need for a stronger basis to justify limitations on freedom of expression. Additionally, I proposed more precise and stringent *actus reus* and *mens rea* requirements to improve legal clarity and effectiveness.

Chapter 7 examined associative offences of terrorism and the legal regime for proscribing terrorist and extremist organisations. It demonstrated that proscription is a problematic executive power and that criminalising associative conduct imposed liability on grounds of remote or *de minimis* forms of association like the wearing of the insignia of a proscribed organisation that flouted various tenets of criminal law. While Chapters 5 to 7 discussed the characteristics of each class of offence, all three categories of pre-inchoate terrorism-related offences were shown to be drafted in vague and unclear terms. As a consequence, they lacked

legal certainty and breached the remoteness principle due to the types of distant or insufficient harm criminalised. While the potential harm of terrorism is undeniably grave, these offences are so broad that they may criminalise conduct that is neither clearly wrongful nor closely linked to an ultimate terrorist harm, often imposing disproportionate liability for minor or preparatory acts.

The detailed doctrinal analyses of specific offences in Chapters 5-7 conclusively show that in the course of 'defending further up the field', the UK has enacted new legislation that criminalises even more problematic acts than other terrorism-related offences. The offences studied distort the temporal limits of the criminal law by expanding the boundaries of criminal liability backwards in time and space. These stretch criminal liability in vertical and horizontal directions to form an ill-evidenced connection between present conduct and potentially violent future acts. The overly extensive temporal expansion of the offences examined in Chapters 5-7 leads back to the question of whether these offences can be justified and also raises the question of whether future similar offences would or could ever be warranted. The thesis calls into question whether these offences are an effective deterrent or whether their overly extensive reach and unfair imposition of criminal liability is counterproductive- both by eroding the rule of law and public trust in legal institutions, and by alienating minority communities in ways that risk fuelling the very radicalisation such laws aim to prevent. If so, arguably a less draconian criminal law might avoid the injustice of criminalizing people for overly remote harms and would be less likely to alienate those who regard such offences as excessive and unwarranted.

1.2. Developing A Preventive Jurisprudence For The Security State: The Role Of Principles And Rights

Constraining principles play a crucial role in developing a 'preventive jurisprudence' to adequately limit and mitigate the challenges created by an expanding criminal law.[6] These principles serve as normative guidelines that should limit the boundaries of criminal law. This thesis has fulfilled its aim to articulate 'what principles, values and limits attach to state action that seeks to prevent future harm by restricting liberty in the present'. Chapter 8 explored the implications of the rise of preventive, pre-inchoate terrorism-related offences as part of the UK counter-terrorism framework.[7] The discussion in Chapter 8 assesses and gives weight to the restraining effects of principles and rights and their broader implications. However, the discussion has limitations: principles are but one of many considerations that courts and the legislature must have regard to when deciding whether to enact far-reaching terrorism offences. The primary rationale behind many of these offences is utilitarian, that is to say the pursuit of public safety through a 'legislative war on terrorism' in which security legislation is a means to an end, namely to reduce the risk of terrorist attacks.[8] Weighing principles and identifying connections and contradictions between them is a crucial step towards a broader preventive jurisprudence, by which the scope and boundaries of the preventive state may be set. How to increase individual security and protect against the intrusions entailed by terrorist laws and measures without jeopardising state and public security is an important debate in the field. This thesis makes clear the importance of constraining principles by advocating a view of criminal

[6] Lucia Zedner, 'Preventive Justice or Pre-Punishment? The Case of Control Orders' (2007) 60 Current Legal Problems 174.
[7] Tamara Tulich, 'Prevention and Pre-emption in Australia's Domestic Anti-Terrorism Legislation' (2012) 1 International Journal for Crime, Justice and Social Democracy 52.
[8] Kent Roach, *The 9/11 effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 238.

law that takes principles seriously and shows how they could and should apply to specific offences to restrain and reinforce the legitimate limits of the criminal law.

Previous scholars have observed that 'the metaphor of balance between security and liberty, though commonplace in contemporary debate, is problematic'.[9] This thesis has examined and elaborated the various principles and rights that might enhance individual security to bridge the gap between utilitarian arguments for preventing terrorism and the assertion that principles and rights are absolute trump cards in this debate. Weighing and considering the impact of restraining principles has revealed important insights relating to how utilitarian justifications behind certain pre-inchoate terrorism offences (such as encouragement) erode established principles. The thesis has shown how they would be enhanced if certain restraints such as proportionality, wrongfulness and remoteness were applied. It has also shown how different principles overlap and interact in their competition for adherence, and most importantly *why* some principles ought to prevail over others.

Discussions of rights throughout this thesis also called into question the metaphor of 'balance' by demonstrating that there is more to the consequentialist versus liberal argument, or rights as 'trump cards' arguments in the pursuit of security.[10] Arguably, certain terrorism-related acts such as wearing the uniform of a proscribed organisation with intent to incite support merits criminalisation to fulfil the core protective duty of the state. This thesis has accepted that many offences fulfil utilitarian aims and can suppress certain fundamental rights and erode liberties to pursue the aim of reducing terrorism in society. Yet, this thesis has argued that the criminal

[9] Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 Journal of Law and Society 507, 532; David Golove and Sthephen Holmes, 'Terrorism and Accountability: Why Checks and Balances Apply Even in 'The War on Terrorism'' (2004) 2 The NYU Review of Law and Security; Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 Journal of Political Philosophy 191.
[10] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1987).

law's response to terrorism-related pre-inchoate acts should be restrained due to the problems inherent in justifying the criminalisation of these acts. This thesis has found that while the offences criminalising pre-inchoate acts such as possession, encouragement, and association aim to avert potentially catastrophic harm, their breadth raises concerns. When seeking to prevent terrorist atrocities and highlighting the severity of potential terrorism harm, these offences tend to disregard the low probability of harm occurring in certain instances and the risk of violating fundamental rights. Whether the above is because of the perceived risk of a terrorist act occurring, or whether these offences were enacted as a symbolic form of 'security theatre', this thesis demonstrated that limits should be enforced to decrease the overreach of preventive aims while acknowledging that conflicting values make the criminal justice response difficult to implement.[11]

2. Implications Of This Thesis For Criminal Law Theorists

The principles and rights examined in this thesis relate specifically to the three classes of pre-inchoate terrorism-related offences studied, however, the analysis and findings of this thesis could equally be applied to other terrorism-related offences. Because the 'precise limits of criminal offences based on abstract standards are inherently uncertain', the framework developed in Chapter 8 provides a model for other scholars who wish to examine the criminalisation of other precursor terrorism-related acts to ask if and how the criminalisation of a particular act can be justified, and how it can be limited.[12] How these offences are investigated, prosecuted and proven at trial could be examined to develop the doctrinal and constraints analyses further. Sentencing research related to terrorism offences would benefit

[11] Zuzanna Buszman, 'Legal Approaches Against Terrorist Attacks–Fundamental Facets of an Effective Criminal Justice Response' (2016) Studia Iuridica 205, 209.
[12] Andrew Cornford, 'Criminalising Anti-Social Behaviour' (2012) 6 Criminal Law and Philosophy 1, 21.

from some of the findings of this thesis, especially the discussions relating to proportionality constraints, which could apply similarly to the sentencing process. Understanding these criminal justice and criminal law processes better would add to the debate on whether the boundaries surrounding these offences are justifiable in general or whether a particular act should be criminalised.

The elaboration, critical analysis of, and debates about constraining principles and exploration of how rights operate set out in Chapter 8 make clear the limits to existing research and reveal lacunae in criminal law scholarship. Much has been said about the perils of seeking security and the preservation of individual liberties.[13] The contribution of this thesis concerning the application of principles and rights, and its extensive assessment of their restraining effect and their limits has raised many further questions about how principles and right could and should enable a redrawing of the boundaries of criminal law to redress the overly hasty, reactive, and ill-considered hyperextension of the criminal law that has occurred in the UK in the decades since 9/11. This thesis offers a principled means by which to decide which limits, principles and rights matter and why. This challenges the idea that the preventive turn in criminal law ought to solely be predicated on future risks at any cost, instead shifting the focus to how liberal principles should be embedded within the foundations of the criminal law relating to terrorism and security. It is hoped that the thesis will further the debate about the proper limits of the preventive state and the rightful extent of the state's duty to pursue security in the face of terror.

[13] Jeremy Waldron (n 9); Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press 2007) 39; Carol W. Lewis, 'The Clash Between Security and Liberty in the U.S. Response to Terror' (2005) 65 Public Administration Review 18; Zedner (n 9).

3. Conclusion

The scope of terrorism legislation is constantly expanding, and the politics of terrorism may inevitably result in the enactment of laws that are overly broad.[14] This thesis conducted an in-depth doctrinal analysis of three important categories of pre-inchoate terrorism offences relating to possession, encouragement and association. It revealed that these offences are problematic as they infringed upon essential criminal law principles. This thesis considered different principles and rights and analysed their restraining effect on some of the most extreme extensions of the criminal law relating to terrorism. In doing so, it contributes to widening the discussion on the principles and rights which might provoke deeper reflection on how to restrain an expanding and distorted criminal law. Its primary contribution has been to show how existing offences contravene the limits of legality and how constraining principles should and can play a strong role in redrawing the boundaries of criminal law.

This thesis has shown that it is possible to construct a constraints-based approach towards anti-terrorism law in which the liberal foundations of criminal law are used to rein in preventive laws and measures.[15] Implicit in this framework is the argument that the utilitarian/deterrence rationale, at least when applied without retributivist limits and adherence to proportionality constraints that should inform a liberal criminal law, is unjustifiable and lacks regard for the 'moral importance' of fundamental rights.[16] Adherence to principles and increased scrutiny on the types of rights that certain terrorism-related offences might violate would serve to strengthen the safeguards offered by a principled criminal law. Principles are powerful restraints on the reach of criminal law. Nevertheless, difficult questions about how to ascertain

[14] F Andrew Hessick and Carissa Byrne Hessick, 'Constraining Criminal Laws' (2021) 106 Minn L Rev 2299.
[15] Ashworth and Zedner (n 4).
[16] Victor Tadros, 'Justice and Terrorism' (2007) 10 New Criminal Law Review 658, 679.

the appropriate weight to be given to each principle, and address or resolve any arising conflicts and tensions between them, will still require continued careful attention.[17] Ultimately, counter-terrorism laws should serve a dual-purpose of protecting individuals from harm while also upholding the rule of law and reinforcing the legitimacy of the state. To achieve these goals, it must prevent the overreach of terrorism legislation that could erode fundamental liberties in the pursuit of security.

[17] Ashworth and Zedner (n 4) 266.

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