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Countering terrorism or criminalizing curiosity? The troubled history of UK responses to right-wing and other extremism

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Abstract

The growth of right-wing extremism, especially where it segues into hate crime and terrorism, poses new challenges for governments, not least because its perpetrators are typically lone actors, often radicalized online. The United Kingdom has struggled to define, tackle or legitimate against extremism, though it already has an extensive array of terrorism-related offences that target expression, encouragement, publication and possession of terrorist material. In 2019, the United Kingdom went further to make viewing terrorist-related material online on a single occasion a crime carrying a 15-year maximum sentence. This article considers whether UK responses to extremism, particularly those that target non-violent extremism, are necessary, proportionate, effective and compliant with fundamental rights. It explores whether criminalizing the curiosity of those who explore radical political ideas constitutes legitimate criminalization or overextends state power and risks chilling effects on freedom of speech, association, academic freedom, journalistic enquiry and informed public debate—all of which are the lifeblood of a liberal democracy.

Keywords

right-wing extremism, radicalization, criminalization, counterterrorism, thought crime, freedom of speech

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Introduction

Right-wing extremism is a significant cause of political violence. The relationship between extreme right-wing views and terrorism is far from new, but until recently such violence was more frequently identified as far right, racially motivated or hate crime and only rarely labelled terrorism.[1] However, the growth of extreme right wing (XRW) adherents and groups, and a precipitous rise in XRW violence, has resulted in increasing willingness to recognize these attacks as terrorism. The Global Terrorism Index 2019 reported that in,

> North America, Western Europe, and Oceania, far-right attacks increased by 320 per cent over the past five years. This trend has continued into 2019, with 77 deaths attributed to far-right terrorists to September 2019. The number of arrests linked to right-wing terrorism in Europe in 2019 increased for the third year in a row . . . Nearly 60 per cent of far-right attacks from 1970 to 2018 were carried out by unaffiliated individuals.[2]

XRW terrorists appear to be motivated by 'broad ideological allegiances rather than specific terrorist groups' and many individuals are lone actors moving between ideologies and movements. Lone XRW actors are 'less likely to exhibit noticeable changes in behaviour or discuss plans with friends or family than their Islamist extremist counterparts'[3]; they are difficult to identify and more likely, therefore, to fall below the surveillance radar. Many are radicalized online,[4] and security specialists warn that the Internet has become an ungoverned space in need of tougher regulation.[5] XRW actors exploit the Internet to proselytize, to promote terrorist atrocities and even to maximize publicity by live-streaming their attacks.[6] Of the 22 terrorist plots foiled in the United Kingdom between March 2017 and September 2019, seven were inspired by XRW ideologies and three fatal terrorist attacks were XRW inspired.[7]

The growth of XRW terrorism is further evidenced by the fact that of the 561 cases referred in 2019 to the UK counterterrorism programme Channel, 45% related to right-wing radicalization and only 37% to Islamist radicalization.[8]

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1. United Nations Security Council Counter-Terrorism Committee (UNSC CTC), *Member States Concerned by the Growing and Increasingly Transnational Threat of Extreme Right-Wing Terrorism 2020* (April 2020) 2 <https://www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED_Trends_Alert_Extreme_Right-Wing_Terrorism.pdf> accessed 23 July 2020.
2. Institute for Economics & Peace, *Global Terrorism Index 2019* 3 <https://reliefweb.int/report/world/global-terrorism-index-2019> accessed 23 July 2020.
3. Ben Butcher and Micah Luxen, 'How Prevalent Is Far-Right Extremism?' *BBC* (2019) <https://www.bbc.co.uk/news/uk-47626859> accessed 23 July 2020.
4. Mark Littler, 'Exploring Radicalisation and Extremism Online—an Experimental Study' published by the Commission for Countering Extremism (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834358/Littler-Exploring-Radicalisation-and-Extremism-Online.pdf> accessed 23 July 2020.
5. HM Government, *Online Harms White Paper* (2019) 41ff <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf> accessed 23 July 2020.
6. UNSC CTC, *Member States Concerned* (n 1) 4.
7. Commission for Countering Extremism, *Challenging Hateful Extremism* (2019) 52 <https://www.gov.uk/government/publications/challenging-hateful-extremism> accessed 23 July 2020.
8. Home Office, *Individuals Referred to and Supported Through the Prevent Programme* (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853646/individuals-referred-supported-prevent-programme-apr2018-mar2019-hosb3219.pdf> accessed 23 July 2020.

Although XRW extremists are less likely to belong to proscribed groups or associate with other extremists, some do. As the UK government has recognized, whereas '[b]efore 2014, extreme right-wing activity was confined to small, established groups with an older membership, which promoted anti-immigration and white supremacist views but presented a very low risk to national security', the emergence of National Action in 2014 changed this assessment.[9] In 2016, National Action became the first right-wing extremist group to be banned in the United Kingdom[10] following the murder of Labour MP Jo Cox by Thomas Mair, a White supremacist. The proscription of two more right-wing groups, Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action), both aliases of National Action, swiftly followed and other XRW groups have since been proscribed.[11] Under UK law, proscription makes it a crime to support, belong to, or wear the uniform or insignia of proscribed groups.[12] In 2018, the Home Office observed 'the threat from extreme right-wing terrorism is growing' and announced increased involvement by the Joint Terrorism Analysis Centre (JTAC) and MI5,[13] a move that was widely seen as recognition of the threat to national security posed by XRW terrorism. In 2019, an XRW terrorist attack on a mosque in Christchurch, New Zealand, in which 51 people died, drew worldwide attention, amplified by the fact that the perpetrator published a manifesto online and live video-streamed the attack.[14]

Yet not all right-wing extremism espouses violence and the question remains, when are those who express fanatical or abhorrent views rightly regarded as extremists and when as terrorists? Lawyers, policymakers and academics have struggled to define extremism[15] and to determine when extremism becomes a cause or form of terrorism.[16] This threshold question is not only a matter of terminology or legal definition, it is also a political choice. Whereas Islamist groups threatening violence are routinely identified as terrorist organizations, in the United Kingdom, far right-wing groups advocating violence have tended to be labelled extremist, a term that suggests they pose a lesser threat. The designation by the court of the murder of Jo Cox MP as 'terrorist' was a significant turning point.[17]

The failure to define extremism clearly contravenes the principle of maximum certainty, which requires laws to be sufficiently precise to permit the public to make decisions and to

9. HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 9608, Stationery Office, London 2018) 21.
10. Home Office, 'Press Release' (December 2016) <https://www.gov.uk/government/news/national-action-becomes-first-extreme-right-wing-group-to-be-banned-in-uk> accessed 23 July 2020.
11. Home Office, 'Government Takes Action to Proscribe Right-Wing Terrorist Groups' <https://www.gov.uk/government/news/government-takes-action-to-proscribe-right-wing-terrorist-groups> accessed 23 July 2020.
12. Sections 11, 12 and 13 under Part II 'Proscribed Organisations' Terrorism Act 2000 (TA2000).
13. Home Office (n 9) 22.
14. Maura Conway, Ryan Scrivens and Logan McNair, 'Right-Wing Extremists' Persistent Online Presence: History and Contemporary Trends' *ICCT Policy Brief* (2019) 1 <http://doras.dcu.ie/23960/> accessed 28 January 2021.
15. See, eg Commission for Countering Extremism, *Study into Extremism* (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742176/Terms_of_Reference_into_Extremism_Study.pdf> accessed 28 January 2021; Tony Blair Institute for Global Change, *What is Extremism?* (2020) <https://institute.global/sites/default/files/inline-files/What%20is%20extremism.pdf> accessed 23 July 2020.
16. The UK definition of terrorism is set out in s 1 Terrorism Act 2000. See Victor Tadros and Jacqueline Hodgson, 'How to Make a Terrorist out of Nothing' (2009) 72(6) MLR 984–98; Keiran Hardy and George Williams, 'What Is "Terrorism?"' (2011) 16 UCLA J Intl L Foreign Aff 77.
17. 'Jo Cox: Man Jailed for "Terrorist" Murder of MP' *BBC News* (2016) <https://www.bbc.co.uk/news/uk-38079594> accessed 23 July 2020.

conduct themselves in accordance with the law. Without clear definition, it is impossible to know whether what one says, writes, views or reads falls with the definition of extremism or not. As this article will show, the history of the UK government's repeated attempts to legislate against extremism attests not only to the difficulties of definition but, more importantly, of the vital interests in play—and in peril—when governments seek to regulate thought and speech.

A striking illustration of these difficulties can be found in a recent change in UK law that directly targets online extremism. Section 3 of the UK Counter-Terrorism and Border Security Act (CTBSA) 2019 makes it a criminal offence to view online on a single occasion 'material of a kind likely to be useful to a person committing or preparing an act of terrorism'.[18] The bill initially criminalized only those who viewed such material three times—a formulation defended by then Home Secretary, Amber Rudd, as designed to

> ensure that only those found to repeatedly view online terrorist material will be captured by the offence, to safeguard those who click on a link by mistake or who could argue that they did so out of curiosity rather than with criminal intent.[19]

Largely to overcome evidential problems (discussed below), the legislation was revised to reduce the requirement of three clicks to one. As finally enacted, s 3 criminalizes the merely curious for whom a single-click, without reasonable excuse, may now result in conviction for a crime attracting a maximum sentence of 15 years' imprisonment. This article examines why the offence was enacted, its history and its place in the troubled history of attempts to counter extremism, particularly XRW extremism, in the United Kingdom.

The article begins by examining the distinct approach taken by the United Kingdom to defining and tackling extremism and observes growing concern about right-wing extremism. It next analyses the UK government's several failed attempts to legislate against extremism. It suggests that this troubled history results partly from the UK's decision to diverge from the international commitment to countering *violent* extremism (CVE), and instead to target non-violent extremism, which has led to a focus on political thought alone. The next section explores the implications of this approach for the UK's policy of 'criminalizing thought'. It focuses on terrorism-related offences that target extremist ideology by criminalizing publication, encouragement, glorification, dissemination, communication, possession of information, and now mere viewing of terrorist-related material online. Many of these offences are vague and overly broad. The final section examines the decision to criminalize the viewing of terrorist-related material online on a single occasion, an offence designed to target lone terrorists who are most easily detected online. It considers its contribution to overcriminalization and implications for core principles of criminal law. The article concludes by suggesting that the targeting of online extremism risks 'criminalizing curiosity'. It breaches the legitimate limits of coercive state power and threatens fundamental rights, creating a chilling effect on academic and journalistic enquiry and informed public debate, all of which are the lifeblood of a liberal democracy. Right-wing extremism threatens the liberal democratic order, but criminalizing those who do no more than view such material online also poses serious risks to freedom of thought and expression.

18. Section 3 Counter-Terrorism and Border Security Act 2019 (CTBS 2019).
19. Home Secretary, Amber Rudd, 'Law Tightened to Target Terrorists' Use of the Internet' (2017) <https://www.gov.uk/government/news/law-tightened-to-target-terrorists-use-of-the-internet> accessed 23 July 2020.

The singular UK approach to extremism

The political imperative to prevent terrorism by 'defending further up the field'[20] has prompted governments to develop policies to tackle its very origins in extremist thought and beliefs. Central to this approach is the UK 'Prevent Strategy', first developed in 2003, and launched in 2006.[21] It seeks to tackle the social, political and ideological causes of radicalization 'to stop people moving from extremist groups or from extremism into terrorist-related activity'.[22] In 2011, the UK government placed extremism squarely on the political agenda when it pledged that, 'There should be no "ungoverned spaces" in which extremism is allowed to flourish without firm challenge'.[23] In 2013, a Prime Minister's Task Force on 'Tackling Radicalisation and Extremism' was established specifically to target those extremist ideologies thought to promote radicalization.[24]

Significantly, whereas most countries and international organizations have focused on CVE, since 2013 the UK government has taken a broader approach that targets *non*-violent extremism, such as mere thought or expression. As the government declared in its strategy report *Tackling Extremism in the UK*,

> The UK deplores and will fight terrorism of every kind, whether based on Islamist, extreme right-wing or any other extremist ideology. We will not tolerate extremist activity of any sort, which creates an environment for radicalising individuals and could lead them on a pathway towards terrorism.[25]

Tackling Extremism identified 'extreme right-wing views' as a particular threat and called on the police to cooperate with other countries to identify right-wing extremists coming to the United Kingdom. Hereafter, however, the United Kingdom approach to countering extremism departs significantly from that adopted internationally.

To-date international attention has focused mainly on Islamist terrorism. The rise to prominence of ISIS in 2014 and its declaration of a so-called caliphate in Syria and Iraq prompted the UN to pass Security Council Resolution 2178.[26] While this Resolution emphasized 'that terrorism cannot and should not be associated with any religion, nationality or civilization',[27] it focused on the need to combat foreign terrorist fighters travelling to join ISIS in Syria and Iraq. The subsequent collapse of the so-called Islamic State in 2019 raised new concerns about the problem of returning foreign terrorist fighters and their families.[28] While the primary focus of UK counter-extremism strategy was also on Islamist terrorism, UK government strategy reports and official guidance documents increasingly referenced the growing threat of right-wing extremism.

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20. David Anderson, 'Shielding the Compass: How to Fight Terrorism Without Defeating the Law' (2013) EHRLR 233, 237.
21. HM Government, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, Stationery Office, London 2006).
22. HM Government, *Prevent Strategy* (Cm 8092, Stationery Office, London 2011) 3.
23. Ibid 9.
24. HC Library, *Counter-Extremism Policy: An Overview* (UK Parliament 2017) 13.
25. HM Government, *Tackling Extremism in the UK* (Cabinet Office, London 2013) 2.
26. UNSCR 2178 (24 September 2014).
27. Ibid.
28. <https://www.un.org/counterterrorism/foreign-terrorist-fighters> accessed 23 July 2020.

Secondly, whereas the UNSC Resolution 2178 called upon all member states to develop 'strategies to counter the violent extremist narrative that can incite terrorist acts',[29] and whereas international emphasis remained on tackling *violent* extremism, the United Kingdom adopted a much broader remit. Declining to confine itself to tackling violent extremism, the UK government insisted, 'Terrorist groups of all kinds very often draw upon ideologies which have been developed, disseminated and popularized by extremist organisations that appear to be non-violent'.[30] While violence is a legitimate focus of government intervention,[31] targeting non-violent extremism is altogether more problematic, as will be shown below.

Thirdly, whereas the United Kingdom declared itself committed to fighting extremism, the UN adopted a less confrontational approach, encouraging member states,

> to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism . . . and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion.[32]

Kent Roach describes UNSCR 2178 as 'the most important global template for counterterrorism since UNSC Resolution 1373' and rightly recognizes it as 'less top-down and state centred than the British approach'.[33] The UK Prevent Strategy also sought to engage the wider community and to encourage referral of those vulnerable to radicalization. However, as I have argued elsewhere, Prevent 'does not dispense with coercion but marries the exercise of soft power programmes designed to win "hearts and minds" to existing hard laws and measures'.[34] The implications of the UK's more expansive approach to tackling extremism are explored further below.

Fourthly, the United Kingdom has adopted a particularly parochial definition of extremism as, 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs'.[35] The definition is problematic in that it defines extremism negatively not by what it promotes but by reference to what it opposes. Obviously, the values listed are hardly exclusively British, and the word 'including' implies that the list is not definitive, such that opposition to other ostensibly 'British' values might also constitute extremism. Moreover, under this definition, 'on a strict reading, those who are committed but peaceable anarchists or who actively declare themselves

29. UNSCR (n 26) para 16. See also UN Security Council, 'Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters' (2014) <http://www.un.org/press/en/2014/sc11580.doc.htm> accessed 23 July 2020.
30. HM Government, *Prevent Strategy* (n 22) 19.
31. Craig Forcese and Kent Roach, 'Criminalizing Terrorist Babble: Canada's Dubious New Terrorist Speech Offence' (2015) 53 Alberta L Rev 35; Keiran Hardy, 'Preventive Justice Principles for Countering Violent Extremism' in Tamara Tulich et al. (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, Abingdon 2017) 122–29.
32. Para 16, UNSCR 2178.
33. Kent Roach, 'The Migration and Evolution of Programs to Counter Violent Extremism' (2018) 68 U Toronto LJ 588, 589.
34. Lucia Zedner, 'Counterterrorism on Campus' (2018) 68 U Toronto LJ 545, 553.
35. HM Government, *Revised Prevent Duty Guidance for England and Wales* (2015) 2. This oddly parochial definition has appeared in UK government policy documents at least since 2011. HM Government, *Prevent Strategy* (n 22) 107.

intolerant of racist or sexist beliefs would qualify as extremists'.[36] In practice, the real target is revealed by the fact that the policy literature and statutory guidance refers repeatedly to 'Islamist extremists' and to 'extreme right-wing groups', which are the twin targets of UK concern.[37]

The troubled history of UK counter extremism policy

Problematic as it is, this official definition of extremism underpinned an important and wide-ranging new provision under s 26 of the Counter-Terrorism and Security Act 2015, which imposed upon specified public institutions (including prisons, hospitals, preschools, schools, colleges and universities)[38] a statutory duty to 'have due regard to the need to prevent people from being drawn into terrorism'.[39] The so-called 'Prevent Duty' has been very controversial because it places the burden on public institutions to tackle extremism, the nature and extent of which has been tested in the courts.[40] Controversy ranges over the vexed questions of what constitute extremist views; how far public institutions should be required to mitigate the risks of people being drawn into terrorism; and how far they should have regard to the countervailing risks to rights of freedom of speech, of association and of academic freedom.[41] Under Article 10 of the European Convention of Human Rights, freedom of expression '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'. These qualifications lead Forcese and Roach to criticize free speech protections in the United Kingdom as 'anemic',[42] and partially explain why intrusions upon free speech are more extensive, and more problematic, in the United Kingdom than in those jurisdictions with stronger protections.

While controversy over the Prevent Duty raged, the UK Government was already taking further steps to tackle extremism. A new 'Extremism Analysis Unit' was launched in 2015 by the then Home Secretary, Theresa May, in a stirring patriotic speech—'A Stronger Britain, Built On Our Values'.[43] May announced that the Extremism Analysis Unit would 'tackle the whole spectrum of extremism, violent and non-violent, ideological and non-ideological, Islamist and neo-Nazi—hate and fear in all their forms'.[44] She acknowledged the rise of hate crime, the doubling of anti-Semitic incidents and an increase in anti-Muslim attacks, and she avowed, 'we draw no distinction between a neo-Nazi and an Islamist extremist'.[45] Her speech failed to provide a more persuasive definition of extremism, affirming that 'the foundation

36. Zedner, 'Counterterrorism on Campus' (n 34) 566.
37. See, eg HM Government, *Revised Prevent Duty Guidance for England and Wales* (2015) 3.
38. The full list of 'specified authorities' is set out in sch 6 Counter-Terrorism and Security Act 2015.
39. Section 26 Counter-Terrorism and Security Act 2015.
40. Zedner, 'Counterterrorism on Campus' (n 34); Steven Greer and Lindsey Bell, 'Counter-Terrorist Law in British Universities' (2018) 2018 PL 84. It has also been the subject of litigation, eg *R on the application of Dr Salman Butt v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin) and *R on the application of Dr Salman Butt v Secretary of State for the Home Department* [2019] EWCA Civ 256, [2019] WLR(D) 148.
41. Zedner, 'Counterterrorism on Campus' (n 34) 574–80.
42. Forcese and Roach 'Criminalizing Terrorist Babble' (n 31) 65.
43. Home Secretary, 'A Stronger Britain, Built on Our Values' (2015) <https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values> accessed 23 July 2020.
44. Ibid.
45. Ibid.

stone of our new strategy is the proud promotion of British values'.[46] May acknowledged that 'others imply that promoting British values is somehow narrow-minded or jingoistic' but she summarily dismissed the claim that it might tend to feed rather than to quell extremism.[47]

There followed an extraordinary run of failed attempts by the UK government to legislate against extremism. In 2015, a new Extremism Bill proposed a raft of measures including Banning Orders to target extremist organizations that fell below the threshold for proscription; Extremism Disruption Orders to prevent individuals from seeking to radicalize others online; Closure Orders to permit police and local authorities to close down premises used to support extremism; and other laws to tackle extremist broadcasting, new powers for the media regulator and employment checks to bar extremists from working with children.[48] These proposals attracted close, critical scrutiny on many grounds, including their failure to formulate a clear definition of extremism that did not impinge on fundamental rights or inhibit the expression of views critical of the government. Other criticisms included the failure to provide evidence of a causal link between the expression of extremist views and terrorism, to establish that existing laws and terrorism-related offences did not suffice and to consider the possible chilling effect of the proposals on free speech and political debate.[49] The Extremism Bill itself did not eventuate, and nor did the Counter-Extremism and Safeguarding Bill proposed the following year. Exactly why is unclear, but media reports suggest,

> behind the scenes government lawyers had found it impossible to find a "legally robust" definition of extremism that would have any chance of surviving a free speech challenge in the courts. The anti-extremism bills went through "dozens of drafts" but the problem was never resolved.[50]

Following its repeated failure to legislate against extremism, the UK government resorted instead to executive endeavour. A new official *Counter-Extremism Strategy* made XRW a significant focus, declaring 'Islamist extremism is not the only threat, as seen by the vicious actions of a number of extreme right-wing and neo-Nazi groups'.[51] It placed XRW terrorism squarely on the UK political agenda and identified online extremism as a potent threat.[52] Evidence that formerly isolated individuals were connecting with one another via online XRW communities made them more readily identifiable and more easily subject to surveillance by security agencies.[53] A Home Affairs Select Committee Countering Extremism Inquiry took evidence about the extent and drivers of extremism, the effectiveness of existing measures and, again, the need for further legislation.[54] Then Independent Reviewer of Terrorism Legislation,

46. Ibid.
47. Ibid.
48. HC Library, *Counter-Extremism Policy* (n 24) 21.
49. See, eg David Anderson, *The Terrorism Acts in 2014 Report of the Independent Reviewer* 54ff <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/461404/6_1256_EL_The_Terrorism_Act_Report_2015_FINAL_16_0915_WEB.pdf> accessed 23 July 2020.
50. Alan Travis 'Paralysis at the Heart of UK Counter-Extremism Policy' (2017) *The Guardian* <https://www.theguardian.com/uk-news/2017/sep/17/paralysis-at-the-heart-of-uk-counter-extremism-policy> accessed 23 July 2020.
51. Home Office, *Counter-Extremism Strategy* (Cm 9148, 2015) 10.
52. Ibid, 11.
53. Butcher and Luxen, 'How Prevalent Is Far-Right Extremism?' (n 3).
54. Home Affairs Select Committee, *Countering Extremism Inquiry* (2015) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/countering-extremism/> accessed 23 July 2020.

David Anderson warned, 'I am wary about extending the law, the hard law, any further than it already goes into what people believe and what they say'.[55] The report resulting from the Countering Extremism Inquiry, *Radicalization*,[56] identified online extremism as a particular problem and castigated Internet and social media companies for 'consciously failing to combat the use of their sites to promote terrorism and killings'.[57] Mindful that all previous attempts had failed,[58] the Inquiry did not recommend further legislation. The Joint Committee on Human Rights took the same position, concluding, 'the Government should not legislate, least of all in areas which impinge on human rights, unless there is a clear gap in the existing legal framework'.[59]

The UK government responded to this sorry history of legislative failure by establishing a Commission for Countering Extremism (CCE) and, in so doing, effectively kicked this intractable issue into the long grass.[60] Eschewing any immediate action, the CCE Lead Commissioner, Sara Khan, declared that instead her task was to examine all forms of extremism and vowed to make right-wing extremism a particular focus alongside Islamist extremism.[61] She warned of the growth of a 'far right online eco-system' and stressed the need to understand 'the links between far right, extremism and terrorism'.[62] The CCE also commissioned academic research on topics including the 'Far right' and 'Extremism online' in order to understand the aims and ideologies, size and reach of XRW groups,[63] and learn more about how extremists promote their objectives online.[64] The establishment of the CCE can be seen as a partial retreat from the unenviable challenge of trying to legislate against extremism, but it was also recognition that the legal armoury of terrorism-related offences targeting extremism was extensive and should not, without warrant, be expanded. It is to these terrorism-related offences we now turn in order to establish whether the rise of XRW terrorism suggests legal lacunae warranting further criminalization.

Criminalizing thought?

Even before 9/11, the UK Terrorism Act 2000 had consolidated 30 years of 'temporary' and emergency laws enacted to tackle political violence arising from the conflict in Northern Ireland. In the years that followed, the British government passed a further seven

55. Home Affairs Select Committee, *Oral Evidence: Countering Extremism* (HC 2016).
56. Home Affairs Committee, *Radicalisation: The Counter-Narrative and Identifying the Tipping Point* HC135 (2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf> accessed 23 July 2020.
57. Commons Select Committee, 'Internet Giants "Consciously Failing" to Tackle Extremism on the Web' (2016) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/radicalisation-report-published-16-17/> accessed 23 July 2020.
58. Travis, 'Paralysis at the Heart of UK Counter-Extremism Policy' (n 50).
59. JCHR, *Counter-Extremism* (22 July 2016), HL39, HC105, Second Report of Session (2016-17) 31.
60. <https://www.gov.uk/government/organisations/commission-for-countering-extremism> accessed 23 July 2020.
61. See, eg the speech by the CCE Lead Commissioner, Sara Khan, to the Centre for the Analysis of the Radical Right (CARR) (2019) <https://www.gov.uk/government/speeches/lead-commissioners-speech-to-the-centre-for-analysis-of-the-radical-right-conference> accessed 23 July 2020.
62. Ibid.
63. <https://www.gov.uk/government/organisations/commission-for-countering-extremism/about/research#far-right> accessed 23 July 2020.
64. <https://www.gov.uk/government/organisations/commission-for-countering-extremism/about/research#extremism-online> accessed 23 July 2020.

counterterrorism statutes that criminalized a broad range of terrorism-related conduct, increased police powers and introduced new restrictive measures.[65] Significantly, terrorism itself is not an offence; instead, the definition of 'terrorism' under s 1 of the Terrorism Act 2000[66] underpins the wide array of 'terrorism-related' offences. Most of these offences target conduct occurring prior to, or associated with, the planning, preparation or encouragement of terrorist attacks. Others target the expression, publication or encouragement of extremist views or accessing such material.

A few examples will suffice to illustrate the broad scope of these offences, particularly those that target speech, communication and viewing of information. Notorious for its lack of certainty, the encouragement offence under s 1 of the Terrorism Act 2006 prohibits the intentional or reckless publication of

> a statement that is *likely* to be understood by *some* or all of the members of the public to whom it is published as a direct or *indirect* encouragement or other inducement to them to the commission, *preparation* or instigation of acts of terrorism or Convention offences (emphasis added),[67]

where the offender intends or is reckless as to whether the public will be directly or indirectly encouraged or induced to commit, prepare or instigate acts of terrorism.[68] Indirect encouragement includes statements that glorify the commission or preparation of acts of terrorism and, less clearly still, a 'statement from which those 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'.[69] All of these offences can be committed online and allow the authorities to target XRW terrorists seeking to target new audiences on social media, as well as on dedicated XRW platforms.[70]

Dissemination of terrorist publications (or its possession with a view to dissemination) where the individual 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', or is reckless thereto, is also criminalized under s 2 of the Terrorism Act 2006. Again, online dissemination is included in recognition of the central role that the Internet plays in political and social life, not least the increasingly sophisticated use of the Internet by XRW terrorists to radicalize and recruit, to secure publicity and to maximize the impact of terrorist attacks.[71]

More problematic still are provisions under the Terrorism Act 2000 that pertain to possession of terrorist-related information, again including information online. Section 57 of the Terrorism Act 2000 creates an offence of possessing 'an article in circumstances which give

65. Joanna Simon and Lucia Zedner, 'Countering Terrorism at the Limits of Criminal Liability' in Benjamin Vogel and Matthew Dyson (eds), *The Limits of Criminal Law* (OUP, Oxford 2018). See also, Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (3rd edn OUP, Oxford 2014).
66. Section 1 TA2000 defines terrorism as the use or threat of action involving serious violence, serious damage to property, endangering life, creating a serious risk to health or safety, or serious interference with or disruption of an electronic system, where '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' <http://www.legislation.gov.uk/ukpga/2000/11/section/1> accessed 23 July 2020.
67. Section 1 Terrorism Act 2006 (TA2006).
68. Section 1(2)(b)(i) & (ii) TA2006.
69. Section 1(3) TA2006.
70. UNSC CTC, *Member States Concerned* (n 1) 4.
71. Ibid.

rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'. As originally enacted, s 58 of the Terrorism Act 2000 made it an offence to collect, record or possess 'information of a kind likely to be useful to a person committing or preparing an act of terrorism', although it is a defence if the person can prove that they had a 'reasonable excuse'.[72] One difficulty was that the s 58 offence required the individual to know what is in their possession,[73] which was problematic given that clicking on a news website may cause multiple items to be stored on the user's computer without their knowledge.

To resolve the difficulties created by the original formulation of the possession offence, s 58 was amended by s 3 of the CTBSA 2019. Introduced in response to the five terrorist attacks in London and Manchester in 2017 and an upsurge of attempted attacks,[74] the CTBS Bill 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'.[75] A particular concern was that the Internet is an increasingly powerful means of radicalization, encouraging terrorist activity, promoting proscribed organizations and supplying information used by those planning terrorist acts. Noting that 'radicalisation and terrorist activity is constantly evolving',[76] the UK government identified a need to update counterterrorist law to enable the security services to 'respond effectively to emerging trends'.[77] Of particularly concern was the increasing use of the Internet by XRW terrorist actors to post XRW material and resort by lone individuals to such sites to seek 'ideological justifications, tactical inspiration, and social support in online communities'.[78]

Among many changes introduced,[79] s 3 of the CTBSA 2019 amends s 58, Terrorism Act 2000 to criminalize merely viewing or otherwise accessing 'information of a kind likely to be useful to a person committing or preparing an act of terrorism' online without reasonable excuse.[80] The change was justified partly by the alleged need for a 'digital fix' to ensure that viewing material online, for example, by streaming, was brought within the purview of the offence. The amendment originally placed before parliament sought to identify 'a pattern of behaviour' by criminalizing 'the repeated viewing or streaming of

72. Section 58(3) TA2000 on the subsequent amendment of section 58 under C-TBS 2019, see further below.
73. See *R v G, R v J* [2009] UKHL 13 and discussion thereof in Antje du Bois-Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat' (2009) 68 CLJ 261–63. Also <https://terrorismlegislationreviewer.independent.gov.uk/law-tightened-to-target-terrorists-use-of-the-internet/> accessed 23 July 2020.
74. From 2013 to 2018, 25 terrorist attacks were foiled by the security services and police. Home Office, *Counter-Terrorism and Border Security Bill Impact Assessment IA No: HO0308* (2018) 3 <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0219/Overarching%20Impact%20Assessment%20Final%20signed.pdf> accessed 23 July 2020.
75. Counter-Terrorism and Border Security Act 2019 Explanatory Notes <http://www.legislation.gov.uk/ukpga/2019/3/notes/division/2/index.htm> accessed 23 July 2020.
76. Home Office, *Counter-Terrorism and Border Security Act 2019 Terrorism Offences Fact Sheet* (Home Office, London 2019) 3.
77. Ibid.
78. UNSC CTC (n 1), as evidenced, for example, by the work of Global Internet Forum to Counter Terrorism (GIFCT) <https://www.gifct.org/ in partnership with initiatives like Tech Against Terrorism> accessed 28 January 2021.
79. The Counter-Terrorism and Border Security Act 2019 also modified other offences relating to extremism. Section 1 extends the existing offence of inviting support for a proscribed organization (section 12 TA2000) to include expressions of support reckless as to whether they will encourage others. Section 2 clarifies that the (section 13 TA2000) offence of displaying in a public place an image which arouses reasonable suspicion a person is a member or supporter of a proscribed organization includes the display of images online.
80. <http://www.legislation.gov.uk/ukpga/2000/11/section/58> accessed 23 July 2020.

terrorist material online that is on three or more occasions'.[81] It prompted the then Independent Reviewer of Terrorism Legislation, Max Hill, to ask, 'why can someone be innocently curious once, or even twice, but not a third time?'[82] However, parliament reduced three clicks to one on the grounds that the original offence would have created evidentiary difficulties if the individual viewed material on different websites, different computers or over an extended period of time.[83] This amendment significantly extends the scope of the original offence making it unnecessary to download terrorist-related material, but enough simply to view it *once* online. The maximum penalty was also increased from 10 years' to 15 years' imprisonment, on the questionable grounds that this would 'properly reflect the increased risk and seriousness'[84] of the offence. Yet this significantly heavier sanction is arguably disproportionate to the gravity of the offence of viewing terrorist material online on a single occasion.

Not surprisingly, s 3 CTBSA 2019 provoked criticism from lawyers and human rights organizations of the risks of overreach and rights infringements. As a result, the reasonable excuse defence was amended to include those cases

> in which (a) 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.[85]

This amendment provides a defence to those who download or view material on the Internet who did not know, and had no reason to believe, that the material contains, or is likely to contain, information likely to be useful for terrorist purposes with the result that unintentional or mistaken viewing of such material is no longer an offence. Following criticisms that academic and journalistic freedom of inquiry would be imperilled, further amendments extend the scope of the reasonable excuse defence to apply if the person's action or possession was for the purposes of carrying out work as a journalist, or for academic research.[86] While the reasonable excuse defence is welcome, its scope is limited and it relies on those publicly accused of a terrorist offence raising the defence.[87] The

81. 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 23 July 2020.
82. Independent Reviewer, 'Tom Sargant Memorial Lecture for JUSTICE 2017' <https://terrorismlegislationreviewer.independent.gov.uk/tom-sargant-memorial-lecture-for-justice-24th-october-2017/> accessed 23 July 2020.
83. JCHR *Legislative Scrutiny: Counter-Terrorism and Border Security Bill Ninth Report of Session 2017–19* (4 July 2018) HC 1208 HL PAPER 167 para 29 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf> accessed 23 July 2020.
84. Ibid, p 15. The increase to 15 years' imprisonment is also applied to offences of collecting terrorist information; eliciting, communicating or publishing information that is likely to be useful to a terrorist about a member of the armed forces, police or intelligence services; encouragement of terrorism; and dissemination of terrorist publications. Section 7 CTBSA 2019.
85. Section 3(4) CTBSA 2019.
86. Counter-Terrorism and Border Security Bill: Explanatory Notes on Lords Amendments <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0317/en/190317en.pdf> accessed 23 July 2020.
87. See the arguments made by the former Independent Reviewer of Terrorism Legislation re. the Bill <https://terrorismlegislationreviewer.independent.gov.uk/counter-terrorism-and-border-security-bill-2018-2/> accessed 23 July 2020.

presumption of innocence is a fundamental principle of criminal law that places the burden of proving the offence on the prosecution. Yet to rely on this reasonable excuse defence to mitigate the risks created by an overly extensive offence definition shifts the burden of proof to the defendant. The promise that 'the police and the CPS are rightly focused on those who pose a genuine threat, and have no interest in wasting their valuable time investigating and prosecuting people who pose no threat, where there is no public interest and no prospect of conviction'[88] relies overly on the exercise of police and prosecutorial discretion.[89]

It is significant that responsibility for detecting XRW terrorist offences has since been transferred from the police to the UK intelligence agency MI5 on the grounds that 'MI5's approach, techniques and greater powers will allow it to discover more about the violent intentions of the extreme right than the police can'.[90] While M15 is responsible for national security and well-placed to gather intelligence from its counterparts overseas concerning international XRW networks, right-wing extremism extends also to lesser threats to political and public order that lie properly within the remit of the police, but which have been securitized by this transfer.

The offence of online viewing—A case of overcriminalization?

The decision to criminalize those who view terrorist-related material online on a single occasion is problematic on many levels. First, the 'one-click' offence contributes to the larger problem of 'overcriminalization'.[91] The single online viewing offence is symptomatic of this trend in that it targets the individual who views terrorist-related material online not the underlying mischief that such material is so readily available.[92] Offences of encouragement and dissemination are already terrorist offences,[93] which apply equally to Internet providers and social media companies. As such, it is questionable whether a new offence aimed at the individual one-time viewer is necessary or defensible. While it is often argued that more should be done to ensure the robust enforcement of online terrorism offences, greater opportunities for users to flag and report extremist content and increased accountability, transparency and self-regulation by Internet and social media firms would arguably be more effective than yet more criminalization.

88. Minister of State for Security, Ben Wallace, Counter-Terrorism and Border Security Bill 11 September 2018 Column 662 <https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/Counter-TerrorismAndBorderSecurityBill> accessed 23 July 2020.
89. James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Criminal Courts' (2010) 30 OJLS 725.
90. Vikram Dodd, 'MI5 to take over in fight against rise of UK rightwing extremism' *The Guardian* (28 October 2018) <https://www.theguardian.com/uk-news/2018/oct/28/mi5-lead-battle-against-uk-rightwing-extremists-police-action> accessed 28 January 2021. Although the police continue to investigate and arrest.
91. Doug Husak, *Overcriminalization* (OUP, Oxford 2007) ch 1.
92. <https://about.fb.com/news/2020/05/community-standards-enforcement-report-may-2020/> accessed 28 January 2021.
93. Section 1 TA 2006, discussed above, criminalizes encouragement, including by publication on the Internet. Section 2 TA 2006 criminalizes dissemination of publications with the intention that they be a direct or indirect encouragement to terrorism or reckless as to their effect. Moreover, the capacious preparation offence under section 5 TA 2006 criminalizes '*any conduct* in preparation for giving effect to his intention' to commit acts of terrorism or assist another to commit such acts (emphasis added).

Several core principles of the criminal law are engaged and eroded by the offence. 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.[94] Furthermore, the imposition of strict liability without any requirement of culpability arguably offends against the presumption of innocence; a problem compounded by the severity of the 15-year maximum sentence, for which culpability might reasonably be thought prerequisite.[95]

Criminalizing the viewing of terrorist-related material online on a single occasion also contravenes the harm principle in that the amended s 58 offence risks capturing those who view or otherwise access (e.g. by listening) terrorist-related material but lack any intention to commit harm. The harm principle famously authorizes power to be exercised over the individual only in order to prevent harm to others.[96] For a single viewing of terrorist-related material online to merit criminalization, it is, therefore, necessary to establish that the conduct causes or risks harm to others: harm to self (here to the viewer alone) does not suffice. In order to justify criminalization of the viewer, the harm must result from the viewing,[97] rather than lie in the production and publication of such material, which are in any case already criminalized.

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 identifiable resulting harm to justify criminalization.[98] Yet, this premise is not borne out by the UK government's own research that concluded

> [t]he empirical evidence based on what factors make an individual more vulnerable to . . . violent extremism is weak. Even less is known about why certain individuals resort to violence, when other individuals from the same community, with similar experiences, do not become involved in violent activity.[99]

94. As Hill and Walker pointed out in their submission to the Bill Scrutiny Committee, further practical and evidentiary questions arise: 'what is a "view"'; does the fact that a page appears on a computer screen necessarily mean it was viewed; what proportion of a page or document is it necessary to view, particularly if only some of the material contained fulfils the statutory definition; and how will it be proven which parts the individual in fact viewed?' Max Hill and Clive Walker 'Counter Terrorism and Border Security Bill: Submission in Relation to Clause 3' <https://terrorismlegislationreviewer.independent.gov.uk/submission-in-relation-to-clause-3-of-the-counter-terrorism-border-security-bill-2018/> accessed 23 July 2020.
95. See Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP, Oxford 2014) 99; Simon and Zedner, 'Countering Terrorism' (n 65) 416–17.
96. JS Mill, *On Liberty* (Penguin, London 1979; 1859) 165.
97. Evidence by Corey Stoughton (Liberty) to the Public Bill Committee on the Counter-Terrorism and Border Security Bill (Tuesday 26 June 2018) *Hansard column* 59 <https://hansard.parliament.uk/Commons/2018-06-26/debates/a2d24560-1b1b-475c-bbb6-b7100b3e6aaa/Counter-TerrorismAndBorderSecurityBill(SecondSitting)> accessed 28 January 2021.
98. Andrew P Simester and Andrew von Hirsch, 'Remote Harms and Nonconstitutive Crimes' (2009) 28 Crim Justice Ethics 89–107.
99. Home Office, *Understanding Vulnerability and Resilience in Individuals to the Influence of Al Qa'ida Violent Extremism* (Home Office, London 2011) ii.

A leading UK expert on radicalization, Peter Neumann,[100] has drawn an important distinction between 'cognitive' and 'behavioural' radicalization,[101] which distinguishes between those who adopt extremist beliefs and those who act upon them.[102] The assumption that exposure to terror-related material online leads to radicalization and draws people into 'terrorist-related activity' is ill-founded and, as such, provides an inadequate basis for criminalization. To hold an individual criminally liable, one must establish the causal link between the conduct (viewing) and the prospective harm in the individual case. To date, much of the research on radicalization has been conducted in respect of Islamist extremism[103] and it is questionable how far it applies to right-wing extremists. Although the UK government appears to have assumed that exposure to extremist ideology leads inexorably to active participation in terrorism, Forcese and Roach point out that 'the connection between radical and extremist ideas and an actual willingness to engage in terrorist violence is tenuous'.[104] It follows that the harm principle is not satisfied by mere viewing.

Furthermore, to criminalize a single viewing of terrorist-related material online is to impose liability at a point remote from the causing of any harm. To do so arguably has the effect of holding the individual liable for actions distant from and insufficiently causally connected to the future decisions or actions by herself or others. The problem of remoteness is well-documented in criminal law theory.[105] It raises the risk that individuals will be held liable in cases in which the activity prohibited—here mere online viewing—lacks a sufficient causal nexus with the 'harm-to-be-prevented'.[106] The issue is that an otherwise neutral act may only fairly be subject to criminalization if it can be shown that it was done either with the intention to cause the future harm or where that harm can fairly be imputed to the original act. Where the prohibited act of online viewing does not in itself cause harm and risk of harm arises only as a result of further action by the individual or third-party actors, is it questionable whether the initial viewing merits criminalization. The weaker the causal relation between the present conduct and the future harm risked, the more difficult is it to impute criminal liability. The online viewing offence thus appears to fall within Simester's critique of 'prophylactic crimes'[107] in that the distance between act and resulting harm is too great to bring it within the harm principle set out above.

If liability is imposed where the prospective harm arises from the individual's own possible future acts, this renders the individual liable today for her own future conduct and arguably contravenes the principle of responsible agency. This principle requires that the individual be

100. Professor Neumann has been Director of the International Centre for the Study of Radicalization at King's College London since its foundation in 2008 <www.icsr.info> accessed 23 July 2020.
101. Peter Neumann, 'The Trouble With Radicalization' (2013) 89 Intl Aff 873, 874.
102. Note that the Royal Canadian Mounted Police also defines radicalization as a cognitive phenomenon, entailing 'the movement of . . . individuals from moderate mainstream beliefs to extremist views'. Royal Canadian Mounted Police, Radicalization: a guide for the perplexed (Ottawa 2009) 1, cited in Neumann 'The Trouble With Radicalization' (n 101) 875.
103. See, eg the work of the International Centre for the Study of Radicalisation <https://icsr.info/> accessed 23 July 2020.
104. Forcese and Roach 'Criminalizing Terrorist Babble' (n 31) 40; Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Irwin Law, Toronto 2015) 463ff.
105. AP Simester, 'Prophylactic Crimes' in GR Sullivan and Ian Dennis (eds), *Seeking Security* (Hart, Oxford 2012) 59–78; HM Lomell, 'Punishing the Uncommitted Crime' in Barbara Hudson and Synnove Ugelvik (eds), *Justice and Security in the 21st Century* (Routledge, Abingdon 2012); Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Crim L Phil 237.
106. Ashworth and Zedner, *Preventive Justice* (n 95) 109–112.
107. Simester, 'Prophylactic Crimes' (n 105).

allowed the opportunity to choose to do right by conforming her conduct to the law or otherwise changing her mind.[108] As Andrew Ashworth and I have argued elsewhere, a person should be held liable on the basis of what she might do in the future only if it can be proven she has the intention to do those future acts, and she should be held liable for the acts of others only if she either has sufficient normative involvement in those acts or if those acts were foreseeable, and she had an obligation to prevent the resulting harm.[109]

Finally, to set the maximum sentence at 15 years' imprisonment would seem disproportionate. The Minister of State for Security insisted before parliament that the proposed offence was 'both proportionate and necessary in order to allow the police to take action to protect the public from potentially very serious threats'.[110] However, without further guidance, it risks imposing a sentence disproportionate to the harm occasioned by a single viewing of material online. The gravity of the threat posed by terrorism places a premium on prevention, yet grossly disproportionate penalties are unjust and may result in unintended, even counterproductive consequences. Such penalties risk undermining the legitimacy of the law and foment grievance. Those who are already politically disaffected may be further alienated by the perceived injustice of the penalty and more readily recruited to right-wing extremism.

Conclusion

The threat posed by terrorism to physical safety, life and property is immense and it is incumbent on governments to take all legitimate means to prevent terrorist violence. The question of what measures are legitimate has prompted considerable debate, not least when new laws impact fundamental rights. The claim that it is possible to balance national security and public safety against the liberties of those individuals subject to counterterror laws has proven contentious.[111] If the task of tackling terrorism is demanding, targeting violent extremism is more challenging still, though in practice the line between the two is often blurred: in the United Kingdom, at least a dozen terrorist-related offences also target violent extremism. More controversial still is the conundrum that has been subject of this article, namely what measures can the state justifiably take to address *non-violent* political extremism. Far-right extremism spans a range of ideology, which includes non-violent, though repugnant, radical views, as well as those that advocate crime or violence.[112] It has been argued that resort to the criminal law to combat non-violent political extremism risks overcriminalization and creates the danger that enforcement will overstep the legitimate limits of state power, stifle public deliberation, impede academic, journalistic and other enquiry and intrude unwarrantedly on free expression of political views and so 'shut down democratic debate'.[113]

108. RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, Oxford 2007) 165.
109. Ashworth and Zedner, *Preventive Justice* (n 95) 112–13.
110. Counter-Terrorism and Border Security Bill 11 September 2018 Hansard Column 662 <https://hansard.parliament.uk/commons/2018-09-11/debates/156B51AC-2504-442B-BEE4-02B6E2FBB5D5/CounterTerrorismAndBorderSecurityBill> accessed 23 July 2020.
111. Ronald Dworkin, 'Terror and the Attack on Civil Liberties' *The New York Review of Books* (2003) 37, New York, 6 November 2003; Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 J Pol Phil 191; Lucia Zedner, 'Securing Liberty in the Face of Terror' (2005) 32 J L Soc 507.
112. Sophie Gaston, *Far-Right Extremism in the Populist Age* (Demos, London 2017) 4 <https://www.demos.co.uk/wp-content/uploads/2017/06/Demos-Briefing-Paper-Far-Right-Extremism-2017.pdf> accessed 23 July 2020.
113. <https://rsf.org/en/news/nine-organisations-call-house-lords-amend-threatening-counter-terrorism-and-border-security-bill> accessed 23 July 2020.

Terrorism-related offences already encroach upon fundamental rights including freedom of association, freedom of expression[114] and academic freedom.[115] The failure clearly to define terms like 'extremism', 'indirect encouragement'[116] and 'glorification' further compounds the existing problems created by the vague and overly expansive statutory definition of 'terrorism'[117] that underpins these offences. Offences that lack definitional clarity risk contravening core principles of criminal law, not least, fair warning and legal certainty, which are central to the rule of law. Furthermore, if legislation is to accord with fundamental rights, under the European Convention on Human Rights and other international conventions, greater weight needs to be given to pre-legislative and parliamentary scrutiny; independent oversight of law enforcement; mechanisms for transparency and accountability; and provision for ongoing evaluative review and revision.

Despite the troubled history of attempts by the UK government to tackle extremism, its commitment remains strong. The creation of the Commission on Countering Extremism in 2018 has ensured that extremism remains a focus of research and policy development that may in due course suggest more proactive means by which to tackle sources of alienation and disaffection and find ways to promote dialogue, social integration and tolerance. As yet, however, the evident difficulties that policymakers and lawyers have encountered in trying to define extremism and their failure to counter the rise of right-wing extremism effectively has led the UK government to fall back on introducing new counterterrorism legislation that creates yet more criminal offences. A disturbing consequence has been the targeting of pre-inchoate activity remote from the commission of acts of terrorism and the criminalization of behaviours whose identification as 'terrorism-related' is questionable. The revised s 58 offence of viewing on a single occasion online 'information of a kind likely to be useful to a person committing or preparing an act of terrorism' is one such egregious example. A single viewing alone is not terrorism, nor are the motivations that may accompany that viewing, however extreme and however reprehensible they may be. As the former Independent Reviewer of Terrorism, Max Hill, rightly observed, 'legislating in the name of terrorism when the targeted activity is not actually terrorism would be quite wrong'.[118]

The UN has sought to tackle extremism by promoting less coercive, 'soft power' alternatives to traditional state-centred law enforcement tactics.[119] A more productive approach might be to tackle the underlying sources of XRW sentiment and causes of radicalization; to identify what draws some individuals to view XRW content online and what causes them to move from mere viewing to violence in order to promote counter-narratives that encourage disengagement from XRW circles and ideology. Detecting and deleting violent XRW online content requires cooperation across international policing and security organizations, the commitment of Internet companies and social media and active participation by civil society. All this relies

114. The right to freedom of expression under Article 10 ECHR is, in any event, qualified by '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'.
115. A right enjoyed by all UK academics under section 202 Education Reform Act 1988.
116. Note the offence does not require that anyone is *actually* encouraged by the statement made or even that there is a clear danger that someone would be so encouraged.
117. Section 1 Terrorism Act 2000.
118. Michael Cross, 'Terror Law Watchdog Warns Against Thought-Crime' (2017) LS Gaz <https://www.lawgazette.co.uk/law/terror-law-watchdog-warns-against-thought-crime/5063373.article> accessed 23 July 2020.
119. Roach, 'The Migration and Evolution' (n 33).

upon a common definition that distinguishes more clearly between non-violent far right-wing ideology and the XRW violence and terrorism which are legitimate targets of criminalization.

Granted the United Kingdom has continued to promote the so-called Prevent Strategy as a tool against extremism and radicalization, but its resort to profiling and surveillance has led to criticisms of discriminatory targeting, intolerance and distrust, and unwarranted intrusions into private life that have led to calls for its abolition.[120] Alongside Prevent, the United Kingdom has continued to rely upon the decidedly coercive tools of criminalization and counterterrorism law. As we have seen, these target not only violent extremism but all forms of extremism, including non-violent expressions of extremist views in respect of which the enactment of expansive new criminal laws and coercive measures is deeply problematic.[121] Offences like that created by the amendment of s 58 risk criminalizing those with 'inquisitive minds'[122] or who engage in a one-off Internet search 'sparked by mere curiosity'.[123] In a highly critical report, the UK parliamentary Joint Committee on Human Rights expressed concern 'that viewing material online without any associated harm was an unjustified interference with the right to receive information'.[124] Echoing claims that the new provisions are 'Orwellian', the United Nations Special Rapporteur on the right to privacy, Joe Cannataci, went so far as to accuse the UK government of straying toward 'thought crime'.[125] In so doing, he endorsed the fundamental principle that thought is not a legitimate target of criminalization. Thought—or mere viewing—without further action may constitute right-wing extremism, but it is not terrorism, and neither is thought alone a proper subject of punishment.

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120. See, eg Ilyas Nagdee, 'Reforming the Prevent Strategy Won't Work. It must be abolished' *The Guardian* (2019) <https://www.theguardian.com/commentisfree/2019/oct/09/prevent-strategy-abolished-secret-counter-terror-database> accessed 23 July 2020.
121. Julian Rivers, 'Counter-Extremism, Fundamental Values and the Betrayal of Liberal Democratic Constitutionalism' (2018) 19(2) German LJ 267–300.
122. Jamie Grierson, 'UK Counter-Terror Bill Risks Criminalising Curiosity—Watchdog' *The Guardian* (2018) <https://www.theguardian.com/politics/2018/jul/10/uk-counter-terror-bill-risks-criminalising-curiosity-watchdog> accessed 23 July 2020.
123. Hill and Walker, 'Counter Terrorism and Border' (n 94).
124. JCHR S*econd Legislative Scrutiny Report: Counter Terrorism and Border Security Bill.*
125. Lizzie Dearden, 'UK Government Straying Towards "Thought Crime" by Criminalising Viewing Terrorist Material, UN Inspector Says' *The Independent* (2018) <https://www.independent.co.uk/news/uk/politics/thought-crime-uk-un-terrorism-government-viewing-material-offence-law-a8423546.html> accessed 23 July 2020.

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