Bill C-51 Backgrounder #1:
The New Advocating or Promoting Terrorism Offence

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This is the first of a series of independent "backgrounder" documents that we shall author on Bill C-51, the Anti-terrorism Act 2015. Here, we focus on the new offence of advocating or promoting terrorism offences "in general".

Summary of Key Concerns

The government wants to jail people who, by speaking, written, recording, gesturing or through other visible representations, knowingly advocate or promote the commission of terrorism offences in general, while aware of the possibility that the offences may be committed.

This offence raises many serious issues, and should (at best) be considered extremely concerning. The scope of the new offence is not clear and the offence is sweeping in its criminalization of advocacy and promotion of "terrorism offences in general", because terrorism offences themselves are sweeping.

The new offence is broader than the offences on which it appears to be modeled, including Canadian offences of advocating under-age sex or genocide or willful promotion of hatred. It is also broader than the Australian offence of advocating terrorism, even though Australia does not have a constitutional bill of rights (though it is likely not as broad as European offences that include glorification or apologie du terrorisme).

We do not accept as credible claims that the scope of the proposed offence is clear, or that it is confined to the objectives cited by the Department of Justice backgrounder on the offence (arguing that current law may not reach instructions to commit attacks against Canada).

This offence is at best ambiguous. And we have serious doubts whether it is consistent with the Charter. We have no doubts that it is capable of chilling constitutionally-protected speech, and ultimately proving an offence that undermines more promising avenues of addressing terrorism.

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About this project

This is a working document. It is legal scholarship done in "real time" in a highly politicized environment, in which fundamental decisions about the shape of law are being made.

We shall continue to develop this paper and its counterparts on different aspects of Bill C-51, adding more discussion, references and sources. We also anticipate developing the ideas and conclusions we present. We welcome (and very much encourage) feedback, critiques, suggestions and observations from other lawyers, legal scholars and other interested persons with expertise to contribute (whether practical, legal, scholarly). We are, in other words, calling for a "crowdsourced" response to Bill C-51, and in this paper, to its new terrorism offence proposal.

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I. Introduction

A. New Offence in Short

The proposed new offence, s.83.221, would apply to:

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

B. Summary of Chief Concerns

This offence, like the 14 existing terrorism offences in the Criminal Code, is very complex. More than that, its meaning is far from clear. No person (including ourselves) can fairly say they know how this new crime will be interpreted and applied. There are many unanswered questions.

We are unable to conclude, for instance, that journalists or academics could never be prosecuted under this offence. Take just one hypothetical: An academic or foreign affairs columnists opines "we should provide resources to Ukrainian insurgencies who are targeting Russian oil infrastructure, in an effort to increase the political cost of Russian intervention in Ukraine". The speaker says this knowing that her audience includes support groups who may be sending money to those opposing Russian intervention.

Providing resources to a group, one of whose purposes is a "terrorist activity" is a terrorism offence. And causing substantial property damage or serious interference with an essential service or system for a political reason and in a way that endangers life, to compel a government to do something, is a "terrorist activity". This is so even if it takes place abroad.

"Terrorist activity" does no not reach acts in an armed conflicts, done in accordance with the international laws of war. But the expression "in accordance" with international law could exclude acts of violence by armed groups who lack what is known as "combatant's immunity" – that is, they are not lawful combatants. Few insurgencies meet the requirements of lawful combatants.

Since the speaker knows some of her audience may respond to her opinion by sending money to the insurgency, her acts may constitute the crime of promoting or advocating a terrorism offence.

We stress that terrorism offences are a much broader category than what would be regarded as actual terrorism. They include various forms of financing, association and preparation for terrorism as well as complicity, incitement and conspiracies directed towards those crimes.

There is no public interest or educational defences, as there are for the existing willful promotion of hate or child pornography offences that serve as the obvious inspiration for this offence. More than this, hate propaganda and child pornography are narrow concepts – much narrower than the extremely oblique reference to "terrorism offences in general". Nor do these analogue provisions have the same extraterritorial reach as the new terrorism crime.

We acknowledge that definitional uncertainty arises often in relation to new crimes. We confront, however, a particular unsatisfactory situation when ambiguity is applied in this new context.

It is one thing, for example, to craft vague offences dealing, for example, with dangerous driving. It is quite another to codify vague offences directed at speech. Driving is a highly regulated privilege, not a constitutional right. Free speech is one of the fundamental postulates of any democratic political order.

Of course we would like to hope that the Attorney General and Crowns would show good judgment and, for example, never charge journalists or academics for doing their jobs. We note, however, that police have substantial and unusually invasive powers when terrorism offences – including this new one – are at issue. Police exercise these investigative powers on their own judgment, or where reasonable expectations of privacy are at issue, on the authority of warrants issued by judges on relatively undemanding standards.

We stress that the proposed offence can, unlike willful promotion of hatred, be applied to statements made in private. Thus, any understanding of the effects of the offence should take into account the implications of expansive anti-terror wiretap and other surveillance powers. The offence, if enacted, can be investigated through warranted surveillance and this will mean that more and more potentially legitimate democratic conduct (if linked to religious and political causes that are deemed extreme enough to advocate or promote terrorism offences) may be swept up by state surveillance. What is said in both surveilled public and private conversations may be criminalized.

We expect the government to exercise restraint. But where such cardinal postulates of a free and democratic society are at stake, the rule of law should never depend on the judgment of individuals in police services and Crown prosecutor offices. That is exactly the principle defended by the constitutional doctrine of vagueness and the related concept of overbreadth.

But even if no charges are ever brought, this offence will loom over conduct in this country: the result of this offence will be speech chill. Poorly defined crimes concerning dangerous driving may be tolerable, if imprecision simply means that people take more care than they truly need to while driving.

Poorly defined speech crimes that mean that people exercise excess caution in speaking are in a different category entirely: they do violence to our democratic order.

C. How We Will Proceed

Understanding the Elements of the Offence

In the analysis that follows, we will take a traditional criminal law approach: we shall distinguish the prohibited "act" of the offence (*actus reus*) from the mental "fault" element (*mens rea*). In criminal law, both of these aspects must be proven beyond a reasonable doubt, in relation to each and every specific accused.

Our traditional bifurcation simplifies our analysis, but at the end of the day any proposed offence must be seen as a whole. In other words, all the elements of the offence interact to determine the ambit of criminal liability.

What do we mean by this? Viewed in the abstract, the proposed s. 83.221 has high fault requirements.

The accused must both "knowingly" advocate or promote and the accused must "know" or be "reckless" that terrorism offences may be committed as a result of communication. So far, so good.

But the apparently high fault requirements of knowledge are weakened by other elements of the proposed offence. For example, the offence does not, like many other terrorism offence, require an actual terrorist purpose. Like other parts of Bill C-51 (which diminish present standards), it applies if a person "may", as opposed to "will", commit a terrorist offence in response to the statement.

The deceptively simple word "may" has huge significance. It requires only a possibility or some risk -- as opposed to a likelihood or probability -- that a sweeping (and very broadly encompassing) range of terrorism offences may be committed by anyone as a result of a broadly defined range of communications.

The government seems to have employed the language of "advocating or promoting" because, as will be discussed below, the courts have defined these expressions for other offences: notably the willful promotion of hate propaganda offence and the offence of advocating sexual activity with underage children.

But context is everything. The words "advocates" and "promotes" in the new offence relate, not to hate, underage sex or genocide, but to "the commission of terrorism offences in general -- other than an offence under this section."

We are frankly baffled at the precise meaning of this term, and especially its reference to "in general". We do know, however, that terrorism offences as defined in s.2 of the Criminal Code include 14 existing and broadly defined terrorism offences and a potentially infinite number of other offences that are committed "for the benefit of, at the direction of, or in association with a terrorist group."[1]

So advocating or promoting terrorism offences covers a significantly wider range of conduct than advocating or promoting hate against an identifiable group or under-age sex or genocide.

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

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

What about the Charter?

The breadth of the new offence is also relevant to what some may view as the ultimate issue: is the new offence consistent with the Charter? [2]

Alas, matters get no simpler here.

We have considered whether the offence violates the doctrines of vagueness or overbreadth. As the Supreme Court observed recently, the constitutional doctrine against vagueness "is founded on two rationales: a law must provide fair notice to

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[1] Criminal Code s.2. A terrorist group is any entity listed by Cabinet as such or an entity or association of entities that has the facilitating or carrying out of a terrorist activity as one of its purposes. See Criminal Code s.83.01

[2] This is not to say that the issue of Charter compliance should be confused with whether the legislation is necessary or wise. See Roach "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism" in Daniels, Macklem and Roach eds. *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

citizens and it must limit enforcement discretion."[3] Moreover, in criminal law, "prohibited conduct must be fixed and knowable in advance".[4]

We acknowledge, however, that it is comparatively rare for a challenge on this ground to succeed, and that the threshold for satisfying this requirement is relatively low. After all, even in writing this document, we are engaged in a legal debate as to the scope of the provision. For the Supreme Court, that is probably enough to meet the vagueness standard.

The real preoccupation with the offence is not that one cannot imagine what is captured by this offence, but rather than the range of conduct that may be captured is so broad. Overbreadth in this context flows both from the offence's sweep, and the absence of reasonable defences that remove from the offence's reach conduct that Parliament could not reasonably wish to penalize (for example, our Ukraine hypothetical).

Rather than pursuing this constitutional issue independently, however, we prefer to focus on the much more concrete free speech issues, returning to overbreadth concerns in our discussion of s.1.

In relation to speech protections, the government will likely argue that the new offence does not even violate freedom of expression, given the Supreme Court's ruling in *Khawaja*. There, the Court confirmed that threats of violence are not a form of expression protected under s.2(b) of the Charter.

Many may, as we do, find this position unpersuasive.

An offence that prohibits the communication of statements will raise free expression issues, as the Supreme Court concluded in its assessment of hate crimes in the *Keegstra* case. As a matter of technical doctrinal constitutional law, everything then hinges on whether all forms of advocacy and promotion of terrorism (in general) amount to actual or threatened violence, a form of behaviour lying behind the remit of the Charter speech protections.

In our tentative view, there is no such sufficiently close connection, of the sort at issue in *Khawaja*. A person promoting or advocating the concept of terrorism (in general) leaves the audience with a choice to reject actual or threatened violence. In comparison, speech that actually threatens violence leaves no additional step to be taken: the choice to move beyond "idea" to truly culpable action has been made. For reasons we discuss below, this distinction makes all the difference. Advocating that someone commit terrorism is odious, but it recognizes the human agency of the listener in deciding whether to act.

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[3] R. v. Levkovic, 2013 SCC 25 at para. 32.

[4] Ibid at para. 33

This is our opinion, and it will be for the courts to decide whether it has merit when (and if) actual prosecutions are brought.

Until then, it is impossible to resolve all the issues and permutation that arise from this complex offence, despite the fact it takes up less than one page in the sixty-two page bill.

II. The Prohibited Act

We begin by focusing on the prohibited act – the actus reus.

A. All statements including signs and gestures

The new offence applies to the communication of all statements. Statements as defined in the Criminal Code include "words spoken or written or recorded electronically... gestures, signs or other visible representations."[5]

Thus all statements whether written or oral or videotaped can be subject to the offence.

A sign or even a gesture could qualify provided that it promotes or advocates the commission of a terrorism offence. This raises the question of whether a sign that says "I support Hamas" or "Tamil Tigers GO" or "the IRA will strike again" would fall within the ambit of the offence.

It might, but only if such a sign constitutes the *knowing* advocating or promoting of the commission of terrorism offences. In addition, the sign bearer must be aware of a risk that someone might commit a terrorism offence as a result of such communication.

B. All statements including private statements

Section 83.221 does not exempt private statements, as does the hate speech offence under s.319(2) of the Code.

The police are generally not privy to private statements, emails or texts, but they may be if such statements are subject to electronic surveillance (as may well be increasingly the case).

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5 Criminal Code s.319(7)

A person could be prosecuted for private statements, although again the prosecution would have to demonstrate that the person at the other side of a private conversation "may" commit a terrorism offence as a result of the private conversation.

C. Parties to the Offence Need not Make the Statements

On its face, s.83.221 requires that a person make statements. But like all criminal offences, a person can be guilty if they aid or assist a person to make statements.

Thus, those who publish statements by others that advocate or promote terrorism could potentially be guilty if they intend to assist in the commission of the offence.

Likewise, a group of people who agree to convey the statements might be guilty of a conspiracy to commit the offence. As will be seen, the Australian advocating terrorism offence is narrower than our proposed offence because it excludes some of these extensions to criminal liability,

There are other more debatable forms of inchoate liability, but the point is that once in the Criminal Code, the offence will not be limited to those who make the actual statements, and can include others who intend to assist those persons.

D. Advocating and Promoting

We do not suggest that "advocate" or "promote" are unknown in the Criminal Code. There are found in several places. For instance, both appear in the hate propaganda sections, and advocate appears in the child pornography provisions. In *R. v. Sharpe*[6], the Supreme Court noted that the word "advocate" is not defined in the Criminal Code. It defined advocate as "actively inducing" or "encouraging" in that case sexual activity with underage children.

In *Mugesera v. Canada*[7], the Supreme Court stated in relation to the offence of willful promotion of hatred that "'promotes' means actively supports and instigates. More than mere encouragement is required."

The government apparently relies on this past use and past definitions as indications of the restraint of the new offence that applies to statements that knowingly advocate or promote the common of terrorism offences "in general".

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6 [2001] 1 S.C.R. 45 at para 56

7 [2005] 2 S.C.R. 100 at para 101

These judicial rulings certainly provide some starting points that suggest that an accused must be "actively" as opposed to "merely" encouraging or supporting the commission of terrorism offences.

These are, however, fine distinctions that will be difficult to distinguish before a person is charged – once again, we raise the peril of speech chill.

Even more critically, it is a mistake to "plug in" definitions tied to words in one offence and assume they apply mechanically to another.

The promoting or advocating terrorism offences are broader and less determinate than the child pornography and hate propaganda offences from which they may derive. What are the differences?

1) The new offence does not, as discussed above, contain exemptions for private conservations found in the willful promotion of hate offence.[8]
2) The new offence applies to merely "knowing" as opposed to the more demanding "willful" promotion found in s.319 (willful promotion of hatred).
3) The new offence requires the promotion and advocacy, not of hate against an identifiable group or underage sex or genocide, but of "terrorism offences in general" that include 14 existing terrorism offences and any other indictable committed to benefit or in association with a terrorist group. The new offence is, in other words, incredibly sweeping, and its remit very unclear.
4) The new offence does not contain defences that are available for both child pornography and willful promotion of hate offences. In the child pornography context, the defences include legitimate purposes for expression related to justice and education[9]. In the willful promotion of hate context, the defences include good faith arguments of "opinion on a religious subject or an opinion based on a belief in a religious text" and also a public interest defence.[10]
5) The new offence will be read with an eye to the existing speech-covering terrorism offences, prompting a likely conclusion that it reaches speech above and beyond that presently criminalized in the terrorism offences. Since the latter *already* covers many forms of incitement and threats of terrorist activity, the analogy to court definitions of hate crimes may understate the reach of the new offence. Those hate speech and child pornography analogues are not layered on already expansive speech crimes. A court may assume, therefore, that the "starting point" for understanding the new terrorism offence is already "more speech restraining" than in the hate and child pornography context.

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8 Criminal Code ss. 319(2)

9 Criminal Code s.163.1(6)

10 Criminal Code s.319(3)(b). Other defences relate to truth, and trying to remove matters that may produce hatred to an identifiable group.

E. The Lack of Statutory Defences

In introducing Bill C-51 in Richmond Hill, the Prime Minister argued that "violent jihadism is not a human right, it is an act of war".[11]

We are deeply preoccupied with this war analogy and in another section shall outline how false analogies between crime and war can contort law. For our purposes here, this attitude may explain why there are no statutory defences, such as that contained in both the child pornography and hate propaganda laws.

This raises the additional issue of what other defences to advocating or promoting terrorism offences "in general" might be available to an accused.

A close read of statutory cross-referencing in the Criminal Code suggests two possible included "defences" (or at least exemptions), but both are rather narrowly defined.

Almost all of the terrorism offences incorporate (directly or indirectly) the notion of "terrorist activity". This concept is defined in s.83.01 of the Code, and occasioned significant controversy for its breadth in the legislative process by which it was enacted.

In partial response, s. 83.01 (1.1) was added to the bill after the 2001 Anti-Terrorism Act was introduced in Parliament. This proviso states that "the expression of a political, religious or ideological thought, belief or opinion" does not come under the definition of s.83.01(b) "unless it satisfies the criteria of that paragraph".

This is a somewhat circular definition. In any event, it was not directly included in the proposed offence, one that refers to "terrorism offences in general" as opposed to a "terrorist activity".

We realize though that s. 83.01(1.1) will likely be in play because, through several chains of cross-referencing, almost all terrorism offences have terrorist activity at their core. What we cannot answer is how a crime that emphatically outlaws speech potentially far removed from actual violence or threats of violence will be reconciled with a savings clause designed to reassure the public that expression alone cannot be prosecuted. We find that the Criminal Code anti-terror provisions are becoming increasingly convoluted, and unpredictable.

Another possible "defence" is the limited "armed conflict" carve-out contained within the definition of terrorist activity. The precise reach of this exemption has

[11] Janyce McGregor, "Stephen Harper makes his case for new powers to combat terror," CBC News (Jan 30, 2015), http://www.cbc.ca/news/politics/stephen-harper-makes-his-case-for-new-powers-to-combat-terror-1.2937602

not been fully explored in the case law to date.[12] It does, however, reach non state actors who are fighting in an armed conflict and are acting in accordance with international law applicable to that conflict.

Notoriously, groups like ISIS are in graphic non-compliance with the laws of armed conflict. No ISIS fighter prosecuted under Canada's terrorism provisions has any serious chance of escaping conviction on the basis of the armed conflict exception – likewise, no person advocating or promoting a crime done in association with ISIS would escape the new provision. (Just as a present, no person instructing, facilitating or participating in -- or counseling any of these -- ISIS activities can escape culpability).

However, the contemporary preoccupation with ISIS does not mean that the case would be so open and shut with other insurgencies. In principle, promoting and advocating violence by armed groups in armed conflicts observing the laws of war would be exempted under the Canadian definition of "terrorist activity." War crimes and acts of terror against non-combatants certainly do not meet this law of war standard.[13] But plain acts of violence directed against other combatants in an armed conflict are not generally war crimes. There is no such thing, for instance, as "murder for using lethal force against a combatant".

We wonder how much all this will mean in practice. If a person advocates, for instance, "acts of violence by freedom fighters defending against the Russian presence in Ukraine", does the armed conflict defence apply only if those insurgents are scrupulously observing international humanitarian law? Could the advocate be expected to know of every act by the insurgency? Or would the court instead consider only their subjective knowledge, if it turns out that the insurgency is not fully compliant with international humanitarian law (few are).

Even if we have bewitched ourselves with academic musings, and the application and relevance of these two limited defences in terrorism prosecutions to the new s.83.221

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[12] The Supreme Court has held, however, that accused must make a *prima facie* case of the applicability of the armed conflict exception, after which the Crown bears the burden of proving its inapplicability beyond a reasonable doubt. Although facts in different cases will vary, the Court has also held that a "violent jihadist ideology" may be "fundamentally incompatible with international law": "The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations, which are considered war crimes. The appellant, by contrast, did what he did in support of a group whose credo was to take arms against whoever supports non-Islamic regimes and that recognized that suicide attacks on civilians may sometimes be justified by the ends of jihad." *R. v. Khawaja*, 2012 SCC 69 at paras. 98 and 102. In *R v. N.Y.*, 2008 CanLII 24543, the Ontario Superior Court cited several of the international instruments discussed in this section to conclude that the "armed conflict" exception was not unconstitutionally vague.

[13] Since a war crime would not be "in accordance" with IHL, such an activity could, therefore, also be a "terrorist activity" in addition to a violation of war crimes provisions found elsewhere in Canadian law, if all definitional requirements were met.

is crystal clear, the defences are limited. These are not defences of the same order as those found in the hate crimes provisions.

The omission of specially tailored defences in the new provision contributes significantly to its overbreadth and is a dangerous omission.

F. Terrorism Offences in General

The advocacy or promotion must be of "terrorism offences in general - other than statements under this section." The meaning of this phrase is strikingly opaque.

A choice was made not to use the more familiar term "terrorist activity", which is embedded (directly or indirectly) in almost all terrorism offences.

This preference for "terrorism offences" is clearly intended to maximize the scope of the new offence. "Terrorist activity" is broadly defined in s.83.01, but "terrorism offences" are even more sweeping: they include all 14 specific terrorism crimes in the Code (almost all which incorporate in some way the terrorist activity definition) and also include all other indictable offences committed for the benefit, at the direction or in association with a terrorist group. This is a potentially infinite number of offences. A person who advocated that a bank robbery or kidnapping take place to benefit or in association with a terrorist group would be advocated a terrorism offence.

The only exclusion is for "an offence under this section" which presumably refers to the proposed s.83.221 offence. We assume that this means that one could not be convicted for communicating statements that advocate or promote the communication of statements that in turn advocate or promote terrorism. We do not need to work hard to imagine how difficult it will be apply such convoluted constructions in the messiness of real life.

The reference to terrorism offences "in general" concerns us greatly. The Justice Department backgrounder[14] on this offence explains "the current law would not necessarily apply to someone who instructs others to 'carry out attacks on Canada' because no specific terrorism offence is singled out". We are puzzled by this logic since it simply not the case that the present terrorism offences depend on the accused using "magic terrorist words" that specify the when, what and how of the offence. If someone calls for Canada to be attacked, we have no reason to believe that the existing instruction provision is inevitably unavailable.

Moreover, we simply cannot conceive how a concern with "instructing" others to carry out attacks on Canada translates into a need for a much more vastly crafted bar on "advocacy or promotion". "Instruction" is already an offence. If it does not reach

[14] http://news.gc.ca/web/article-en.do?nid=926049

calling for attacks, then the obvious solution is to create an offence criminalizing "instruction for the purpose of carrying out attacks on Canada". This modest offence would be squarely in the tradition of the existing terrorism offences, and there would be no need for us to write this document.

The government has not taken this reasonable path, and has instead walked a more dangerous course. We do not take seriously therefore, the explanation offered in the Department of Justice backgrounder.

Instead, we read the actual language of the provision and conclude that the reference to terrorism "in general" may eventually be construed to capture promotion or advocacy of the "concept" of terrorism. That is, its reach will be far greater than simply covering calls for attacks on Canada.

G. Terrorism Offences Committed Outside of Canada

The terrorism offences that are advocated or promoted need not be committed in Canada. They can occur anywhere. In the context of examining British glorification of terrorism offences, Clive Walker, a leading UK commentator, has warned that "the extension of jurisdiction leads to a slippery slope of judgments which take sides in foreign disputes and sometimes in favour of despots."[15]

Professor Walker also warns that the criminalization of extreme speech may be counter-productive in rebutting arguments for violence and may "hinder policing by reducing flows of intelligence."[16] We have addressed the counter-productive consequences of speech crimes elsewhere,[17] and will do so again in a later, fuller version of this discussion.

H. Terrorism Offences that "May" Be Committed as Result of the Communication Offences

The final element of the prohibited act of the proposed new offence is that it is enough to advocate a terrorism offence in general but also that the accused must know or be reckless as "whether any of those offences may be committed". Leaving aside the fault requirements, this part of the offence seems to present a very diluted "clear and present danger" requirement by criminalizing statements that promote or advocate terrorism if they "may be committed as a result" of the communication.

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[15] Clive Walker *Terrorism and the* Law (Oxford: Oxford University Press, 2011) at 8.150

[16] Ibid at 8.152

[17] Forcese, Craig and Roach, Kent, Terrorist Babble & the Limits of Law: Assessing a Prospective Canadian Terrorism Glorification Offence (January 2015). TSAS Working Paper No. 15-02. Available at SSRN: http://ssrn.com/abstract=2546555 or http://dx.doi.org/10.2139/ssrn.2546555

The requirement that a terrorism offence "may" be committed is found in other parts of Bill C-51. The recurring use of "may" in Bill C-51 seems designed to require only the demonstration of a possibility rather than a probability of the terrorism offence occurring. It can be contrasted to s. 319(1) which criminalize incitement of hatred against an identifiable group only if "such incitement is likely to lead to a breach of the peace."

We leave aside to another section discussion of whether departing from the more conventional "will" language in favour of the less demanding "may" can be justified with respect to peace bonds and preventive arrests. For our purposes here, however, a strong case can be made that if advocacy speech is to be prohibited, the state should at least be required to establish the more demanding requirement that an offence "will" rather than "may" result. The consequences of conviction are grave, and the speech chill occasioned by sweeping speech crimes significant.

I. The Australian Analogue

The proposed Canadian offence bears some resemblance to the Australian advocating terrorism offence enacted in 2014. Like the Canadian offence, the Australian offence applies to advocating a broad range of terrorism offences

Unlike the Canadian offence, the Australian offence excludes advocating a terrorism offence that a person would commit with others or would only involve an attempt or conspiracy. This feature of the Australian offence restricts some of the breadth of the Canadian proposal, and we are concerned that the Canadian offence deliberately omits it. This may make it more likely that the Canadian offence will apply to statements of even "attempt to join or finance a terrorist group" variety. In other words, the nexus between speech and actions that contribute to terrorism could become even more tenuous under the Canadian approach. In short, the Australian offence might not capture advocacy of planning or attempting a terrorist act or joining with others, things that the proposed Canadian offence might capture.

The Australian exclusion is an important reminder that the broad reference in the Canadian offence to "terrorism offences in general" would include various complicity of parties, attempts or conspiracy add-ons that apply to all Canadian criminal offences.

Unlike the proposed Canadian offence, the Australian offence defines the critical word "advocate" as occurring "if the person counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence."[18]

This approach makes the notice that the offence gives to the public more accessible,

[18] Crimes Act S.80.2C (3) as amended by Counter-Terrorism Legislation Amendment (Foreign Fighters) Act, 2014 No 116 of 2014

but the Australian approach seems to be based on the idea that the legislator drafter gets paid by the word and demonstrates that the word advocate can include the simple encouragement of the act,

Courts will likely react to it by attempting to give each word a distinct meaning. Counseling in Canada is defined in the Criminal Code and already included in the definition of terrorist activities.

Encouraging and urging are probably the broadest Australian analogues to "advocate" and they might be slightly broader than the Supreme Court's interpretation of advocate in the child pornography case of *Sharpe* (where it stresses that active as opposed to more mere encouragement is required).

We note that Australia operates without a codified bill of rights. The offences its Parliament enacts will never undergo the testing that the Canadian government's proposal will undergo, and thus should be emulated with caution.

III. Fault Elements

We turn now to the mental fault element – the *mens rea*. The new offence requires subjective fault (that is, what is in the mind of the accused). Because of the stigma and punishment of terrorism offences it can be argued that proof of subjective fault is required here for constitutional reasons, as it is of murder, attempted murder and war crimes. The new offence seems to satisfy this requirement. Nevertheless, the restraining effects of such demanding fault requirements may be more modest than is commonly believed.

A. Knowingly Advocates or Promotes

As noted, the Crown must prove beyond a reasonable doubt that the accused "knowingly" advocates or promotes the commission of terrorism offences in general. In most cases, it seems likely the accused will "know" the import of the statements that he or she has made. As such, this *mens rea* requirement will frequently be satisfied, with most of the dispute focused on the *actus reus* question of whether the statements constituted advocacy and promotion, discussed above.

B. No Requirement of Wilful Promotion or a Terrorist Purpose

We note with considerable concern, however, that although the fault elements in the proposed offence are subjective, they are lower than required by some other offences that limit freedom of expression. In *Keegstra*, the Supreme Court of Canada narrowly upheld the main hate speech offence of s.319(2) of the Code, but stressed that its restrictions on freedom of expression were reasonable and proportionate in large part because of the requirement of proof that the accused "willfully" promoted hatred. The participation in a terrorist group offence in s.83.18 of the Code upheld

by the Court in *Khawaja* requires proof that the accused was acting for the "purpose" of assisting a terrorist group. No such requirement is included in the proposed new promotion or advocacy of terrorism offence. The accused must just understand what the statement does, not "will" or "desire" that outcome.

Knowledge is a slightly lower form of form of fault than willful, and the willful requirement in the hate propaganda opens up the possibility that the accused can argue that they really did not "will" or "desire" that a terrorism offence be committed. That sort of argument seems to be precluded by the use of the lower standard of knowledge in the new offence.

C. Knowledge or Recklessness that Terrorism Offences May be Committed

In addition to knowingly advocating or promoting terrorism offences, the accused must also know or be *reckless* that "terrorism offences in general" "may be committed as a result of such communication."

Both knowledge and recklessness are terms of art in Canadian criminal law.

Knowledge requires that the accused must know that the prohibited consequences are probable, while recklessness requires that the accused subjectively be aware of the possibility of the prohibited consequences occurring.

Recklessness in Canadian criminal law does not mean objective negligence – everything still depends on the accused's subjective state of mind.

At the same time, the inclusion of recklessness might violate s.7 of the Charter. This is true should the courts hold that terrorism offences are associated with a special stigma and therefore require knowledge, or its equivalent of willful blindness, in relation to all aspects of the prohibited act.

Fault elements do not exist in the abstract. The requirements of knowledge or recklessness in the proposed offence are influenced and arguably made less demanding by the fact that the accused is only required to know or advert to the possibility that a terrorism offence "may be committed". As discussed above, the word "may" is probably the most important and recurring word in Bill C-51. It is regularly substituted for the existing requirement of "will" to require only a possibility rather than a probability of the terrorism offence occurring.

The combination of recklessness and "may" in the proposed s.83.221 sets a fairly low standard. The *mens rea* requirement may be satisfied if the accused subjectively is aware that there is a possibility that someone will commit a terrorism offence in general in response to his or her statement.

D. The Failure of Subjective Fault Requirements to Restrain

The failure of *mens rea* or fault requirements to restrain terrorism offences has been observed in other situations. A landmark US case affirmed that a person could be guilty of providing material support of terrorism, even if they only provided support with the intent to assist the humanitarian efforts of a listed terrorist group. Chief Justice Roberts stressed that there was no alternative because "Congress plainly spoke to the necessary mental state for a violation… and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."[19]

Justice Breyer in his dissent warned that this logic had "no natural stopping point," and that even a lawyer acting for a group might be said to have knowingly supported a terrorist group.

In Canada, our Supreme Court rejected the idea that lawyers and doctors could be guilty of the Canadian "participation" in a terrorist group offence. However, the Court stressed that this would be so because the s.83.18 offence required proof of a purpose to assist terrorist.[20]

In contrast, s.83.221 does not require a clear terrorist purpose. It only requires that the accused knowingly advocates or promotes and is aware of a possibility that someone (perhaps a deluded or mentally instable person) may commit a terrorism offence as a result of the communication.

One of us has argued elsewhere that subjective *mens rea* offences will only truly restrain the ambit of terrorism offences if they require proof of a terrorist purpose, and not simply knowledge or recklessness that there may be a result lying within one of the broadly defined terrorism offences.[21]

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[19] Holder v. Humanitarian Law Project 130 S.Ct. 2705, 2717 (2010)

[20] The Court stressed: "To be convicted, an individual must not only participate in or contribute to a terrorist activity "*knowingly*", his or her actions must also be undertaken "*for the purpose*" of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The use of the words "for the purpose of" in s. 83.18 may be interpreted as requiring a "higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity": K. Roach, "Terrorism Offences and the Charter: A Comment on R. v. Khawaja" (2007), 11 *Can. Crim. L.R.* 271, at p. 285. To have the *subjective* purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must *specifically intend* his actions to have this general effect. The specific nature of the terrorist activity, for example the death of a person from a bombing, need not be intended (s. 83.18(2)(*c*)); all that need be intended is that his action will enhance the ability of the terrorist group to carry out or facilitate a terrorist activity.

[21] Kent Roach "Terrorism" in Markus Dubber and Tatjana Hornle eds *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 828-9

IV. Constitutional Doubts

A. Does the Proposed Offence Violate Freedom of Expression

At the beginning of this document, we flagged constitutional concerns with vagueness and overbreadth. We will not explore those further here. Instead, in light of the above, we can now offer our views on whether the proposed offence of knowingly advocating or promoting terrorism offences in general violates freedom of expression.

The government will likely argue that the offence does not violate s.2(b) of the Charter on the basis that actively inducing or encouraging the commission of terrorism offences is not protected expression. That is because it constitutes threats of violence or is a "thing directed at violence".[22]

In past jurisprudence, the Supreme Court's rationale for excluding threats of violence from expression has been that threats, no less than violence, "take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression."[23]

We freely concur that the concept of advocacy and promote may well be constrained to speech more closely related to violence than sweeping European concepts of glorification or "apologie" of terrorism. Nevertheless, we think that even active advocacy or promotion of terrorism should be protected expression. Such advocacy leaves the listener with a choice. You can advocate and promote terrorism, especially in some foreign land, without voicing a threat to do violence. To say "freedom fighters in the Ukraine should resist the Russian occupation with violence, even if it means bringing the conflict to Russian cities" does not directly threaten violence. It merely advances an argument in favour of that violence, leaving it to the listener to be persuaded or not of its merits. This is exactly the substance of free speech: the idea need not be palatable, but it remains an idea.

Statements that advocate or promote terrorism are without doubt extreme and misguided. The available social science evidence suggests, however, that they do not often lead to violence. We report this evidence elsewhere.[24]

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[22] Suresh v. Canada [2002] 1 S.C.R. 3 at para 108

[23] Khawaja at para 70

[24] Forcese, Craig and Roach, Kent, Terrorist Babble & the Limits of Law: Assessing a Prospective Canadian Terrorism Glorification Offence (January 2015). TSAS Working Paper No. 15-02. Available at SSRN: http://ssrn.com/abstract=2546555 or http://dx.doi.org/10.2139/ssrn.2546555

On the other hand, such statements place extreme and misguided ideas, often associated with politics and religion, into the public forum. There they may countered, and not left to fester unopposed in less overt venues.

We noted above our view that the new concepts of "advocacy" or "promote" will reach beyond the current concepts of instruct, participate and facilitate and probably also the more universal concepts of threaten and counsel found in the definition of terrorist activity. The fact that the new offence must be purposively interpreted as going beyond existing laws that criminalize both incitement and threats of terrorism is precisely another reason why the Supreme Court should hold that the new offence has encroached even further into speech and departed even further from proximity to violence.

If Parliament enacts this law, it intends to bring into the criminal orbit ideas that are, at best, only possible sparks for violence. Moreover, that distance to violence depends on what is being advocated. We have already provided an example of a risky statement: "freedom fighters in the Ukraine should resist the Russian occupation with violence, even if it means bringing the conflict to Russian cities". If there is a mere possibility that in response to this statement, a single person might give money to an insurgency, one of whose purposes is to drive Russia from Ukraine by attacking civilians, the speaker has committed the new speech offence.

Put another way, the conduct (in this case, terrorist financing) that may flow from the statement can be itself several steps away from actual or threatened violence, and yet the speaker is equally culpable. In the result, the new offence is extremely untempered in its vision of speech and its relationship to violence – a hammer and not a scalpel.

In sum, we note that the Court has interpreted many odious statements, including those that willfully promote hatred against identifiable groups, as protected expression. Although it has extended excluded forms of expression in the terrorism cases of *Suresh* and *Khawaja,* and might possibly extend these exclusions to include advocacy and promotion of terrorism, this is not certain.

In Khawaja[25], the Court stressed (in a different context) that:

> Only individuals who go well beyond the legitimate expression of a political, religious or ideological thought, belief or opinion, and instead engage in one of the serious forms of violence — or threaten one of the serious forms of violence — listed in s. 83.01(1) (*b*)(ii) need fear liability under the terrorism provisions of the *Criminal Code*.[26]

[25] R. v. Khawaja supra at para 81

[26] ibid at para 82

We believe that the knowing promotion and advocacy of terrorism offences in general coupled with the recklessness language criminalizes the expression of meaning too far removed from threats of or actual violence – it is protected speech. This is especially true because the new speech offence has no explicit defences and only requires the possibility of a terrorist offence occurring, while also applying to attempts, aiding and conspiring to commit terrorism offences.

C. Can the Limit on Expression be Justified Under Section 1

If it is accepted that the new offence infringes freedom of expression, the government must justify the limit as reasonable. Under the *Oakes* test, section 1 may save a rights-impairing measure where the government proves that the measure has an important objective, that there is a rational connection between the objective and the means, that there is a minimal impairment of the right in question, and that there is proportionality between the impact on the right and the benefits of the measure in question.[27]

Important Objective

We do not doubt that the objective of preventing terrorism or even the promotion of terrorism would be accepted as sufficiently important to limit freedom of expression.

Rational Connection

We are less persuaded that and the new offence would be rationally connected to the obviating these harms.

The social science evidence suggests that the causal correlation between extreme speech and terrorist activity is not at all a close or firm one. For this reason, we question elsewhere the rational connection between European-style glorification offences and anti-terrorism.[28]

Still, for present purposes, we have significant doubts, but are unable to form a firm conclusion that the government will fail the rational connection test in relation to the new offence. Whatever its considerable ambiguities, the new offence does seem more narrowly drawn than concepts of glorification or apologie. Although there remains precisely zero evidentiary basis at present in the public record for this law, the courts might well defer to the government's judgment and accept that there is a

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[27] *R v Oakes,* [1986] 1 SCR 103.

[28] Forcese, Craig and Roach, Kent, Terrorist Babble & the Limits of Law: Assessing a Prospective Canadian Terrorism Glorification Offence (January 2015). TSAS Working Paper No. 15-02. Available at SSRN: http://ssrn.com/abstract=2546555 or http://dx.doi.org/10.2139/ssrn.2546555

rational connection between preventing terrorism and speech that advocates or promotes terrorism.

Minimal Impairment

On the other hand, the government may struggle with other aspects of the section 1 test. If the government's objective is to forestall terrorism, there are obvious alternative measures that can achieve that objective without violating free expression, or do so in a manner that is more clearly connected to actual harm. These include criminal prosecution under the existing laws, including under hate crimes and the multiple terrorism offences. The latter almost all incorporate incitement and threats of a broad range of terrorist activity.

These are tools that are much more likely to comply with the *Charter*, and whose usefulness has not yet been fully explored by the government given the paucity of charges brought in this area. We explore their potential reach to speech elsewhere.[29] We note that in the only instance where it actually tried to do so, authorities have secured a conviction against an accused under existing provisions for terrorist propaganda.[30]

The fact that outside of this single case, these offences have not been deployed probably has more to do with law enforcement and less to do with substantive law.

But whatever the case, the reach of these existing offences will be properly considered in a section 1 analysis. For instance, in striking down the false news provision of the *Criminal Code*, the Court paid much attention to the less restrictive alternative of hate propaganda prosecutions[31] even though these prosecutions are relatively rare.

Proportionality and Overall Balance

In the last, overall-balance stage of the section 1 analysis, the courts would weigh the salutary effects of the offence against its harmful effects. Although the government does not have to produce proof positive that the offence would be successful, it would have to provide some evidence. In the public defences of this provision to date, we are left searching for a salutary benefit. The scenarios the new provision is said to cover seem mostly instances that would already be covered by the existing offences. In other words, the ill cured by the new offence is unestablished. (We

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[29] Forcese, Craig and Roach, Kent, Terrorist Babble & the Limits of Law: Assessing a Prospective Canadian Terrorism Glorification Offence (January 2015). TSAS Working Paper No. 15-02. Available at SSRN: http://ssrn.com/abstract=2546555 or http://dx.doi.org/10.2139/ssrn.2546555

[30] R. v. Namouh, 2010 QCCQ 943.

[31] R. v. Zundel [1992] 2 S.C.R, 731

mentioned above the call for foreign attack scenario painted by the Justice Department).

Where the Prime Minister has suggested a novel reach for the new bill, he has reportedly done so without explaining the danger at issue. For instance,

> [a]sked whether Ottawa would distinguish between real *jihadis* and a teenager making idle talk in his basement when it comes to statements that encourage terrorism, Mr. Harper signalled the government doesn't intend to make exceptions for people. He compared criminalizing the incitement to commit terrorist to bans on joking about bombs at the airport, stating "we cannot tolerate this.[32]

We have seen no evidence in the research that teenagers posting radicalized blather on the internet from their basements constitute the real menace. Indeed, that evidence suggests on the contrary that radicalization to violence is generally associated with in person social contacts with an influential, charismatic figure in the community.[33]

Government is free to posit its understanding of the risk, but it must adduce evidence, and that evidence must show that the harm cured outweighs the downside of the offence. Since the benefits appear to be scant, and indeed may even be imagined, and the deleterious consequence of the offence significant, we do not imagine an easy time for the government.

For instance, in conducting its balancing analysis, courts would be acutely aware that the absence of clear defences such as those available under the hate propaganda provisions make it much more likely that a speech chill will be caused by the new offence, as compared to its hate crimes and child pornography analogues. In *Khawaja*, the Court held that any chill "in the expression of religious and ideological views referred to by the trial judge flowed from the post-'9/11' climate of suspicion, not from the motive clause in the terrorism legislation." Here, we believe that the chill will not stem from climate but from law. It will be engineered by an overbroad law.

There are other, quite meaningful practical harms to this sort of offence, as well. We detail these elsewhere.[34] To summarize: there is a danger that the chill from the offence may drive extremist chatter further underground where it cannot be monitored. This will degrade the ability of law enforcement and security services to

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[32] Steven Chase and Daniel Leblanc, "Harper proposes new powers for spies, plays down civil liberties concerns," *Globe and Mail* (Jan 30, 2015).

[33] Forcese, Craig and Roach, Kent, Terrorist Babble & the Limits of Law: Assessing a Prospective Canadian Terrorism Glorification Offence (January 2015). TSAS Working Paper No. 15-02. Available at SSRN: http://ssrn.com/abstract=2546555 or http://dx.doi.org/10.2139/ssrn.2546555

[34] Ibid

perform their tasks.

It is also difficult to deny that since 9/11 the burden of an expression-based offence will fall disproportionately on Muslim communities. An already difficult social and political climate will become more difficult, potentially undermining considerably the promising counter-violent extremism programs being developed by the RCMP. It is exactly these programs that the research suggests may be the ultimate solution to the violent extremism problem.

As an aside, we hasten to add that while the impact on the Muslim community is obvious, there is no end to the causes whose advocates might be captured by this new offence. We will inevitably be asked if the bill could reach Quebec sovereigntists, Indigenous activists or environmental protesters. The answer is that it could reach any and all of these causes, so long as the highly imprecise and uncertain elements of the crime, discussed above, are met. (For example, statements that all true Aboriginal warriors or environmentalists should be prepared to attack pipelines, or that it is time to support a group with the same aims and methods of the FLQ could run afoul of the proposed offence. This speech may be reprehensible, but we think that the deleterious consequences that may flow from such attitudes is already sufficiently regulated by existing terrorism offences.)

We acknowledge that all the terrorism offences are broad and uncertain at the margins. What is true, however, is that this offence is unusually sweeping compared to its closest analogues and ambiguous in a manner that trenches on a fundamental democratic right – speech.

That should matter enormously for a Parliament asked to enact this provision, and any court who may need to consider its constitutionally should Parliament choose (wrongly in our view) to proceed.

V. Conclusion

The new promotion or advocacy of terrorism offences raises many issues, and should at best be considered extremely concerning.

Although the offence requires proof of subjective fault, the restraining effects of these requirements are muted by the breadth of other parts of the offence. In particular, the offences applies to the advocacy or promotion of a wide array of "terrorism offences in general" including various forms of complicity, conspiracy, attempts and incitement of what are already broad crimes. Moreover, it applies in circumstances where a person "may" commit any one of these offences as a result of the communication.

Whatever the case for using the "may" standard for preventive arrest and peace bonds, it is less warranted in a context where freedom of expression is in play.

The "may" standard is also accompanied by the undemanding requirement that the accused need only be "reckless" as to whether a terrorism offence will result. Thus a speaker could be convicted if he or she knowing advocates and promotes a broad range of terrorism (perhaps merely the concept of political violence) while aware of a possibility that someone (and indeed, anyone) might commit a terrorism offence as a result of the communication.

The offence also lacks a number of possible safeguards. A more constrained law proposal would require "willful" promotion and not just "knowing" promotion.

It could require that the accused know (and not simply be reckless) that speech "will" result as opposed to "may result" in terrorism offences being committed.

It could follow the Australian advocacy of terrorism offence on which it appears to be based, and exclude complicity, conspiracy, attempts and incitement crimes which extend the already broad notion of "terrorism offences in general". This should also be done even if Parliament amended the reference to "terrorism offences in general" and replace it with the slightly less broad concept of "terrorist activity" because that definition itself includes these extensions of criminal liability.

The exclusion of religious, political or ideological thought, belief or opinion in s.83.01(1.1) that the Supreme Court stressed was so important in saving terrorist activities from infringing fundamental freedoms could be much more explicitly grafted to the new offence, sending signals that do not require complicated cross-referencing. Much more than this, defences analogous to those in the hate crimes provisions in s.319(3) (most notably those relating to the expression of religious belief and public interest) could be extended to the new offence.

These are all examples of an offence that would be less restrictive of fundamental freedoms.

Elsewhere, we have argued vigorously that no new anti-terror speech offence is needed.[35] Nothing said in defence of the proposed measure changes our mind. Those citing the need for the provision seem to inclined to point to hypotheticals involving acts *already* criminalized. These are not persuasive.

We urge that if Parliament decides to proceed with the new offence, that it consider closely the pernicious consequences of its choice. We plead that it exercise restraint and incorporate the restraining provisos we have enumerated here. A decade of fraught constitutional litigation, speech chill and a redoubled sense of grievance by the communities most chilled would be a disservice to the country.

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[35] Ibid

We are hard pressed to imagine a course more counterproductive than a crime that discourages cooperation, chills open dialogue, and forecloses speech that allows for early counter-violent radicalization intervention.

We simply do not believe that this offence will make us safer, and indeed are inclined to the opposite view.