Bill C-51 Backgrounder # 4
The Terrorism Propaganda Provisions

Kent Roach[*] and Craig Forcese[**]

Abstract

Proposed s.83.222 of the Criminal Code creates a new concept of "terrorist propaganda". It also allows judges to order deletion of "terrorist propaganda" from the internet.

We support the concept of deletion orders for "terrorist propaganda" in principle. We believe they can have a role as part of a balanced and evidence-based counter-radicalization strategy that aims both to reduce the supply of terrorist material and (even more importantly) the demand for it.

However, the details matter. We remain concerned about the breadth of the definition of "terrorist propaganda". It includes cross-referencing to the new speech crime proposed by bill C-51. As we discuss in backgrounder #1, that new offence risks sweeping in too much speech that is not tied to violence or threats of violence.

We think instead the terrorist propaganda concept should be anchored to existing terrorist crimes, which capture already the vast range of actually dangerous speech.

Such an approach would ensure that deletion orders were appropriately focused on material proximately related to actual and threatened violence, as opposed to extremist and objectionable ideas that advocate the use of political violence for any number of causes, including ones that many would regard as "mainstream" (e.g., contesting the Assad regime in Syria).

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 terrorist propaganda deletion proposal.

Please send feedback to: cforcese@uottawa.ca and kent.roach@utoronto.ca

[*] Professor of Law, University of Toronto

[**] Associate Professor of Law, University of Ottawa

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Summary of Key Concerns

Our first backgrounder (posted to www.antiterrorlaw.ca) examined the proposed new criminal offence of knowingly advocating or promoting "terrorism offences in general" in bill C-51. Many of the concerns raised in that document, especially about the overbreadth of the phrase "terrorism offences in general", apply equally to the definition of "terrorist propaganda" in the proposed s.83.222 of the Criminal Code. The bill provides for judicial orders for the deletion of this "terrorist propaganda" from the internet, and we focus on these in this backgrounder.

Overview

Setting aside the technical difficulties of doing so, we support the idea that terrorist propaganda should be constrained, hidden or deleted from the internet. This is, however, a form of state censored of speech that is, by its very nature, an expression of political, religious or ideological views. Any state censorship raises acute free speech issues and needs to be justified and carefully tailored.

Everything turns, therefore, on the meaning of "terrorist propaganda". We support the reference in the proposed C-51 provisions for deleting material "that counsels the commission of a terrorist offence". This phrase contains well-understood legal concepts. It allows for the deletion of speech that already is criminal because it solicits, incites or counsels the commission of a terrorist offence. A video that tried to solicit people to bomb is already criminal. So too is a video that seeks to recruit persons to a terrorist activity or group. This speech would likely not be protected as freedom of expression under current Supreme Court jurisprudence. We see no reason why such material should not be deleted from the internet, with the safeguards of a judicial warrant. Indeed we would even support an expansion of this provision to include material that instructs the commission of a terrorist activity.

We are, however, concerned that written and audio or visual recordings may be deleted simply on the basis that they "promote" or "advocate" the commission of any "terrorism offences in general". As we argue in backgrounder #1, "promote" and "advocate" applied in the terrorism law context are uncertain expressions. Likewise, the phrase "terrorism offences in general" is a new term, and its reach utterly unclear. It could conceivably reach "the concept of political violence".

We personally do not favour political violence. But we appreciate that there are many overseas causes with which others might sympathize that could conceivably be rolled into this uncertain concept of "terrorism offences in general", including many that are "mainstream".

We are reasonably confident that material that advocates or promotes terrorism offences in general (as opposed to material that simply counsels the commission of terrorism offences) would be protected freedom of expression under the Charter. The state would have to justify placing limits on such expression. The deletion of such material might rationally advance the objective of preventing terrorism, but there are likely less restrictive means that can be used, including focusing on deleting

hate speech and speech that counsels or provides operational support for terrorism offences.

Analogues

Precedents exist for deleting material that is criminal. Obscenity and hate speech could always be seized. Since the Anti-Terrorism Act, 2001, s.320.1 of the Criminal Code provides for judicial orders to delete hate propaganda from the internet.

We are not aware of any use of such orders, but are reasonably confident that, if used, they would be upheld as a reasonable limit on freedom of expression. Judicial orders are more respectful of freedom of expression than a regime that would allow the executive to delete material without judicial approval. We note, however, that effective self-initiated review by an independent review entity will be necessary to ensure that the police and perhaps CSIS do not short circuit judicial oversight through informal demands on internet providers that material be deleted. This is especially true given the new capacity of CSIS to engage in "measures" reducing "threats to the security of Canada" proposed in bill C-51. These powers are discussed in our backgrounder #2.

We recognize that judicial proceedings leading to a possible deletion order do not have the full safeguards of a criminal trial. The Crown only has to prove that the material to be deleted is terrorist propaganda on a balance of probabilities, and not beyond a reasonable doubt as in criminal trial.

Moreover, there is no need to prove mental fault levels of knowledge and recklessness by the poster, as there would be if a person was charged under the proposed offence of advocating or promoting terrorism offences in general. Although the person who posted the impugned material has rights to make representations and to appeal, they may often not exercise these rights in part because of fears of exposing themselves to possible prosecution under the new "advocacy" offence discussed in backgrounder #1.

These features of the deletion proceedings increase our concerns about the overbreadth of the definition of terrorist propaganda.

Application of the law by customs officials

We raise practical concerns about a little noticed consequential amendment in the omnibus bill C-51 that would add the broad new category of "terrorist propaganda" to a customs tariff currently allowing the warrantless seizure and detention of obscenity and hate propaganda at the border.

Customs officials have had difficulty applying complex legal tests for "obscenity" in the past to gay and lesbian pornography. The proposed definition of "terrorist propaganda" is even more complex than obscenity because it extends to 14 existing terrorist offences and other indictable offences committed on behalf of or in association with a terrorist group, and adds on the utterly unknown modifier of "in general". Determining the meaning of this phrase will necessitate sustained

litigation. It is certainly not the kind of expression that customs officials should be applying according to their own discretion in border inspections.

Our concerns are increased by the absence of self-initiated review by an independent body able to review the Canadian Border Service Agency, despite the 2006 recommendations of the Arar Commission to that effect. A Charter challenge is possible, but would be very expensive and unwarranted seizure of religious and other legitimate material at the border would chill fundamental freedoms.

How have terrorist propaganda provisions been applied elsewhere?

Our concerns about unilateral interpretation of "what is terrorist propaganda" also reflect learning from other jurisdictions. In the United Kingdom, there are laws against the dissemination of such materials. There, a bookstore owner who had no role in specific terrorist plots was convicted of dissemination of terrorist publications, and sentenced for a term of three years, before appealing.[1]

Among the publications for which the bookstore owner was prosecuted were "*Milestones* – special edition", a "work of Sayyid Qutb, a leading member of the Muslim Brotherhood, who was executed in Egypt in 1966". Compared by some to Lenin's *What is to Be Done*,[2] *Milestones* is a revolutionary tract that has clearly influenced Islamist militants, including the terrorist movement led by Osama Bin Laden.[3] It is, however, more ideological treatise than "how to guide" to terrorism tools or tactics. Moreover, as these authors can attest, it is readily available – including on Amazon websites. This special edition included "a biography of the author of Milestones, and nine appendices containing works by various authors". In the case, police reportedly alleged that the special edition of *Milestones* there at issue "was developed specifically to promote extremist ideology".[4]

Other materials for which the bookstore owner was prosecuted included "Malcolm X, Bonus Disc", a "DVD containing a film about the life of the deceased Muslim leader. It included a number of trailers and other recordings of interviews with the families of men who had died 'fighting' US forces in Afghanistan and Israeli forces in the occupied Palestinian territory. It included footage of a suicide bomber driving to his death in Iraq."

The prosecution led evidence that several of the impugned publications had been found in the possession of past terrorist plotters, and indeed offered a statistical portrait on this point. The trial court convicted, seemingly on this basis. On appeal, the Court of Appeal concluded that the use of past cases in which terrorist plotters were found in possession of the impugned publications was unduly prejudicial, "since

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1 *R. v. Faraz*, [2012] EWCA Crim 2820.

2 John Zimmerman, "Sayyid Qutb's influence on the 11 September attacks," (2004) 16(2) *Terrorism and Political Violence* 222 at 244.

3 *Ibid* at 240-241.

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

it is not known (and probably could not be reliably ascertained) how many young Muslim men, who had no terrorist intentions whatsoever, possessed the relevant material or other reasonably comparable material."[5] On this ground, the convictions were quashed.

Not having studied the question, we cannot answer the question of how this material may have differed from mainstream versions of these or similar publications (if at all). Our point is just this: Given the difficulty two UK courts with a total of four judges had weighing this question, we are troubled by the thought of customs officials deciding "what material is too inherently dangerous", outside of any adversarial judicial proceeding and with no independent review of their decision making.

Smart counterviolent extremism programs

Finally, we underscore the importance of "demand reducing" strategies in dealing with violent extremism, and not simply "supply reducing" strategies of the type found in bill C-51 that criminalize speech and attempt to remove materials from consumption. Supply side criminalization will not suffice to meet the challenges of radicalization that has seen over 100 Canadians leave Canada to join ISIL or other terrorist related causes. Initiatives that reduce interest in material that promote and attempt to glorify terrorism are critical; that is, demand reducing strategies. They are not found in bill C-51.

The available research on this area is not entirely robust and this remains a dynamic and changing area. But the research does suggest that the casual links between extremist material (which given present preoccupations, often means related to Islam) and actual violence are not firm or automatic. Internet material appears to more a facilitator than an actual cause of radicalization to violence.

The research also suggests the need for strategies that work in partnership with Muslim communities and non-criminal justice actors to reduce the demand for such material. Care must be taken to ensure that harder edge criminalization strategies -- such as bill C-51's new advocacy offence and deletion of terrorist propaganda provisions -- do not frustrate or hinder other arguably more important and hopefully more effective counter-radicalization strategies.

In this same spirit, we recognize the need for holistic multi-disciplinary approaches toward counter-radicalization. We note that bill C-51, unlike the UK's recently enacted *Counter-Terrorism and Security Act, 2015*, does not require such programs at institutions such as schools, health authorities and prisons, despite the involvement of prison radicalization in the recent Paris and Copenhagen attacks. (We acknowledge that moving forward with at least some of these institutions requires provincial cooperation).

This "demand reducing" strategy is made more urgent by the difficulties associated with supply reducing efforts that, like those in bill C-51, rely on the criminal law. The efficacy of the proposed deletion procedures in bill C-51 is likely to be low given

[5] Above note 1 at para. 47.

the ease with which terrorist propaganda can migrate to less restrictive jurisdictions. Deletion orders directed at Canadian internet servers may only result in the material being placed on foreign servers with less restrictions, including American servers where free speech protections are more robust. This limits the benefits of deletion orders and speaks to the need for broader and less coercive measures targeting radicalization and violent extremism.

Introduction

The first part of this backgrounder will examine the definition of "terrorist propaganda" set out in bill C-51 and the procedures it contemplates for deletion of this material from the internet.

The second part will discuss consequential amendments that would add the broad new category of "terrorist propaganda" to the Customs Tariff that allows officials with the Canadian Border Service Agency to seize obscenity and hate propaganda at the border. The last part of this backgrounder will also discuss how the proposed deletion procedures will fit into what is known in the research literature about counter-radicalization programs.

This backgrounder will suggest that the focus of the "terrorist propaganda" should be drawn more narrowly in bill C-51 to include material that is already criminal – something it accomplishes in part by simply by listing material that counsels the commission of terrorist offences. The much broader and vaguer reference to material that advocates or promotes "terrorism offences in general" should be deleted from the bill.

I. The Proposed Terrorist Propaganda Amendments to the Criminal Code

A. The Definition of Terrorist Propaganda

The heart of the new deletion provisions is the definition of "terrorist propaganda" in proposed s.83.222(8) of the Criminal Code. It defines "terrorist propaganda" to mean:

> any writing, sign, visible representation, or audio recording that advocates or promotes the commission of terrorism offences in general - other than an offence under subsection 83.222(1)[6]- or counsels the commission of a terrorist offence in general.

This definition needs to be examined in its component parts.

1. "any writing, sign, visible representation, or audio recording"

This phrase captures the full range of expression. The inclusion of "signs" could authorize the deletion of the use of symbols associated with "terrorist propaganda", provided the other requirements of the definition are satisfied.

a) Including material on any computer system even if not publicly available

There is no requirement in the definition that "terrorist propaganda" be publicly displayed or publicly available. In other words, "terrorist propaganda" can reach

[6] Namely the new proposed offence of knowingly advocating or promoting terrorism offences in general while being reckless that one may be committed as a result of the communication that is discussed in Backgrounder #1.

purely private expression. This focus mirrors a similar failure to limit the new the promotion and advocacy offence to statements made in public.

We note that a requirement that material be available to the public is incorporated in s. 83.223(5), the provisions relating to actual deletion orders. Specifically, a deletion order requires a judge to be satisfied on a balance of probabilities under s.83.223(5) that the material is both "terrorist propaganda" and "available to the public" through a computer system within the court's jurisdiction.

Lest there be confusion on this point: This is not to say that the origin of the material must itself be in a public place. Section 83.223(1) refers to terrorist propaganda that is "stored on…a computer system that is within the court's jurisdiction" without reference to the requirement that the system be a public one. The incorporated definition of a "computer system" in s.342.1(2) of the Criminal Code is broad and could include laptops or home computers, because they contain computer programs or data and perform logic and control and other functions over that data.

We underscore that the deletion orders require public display, but the concept of "terrorist propaganda" does not. Because the definition of "terrorist propaganda" does not itself include a reference to public display, the new powers on customs officials to seize materials do not depend on any consideration of whether it is likely to be used privately or publicly.

Underlying the legal technicalities here is perhaps an issue of contested principle. The proposed advocacy offence also reaches purely private statements. It does not contain the exemption for private conversations found in the offence of willful promotion of hatred under s.319(2) of the Code.

Our view is that in a liberal democracy the state should focus on actions in the public realm and should not intrude, at least without a clear violence predicate, on people's private thoughts and reading and viewing material. We recognize, however, that others may have different views, but would suggest that they have the burden of justifying extraordinary intrusions into the private realm.

For our part, we think that if the deletion orders are focused on radicalization, so too the definition of "terrorist propaganda" should also require that the material be of a sort that might reasonably be capable of being disseminated to the public. A single dog-eared copy of a radical tract intended for private consumption is presumptively of less concern than a truck load of such material clearly intended for distribution, and the law should not treat both as equal.

b) Interaction with other aspects of bill C-51

The seeming disconnect between "terrorist propaganda", including purely private material, and the scope of the court ordered deletion powers for only public display raises questions about the interface with the proposed CSIS "kinetic" powers to "reduce" threats.

We note here that deletion orders under s.83.223 will be made by superior court judges and in Quebec by the Court of Quebec, according to the incorporated definitions in s.320(1).

In contrast, CSIS "kinetic" measures warrants discussed in our backgrounder #2 will be granted by the Federal Court. Would CSIS be able to point to the definition of "terrorist propaganda" in bill C-51, and persuade a court that it should be empowered to violate the law, as bill C-51 would permit, by corrupting or otherwise deleting the data on purely private computers?

Again, we worry tremendously about covert judicial proceedings authorizing CSIS to violate the law, and would prefer approaches to the issue of terrorist propaganda that are as overt as possible.

We support ordinary provincial superior courts deciding the deletion warrants. Open court proceedings are especially appropriate given the potential impact of deletion orders on fundamental freedoms such as free speech. We welcome that choice of the provincial courts to adjudicate deletion orders.

2. "advocates or promotes terrorism offences in general"

There are two alternative definitions of "terrorist propaganda" contained in the proposed provision. First, terrorist propaganda is material that advocates or promotes terrorist offences in general. Second, it is material that counsels the commission of a terrorist offence. We will discuss each of these two different definitions in turn.

a) "Advocates or promotes"

As discussed in backgrounder 1, the words "advocates" or "promotes" are not defined in bill C-51. The Supreme Court has defined them for the purposes of the very different offences of advocating under age sex and promoting hatred.

In *R. v. Sharpe*[7], 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,*[8] 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."

However, as suggested in backgrounder #1, the above definitions of advocating and promoting are helpful starting points, but it is a mistake to "plug in" definitions derived from caselaw involving other offences, given differences in the offences. The

7 [2001] 1 S.C.R. 45 at para 56

8 [2005] 2 S.C.R. 100 at para 101

promotion or advocacy of terrorism offences in general is simply a much broader and vaguer concept than the advocacy or promotion under-age sex, hatred or genocide.

Specifically, the new definition of terrorist propaganda 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.

b) "Terrorism Offences in General"

The scope of the concept is made even more sweeping by inclusion of the expression "terrorism offences in general".

The first part of this phrase is already vast. "Terrorism offences" include 14 existing terrorism offences and any other indictable crime committed to benefit or in association with a terrorist group. Thus, something could be classified as terrorist propaganda on the basis that it "advocates or promotes" the commission of a terrorist financing offences or the commission of any indictable offence, including conspiracy or attempts, to benefit a terrorist group, including (but not just) any listed terrorist group.[9] The Criminal Code's concepts require substantial unraveling. But a close read suggests that it could be an offence to encourage persons to make a financial donation to an overseas insurgency (that is, unlawful combatants under the laws of war) contesting, e.g., the Russian presence in Ukraine by targeting Russian critical infrastructure in a manner that might endanger life.

More than this, the addition of "in general" then converts a broad offence into an entirely uncertain and vague one. We simply have no idea what "in general" is supposed to signal. We suspect that the reference to terrorism "in general" may eventually be construed to capture promotion or advocacy of the "concept" of terrorism, that is, violence done for political, religious or ideological reasons to induce a government or person to do something. We think any such violence is wrong. There have been circumstances, however, where conduct of this sort directed against repressive regimes has been "advocated" or "promoted", including in the mainstream. These are exactly the issues that we would expect to be debated in the public realm, not repressed on the theory that suppression quashes ideas.

[9] Terrorism offence is defined in s.2 of the Criminal Code and terrorist group is defined in s.83.01(1)

c) Terrorism Offences Committed Outside of Canada

As our discussion suggests, the terrorism offences that are advocated or promoted need not be committed in Canada. They can occur anywhere. Examples would include insurgencies in the Ukraine, in Syria and in Libya. The world is a violent and ambiguous place that does not always fit well with the certain and bright lines of the criminal law. In the context of examining British glorification of terrorism offences, Clive Walker, a leading UK commentator, has warned "the extension of jurisdiction leads to a slippery slope of judgments which take sides in foreign disputes and sometimes in favour of despots."[10]

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."[11] We will address the counter-productive consequences of speech crimes below.[12]

d) No Explicit Requirement of Fault

The requirements of mental fault in the proposed new offence of promotion or advocacy of terrorism offences in general are not present in the definition of "terrorist propaganda".

Although it is possible that courts might read-in requirements of knowledge and recklessness, they are not explicitly stated in the definition of terrorist propaganda. Moreover, they apply somewhat awkwardly in deletion procedures, which are aimed at the tangible thing of material on a computer system as opposed to establishing the criminal fault of the speaker.

e) No Defences Available

Unlike for crimes such as hate crimes and obscenity laws, there are no defences associated with the new speech crime. Nor will "I did not know" or "I did not intend" or "I thought no one would take me seriously" be relevant in a deletion procedure. This increases the risk that satire, discussion of matters of public interest or good faith claims about religious texts may be swept up into a deletion order.

The definition of terrorist propaganda, like the primary offence of promoting or advocating terrorism offences in general, do not contain public interest or religious discussion defences which are included in the hate propaganda and obscenity offences. This is a serious omission that we hope that Parliamentary committees will address in the time available to debate bill C-51 after 2nd reading.

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

11 *Ibid* at 8.152

12 See also 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

3. "Counsels the commission of a terrorism offence"

This is an alternative definition of "terrorist propaganda" and in our view is much less problematic.

As we describe in more detail in backgrounder #1, "counsel" is a term of art in the Criminal Code and is defined in s.22(3) of the Code as including procuring, soliciting and inciting. This is commonly called incitement. It makes a person a party to a crime that they incited and also makes it a separate offence under s.464 of the Criminal Code to counsel criminal offences that are not committed.

Counselling, as well as threatening, are already criminal to the extent that counselling and threatening terrorist activities are defined as a form of terrorist activity in s.83.01(1) (b) of the Criminal Code, and that term is then incorporated into most of the existing terrorism offences.

Counselling requires that the accused engage in an act of soliciting, procuring or soliciting a terrorism offence.

Thus, in order to constitute material that counsels a terrorism offence, courts would need to discern an act of incitement, procuring or soliciting of one of the broadly defined terrorism offences in the Criminal Code. The speech captured in this definition is much more proximate to violence than the speech caught by the broader alternative version of "promoting or advocating terrorism offences in general".

Thus, this "counselling" definition of terrorist propaganda requires a closer link between the content of the speech and an actual terrorism offence, and not the broader and more open-ended references to "terrorism offences in general".

The government has defended the necessity for the latter on the basis of concerns that general threats or incitement to commit acts of terrorism would not be covered by existing offences.[13] We are not convinced by this argument. We note that ss.83.19(2), 82.21(2) and 83.22(2) reach very far at present, and do not require that the penalized conduct be tied to identified and specific terrorist acts.

But to repeast: we support the judicial deletion of material from the internet that is already criminal, and like the Supreme Court we are not absolutists in our views on free speech. Indeed while the incorporation of counselling is welcome, we believe that it is underinclusive. Specifically, we would be content with a definition of "terrorist propaganda" that included not just "counsel" but also the already criminal concept of "instruct" a terrorist activity or certain forms of participation with terrorist groups. Why the government instead decided to create brand new advocacy concept and web it to an unknown concept of "terrorism offences in general" remains a mystery to us when existing laws and concepts provide a more certain,

[13] See Government of Canada, Backgrounder Jan 30, 2015

restrained and justified (and more clearly constitutional) basis for limiting speech associated with terrorism.

This is especially the case given that the government has succeeded in securing convictions for propagandistic activities already, under the current law. In the 2010 *Namouh*[14] case, the accused was charged and successfully prosecuted for (among other things) "enthusiastically participat[ing] in most of [a terrorist groups' propaganda activities". Among other things, the accused participated in conveying "a message to Austria and Germany threatening terrorist action if their soldiers are not withdrawn from Afghanistan". The accused also participated in most of the groups more clearly propagandistic activities, including (as described by the court):

- analyzing the speeches of Al Qaeda leaders
- inciting violent jihad
- calling for support for jihadist groups
- redistributing Al Qaeda materials
- acting as a spokesperson for captured jihadists
- singing the praises of jihadist leaders who died for the cause
- ensuring the security of online communications between jihadists
- taking part in psychological warfare
- providing military training with the purpose of implementing violent jihad
- producing a series of videos called the "Califate Voice Channel," with the aim of transmitting news from the jihadist front
- publishing jihadist magazines online
- acting as an official media outlet for two groups taking part in terrorism.

The accused was deeply invested in his cause and was not an idle apologist of things terroristic. This undoubtedly contributed to the ultimate outcome. But still, the behaviour cited by the court in support of the participation and facilitation convictions ranges from outright threats to propaganda more distantly linked to violence. Nevertheless, this propaganda style speech contributed to the convictions. A conviction such as this helps to denounce and deter speech that is closely associated with terrorism.

Canada even has an ancient "corrupting morals" offence in s.163 of the Criminal Code that has been used (occasionally) to be bring charges against those posting "snuff films"[15] and presumptively, therefore, reach the infamous ISIS execution videos. The government chose not, however, to update this provision and extend its reach in terms of internet deletion orders, for reasons we do not understand.

We will discuss the role of criminal law in counter-radicalization programs in the last part of this backgrounder, but note that the traditional adage that the criminal law

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[14] *R. v. Namouh*, 2010 QCCQ 943

[15] See, e.g., David Schwartz, CBC News, "Magnotta video arrest: What does 'corrupting morals' charge mean," (Jul 18, 2013), online http://www.cbc.ca/news/canada/magnotta-video-arrest-what-does-a-corrupting-morals-charge-mean-1.1317478

should be used with restraint is especially important in such a context. The criminal law should send the clear message that it is things associated with violence that are criminalized because violence is never justified. At the same time, a liberal democracy accepts a wide range of even extreme views on political and religious matters.

The burden of justifying why it has departed from this approach in creating an overbroad concept of "terrorist propaganda" that incorporates a new, vague and sweeping speech crime lies with the government.

B. The Charter and the Definition of Terrorist Propaganda

This discussion, of course, leads naturally to consideration of the constitution. As discussed in backgrounder #1, we acknowledge that the concepts of advocate and promotion in bill C-51 are not as broad as the European concepts of glorification or "apologie du terrorisme".

We also acknowledge that in *R. v. Khawaja*,[16] the Supreme Court upheld the definition of "terrorist activity" in the Criminal Code from Charter challenge on the basis that threats of violence is not expression protected under the free expression guarantee in s.2(b) of the Charter.

1. Violations of Freedom of Expression

The government will likely argue that "terrorist propaganda" is not protected expression given the restrictions articulated by the Court in *Khawaja*. We believe that this argument has merit with respect to the definition of terrorist propaganda as material that counsels a terrorism offence (or, as we have proposed, instructs terrorist activity). Such material is so closely connected with violence that the Supreme Court is unlikely to find that it is protected expression.

On the other hand, a government's argument that material that promotes or advocates terrorism offences in general falls outside free speech protections is more doubtful. As we have argued, such material could easily capture the expression of ideas, often with political content, that are only very distantly and indirectly connected with violence or even threats of violence.

a) Counselling the Commission of a Terrorism Offence

Material that counsels or incites a terrorism offence is so closely tied to the actual violence of an offence that it may well be characterized as activities associated with violence or threats of violence. We note here that the Supreme Court indicated in *Khawaja*:

> 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

[16] *R. v. Khawaja*, [2012] 3 SCR 555

violence — listed in s. 83.01(1) (*b*)(ii) need fear liability under the terrorism provisions of the *Criminal Code*.[17]

b) Advocating or Promoting Terrorism Offences in General

In contrast, the definition of terrorist propaganda as material that "promotes or advocates terrorism offences in general" would capture expression that we believe is Charter protected.

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."[18]

As we suggested in backgrounder #1, advocacy (in comparison) leaves listener with a choice, and thus it contributes to "the marketplace of ideas" in which ideas should be voiced, supported or condemned.

A person 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.

2. Section 1

If a provision violates the Charter, the burden lies on the government to justify it under s.1 of the Charter, in keeping with the elements we discuss next.

a) 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.

b) Rational Connection

As discussed in backgrounder #1, we have doubts that there is rational connection between extreme speech that promotes terrorism offences in general, and the government's legitimate objectives. The available social science evidence, some of which will be briefly examined in the last part of this backgrounder suggests, however, that it does not often lead to violence. At the same time, we recognize that

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17 *Ibid* at para 82

18 *Ibid* at para 70

this is a rapidly evolving area and there are real concerns about ISIL and AQ related radicalization. In this dynamic threat environment, courts may defer to the government's judgment that there is a rational connection.

c) Minimal Impairment

Courts will ask the question of whether the government can fulfill its objective with less violation of freedom of expression. Here ,they will consider the alternatives of using hate speech provisions, including judicial orders to delete hate propaganda speech, as well as the alternative of only deleting speech that actually counsels the commission of a terrorism offence or otherwise involves the commission of a terrorist offence. The government will have the burden of justifying why broader incursions on freedom of expression are necessary.

d) Proportionality and Overall Balance

Here, our analysis would again be similar to that offered in backgrounder #1. One difference, however, is that the harm to freedom of expression in deletion procedures might be somewhat reduced, because the focus is on the material and not incarceration. In other words, no one is being prosecuted and potentially sent to jail, as the author and poster of the statements.

That said, we would not want to diminish the importance of controversial materials, including those on the internet, to freedom of expression. Indeed one of the most important cases on the role of artistic defence and its interaction with obscenity was determined in a case that proceeded as a forfeiture against paintings, and not a criminal prosecution of the painter.[19]

Even if the deletion, as opposed to conviction, objectives of the proceedings mitigates the harm done to freedom of expression, this may be offset by the absence of proof of any fault requirements. Recall that the state need only establish that the material constitutes terrorist propaganda on a balance of probabilities. Another factor, to be discussed more fully below, is a full adversarial defence against the state's deletion procedure may well be prevented because of concerns that a person who posted the offence might be subject to prosecution under the proposed advocacy offence if they turned up in court.

The benefits of deletion are also somewhat attenuated by the fact that a person who posted deleted material could simply migrate the material to a server in a jurisdiction with a firmer free speech tradition, including servers in the United States.

In sum, we have serious doubts that the "terrorist propaganda" concept, as currently drafted, would survive a constitutional challenge.

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[19] *Ontario v. Langer* (1995), 123 DLR (4th) 289; 97 CCC (3d) 290

C. The Procedure of Obtaining a Deletion Order

We turn to procedural concerns with the "terrorist propaganda" deletion system. As suggested above, the deletion orders will be sought in provincial superior courts and, in Quebec, in the Court of Quebec. Judicial hearings are an important safeguard, but as discussed in backgrounder #2 in relation to CSIS warrants, they are not a panacea. This is especially true if the proceeding is not adversarial and is a one sided hearing with only the judge and a government lawyer present.

The deletion procedures, unlike the new proposed CSIS warrants, are intended to be adversarial. That is an important virtue and we welcome the inclusion of space in the proposed deletion warrant procedures for both adversarial challenges and appeals. Alas, we fear that in practice, deletion warrant proceedings will often not be adversarial.

1. Post and Defend At Your Own Risk

Section 83.223(2) provides that after receiving the original information for a deletion order that the judge "shall cause notice to be given to the person who posted the material" and give them an ability to hear and "show cause why the material should not be deleted." Notice and an adversarial hearing are important safeguards against state overreaching against speech.

But the person who posted the material may very well not appear to ensure an adversarial challenge to the state's claim that the material is terrorist propaganda. Why?

One reason may be that the person may not receive notice, even when those who run the system post notice. We accept, however, that no system is perfect and the state cannot be held responsible if reasonable measures are taken and fail to provide notice.

A more troubling reason why deletion proceedings may not be adversarial is that a person may not appear because they fear being arrested for violating the proposed offence of knowingly promoting or advocating terrorism offences in general. As discussed at length in backgrounder #1, such fears may not be unreasonable given that the criminal fault requirements of that new offence (knowledge and recklessness) are lower than willfulness, and the new offences, unlike their willful promotion of hate and obscenity analogues, have no defences.

In the result, what are properly intended to be adversarial hearings may often become, like the CSIS warrant proceedings, a one-side hearing with only the government lawyer and the judge.

Section 83.223 (4) contemplates such one-sided hearings and provides that they are acceptable. They could, however, be avoided by allowing the judge to appoint an *amicus curiae* or friend of the court to challenge the government's case when the person who posted the material does not appear to challenge the government's

argument that the material is terrorist propaganda that should be deleted from the internet. This would in our view be a welcome addition.

2. Appeals, but not from one-sided hearings

Section 83.233(8) appropriately recognizes broad rights of appeals from decisions about deletion warrants and that a deletion order will not take effect until the appeal period has expired. Appeals have the potential to ensure that "terrorism propaganda" is interpreted in a consistent manner that respects the Charter. These are important and praiseworthy safeguards built into the legislation.

If, however, deletion hearings are, as we anticipate, frequently one-sided hearings where the person who posted the material does not appear to defend it, there will be no appeals from deletion orders in such cases. This would be case even if the deletion order raised a novel and important point of law about what may constitute "terrorist propaganda" and even though a legal error by the issuing judge could both delete legitimate material and chill freedom of expression. Again the ability to appoint *amicus curiae* with appeal rights and resources might address this issue, but is not provided for in bill C-51.

3. Proof on a Balance of Probabilities

The proposed s.83.223(5) provides that material can be deleted once it is established on a balance of probabilities that it is terrorist propaganda or data that makes such propaganda available.

This is patterned on the hate propaganda deletion orders in s.320.1 that were enacted after 9/11. The orders also accord with typical search warrants which do not require proof beyond a reasonable doubt, but generally only require reasonable grounds or a probability that an offence has been committed and that a search will discover evidence of the offence.

The result means that it will be easy to obtain a deletion order than it will be to convict a person under the new promotion and advocacy of terrorism offences in general, which will require proof beyond a reasonable doubt.

This seems sensible, but again, the potential one-sided nature of a proceeding with such low thresholds should give pause.

4. Consent of an Attorney General Required

Section 83.223(10) requires the consent of either the Attorney General of Canada or a provincial Attorney General. The Supreme Court has recognizes a similar requirement as an important one that help justify the limit on freedom of expression in hate propaganda offences.[20]

[20] *R. v. Keegstra,* [1990] 3 S.C.R. 697

The consent requirement may also help ensure some operational co-ordination. In some cases, there may be competing demands to allow a website to continue to run because of its intelligence value, but also demands that it be taken down because it constitutes terrorist propaganda. The requirement that the Attorney General consent to deletion proceedings may allow these competing interests to be discussed and resolved within the government of Canada. This may, however, not always happen if a provincial Attorney General grants consent without perhaps being informed that a particular web site is being monitored for intelligence collection purposes.

This raises issues of the need for a central whole of government co-ordinating mechanism that resolves the competing interests in intelligence gathering and law enforcement, as proposed in volume 3 of the 2010 report of the Air India Commission. We note that neither bills C-44 or 51 addresses this critical issue. This underscores a concern that we have that these two bills may have unintended consequences with respect to the relationship between intelligence and evidence. The effects of both bills should be carefully monitored and subject to a full Parliamentary review in 3 years. Parliamentarians who conduct such a review must have access to secret information if the review is to be thorough and credible. There are no provisions in place now or in c-51 for such a review, including Parliamentary access to secret information. We note with concern that the last time Parliament altered the relation between intelligence and evidence when it created CSIS in 1984, it led to transition problems that contributed to the failure to prevent the 1985 Air India bombings that killed 331 people in what was the world's most deadly act of aviation terrorism before 9/11.

5. Informal Enforcement in the Shadow of the Law

The lack of reported decisions on deletion of hate propaganda from the internet as well as the experience with executive-based deletion procedure under 2006 UK legislation leads us to have concerns that even if enacted, the new deletion orders are likely to rarely used.

The more likely scenario is that security officials are likely to consult internet providers and those in Canada known to post "terrorist propaganda" on the internet and ask them voluntarily to delete or otherwise hide the material.

Such informal methods will escape judicial supervision and could involve demands to delete material that might be protected expression. The likelihood of such informal negotiation in the shadow of the law underlines the importance of adequate self-initiated review of the security officials who may invoke the new terrorist propaganda deletion procedures.

We add that is possible that CSIS and the RCMP may jointly approach internet providers to request the deletion of terrorist propaganda. We are not opposed to joint operations between security agencies. We think, however, that joint operations should be matched (as proposed by the Arar Commission), by joint reviews by the separate bodies that review the work of CSIS and the RCMP. We intend to address issues of review in our next backgrounder.

C. Enforcement by Customs Officials

The concerns that we have about informal enforcement of the law that short circuits both requirements for the Attorney General consent and judicial oversight are magnified by the prospect that customs officials will now be empowered determine what is terrorist propaganda.

A little-noticed consequential amendment in bill C-51 would add the new, and in our view, overbroad term "terrorist propaganda" to a customs tariff. This tariff is used to allow customs officials to seize and retain obscene material and hate propaganda at the border. This is typically done without a judicial order, in recognition of reduced privacy expectations at the border.[21] The relevant customs directive provides for detention of material up to 30 days while determinations are made whether the material is prohibited in entry from Canada.[22]

The Supreme Court of Canada determined in the first Little Sisters Bookstore and Emporium case that customs officials had violated both freedom and expression and equality rights by targeting and retaining material imported by a gay and lesbian book store while allowing the same material destined to other sellers to enter the country.[23]

It is not far-fetched to think that similar issues and claims of discriminatory profiling and violations of fundamental freedoms might be made in relation to the new category of terrorist propaganda – a concept even more complex and ambiguous than the obscenity provisions that were wrongly enforced by customs officials.

It should also be noted that problems continued even after the Supreme Court ruling, but were not fully litigated after the Supreme Court denied Little Sisters advanced costs that were necessary to engage in another costly round of litigation.[24]

And yet, should the Canadian Border Service Agency misapply their new powers to prohibit the entry of terrorist propaganda, the courts may provide the only recourse because CBSA is not subject to any independent review body with a mandate to ensure the legality and proportionality of their conduct. The Arar Commission recommended in its 2006 report that a new RCMP complaints body also be able to

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[21] *R. v. Simmons*, [1988] 2 S.C.R. 495

[22] Canada Border Services Agency Memorandum D 9.1.1 Oct 26 2012 available at http://www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-1-eng.html See also Canadian Border Services Agency Memorandum D-1-15 Feb 14, 2008 available at http://www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-15-eng.pdf. The latter memorandum quite broadly defines hate propaganda that can be seized. Ibid at para 8. At the same time, the memorandum recognizes a variety of defences to both seditious and hate propaganda material that would not be available for the new category of terrorist propaganda ibid at paras 11 and 12.

[23] [2000] 2 S.C.R.1120

[24] [2007] 1 S.C.R.38

review the activities of the Canadian Border Services Agency, but this has not been done.[25]

The absence of independent review of the new and largely unnoticed powers that C-51 would give customs officials is another indication how the government's refusal to respond to the Arar Commission's 2006 recommendations, provides good reasons to be concerned that C-51 will increase governmental powers in what is already a deficient review environment. We will return to this issue in our next backgrounder but note that four former Prime Ministers, retired Supreme Court judges and former security reviewers and privacy commissioners have recently raised concerns about Canada's inadequate review structure. [26]

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[25] Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *A New National Security Review Mechanism for the RCMP* (Ottawa: Supply and Services, 2006) Recommendation 10

[26] The signers of the letter noted that they "share the view that the lack of a robust and integrated accountability regime for Canada's national security agencies makes it difficult to meaningfully assess the efficacy and legality of Canada's national security activities. This poses serious problems for public safety and for human rights. A detailed blueprint for the creation of an integrated review system was set out almost a decade ago by Justice Dennis O'Connor in his recommendations from the Maher Arar inquiry, which looked into the role that Canada's national security agencies played in the rendition and torture of a Canadian citizen. Justice O'Connor's recommendations, however, have not been implemented; nor have repeated calls from review bodies for expanded authority to conduct cross-agency reviews....Canada needs independent oversight and effective review mechanisms more than ever, as national security agencies continue to become increasingly integrated, international information sharing remains commonplace and as the powers of law enforcement and intelligence agencies continue to expand with new legislation" Jean Chretien, Joe Clark, Paul Martin and John Turner "A Close Eye on Security Makes Canadians Safer" Globe and Mail Feb 19, 2015. The other signers of the letter were: "The Honourable Michel Bastarache, Justice of the Supreme Court of Canada (1997-2008);The Honourable Ian Binnie, Justice of the Supreme Court of Canada (1998-2011); The Honourable Claire L'Heureux Dubé, Justice of the Supreme Court of Canada (1987-2002);The Honourable John Major, Justice of the Supreme Court of Canada (1992-2005);The Honourable Irwin Cotler, Minister of Justice (2003-06); The Honourable Marc Lalonde, Minister of Justice (1978-79);The Honourable Anne McLellan, Minister of Justice (1997-2002), Minister of Public Safety (2003-06); The Honourable Warren Allmand, Solicitor General of Canada (1972-76); The Honourable Jean-Jacques Blais, Solicitor General of Canada (1978-79); The Honourable Wayne Easter, Solicitor General of Canada (2002-03); The Honourable Lawrence MacAulay, Solicitor General of Canada (1998-2002); The Honourable Frances Lankin, Member, Security Intelligence Review Committee (2009-14);The Honourable Bob Rae, Member, Security Intelligence Review Committee (1998-2003); The Honourable Roy Romanow, Member, Security Intelligence Review Committee (2003-08);Chantal Bernier, Acting Privacy Commissioner of Canada (2013-2014); Shirley Heafey, Chairperson, Commission for Public Complaints against the RCMP (1997-2005) and Jennifer Stoddart, Privacy Commissioner of Canada (2003-2013).

II. The Need for Balanced Counter-Radicalization Programs

The final question we address is how will the proposed deletion procedures and the proposed advocacy offence link (or not) to counter-radicalization policies. Here we draw on our understanding of a small but important body of research on radicalization and terrorism. We do not pretend to be expert in this area. We are students of the literature on radicalization to violence, and can only consider a small portion of it in this document.[27]

We believe that literature suggests the importance of a dual track approach, one that stigmatizes through criminal law, but in a manner that does not undermine "all of society" counter violent extremism initiatives.

We acknowledge that such countering violent extremism (CVE) programs are underway in Canada, and consider them vital. We note, however, that bill C-51 does not contain provisions for CVE structured programs, as does the recently enacted Terrorism and Security Act, 2015[28] in the UK.

We are also concerned that bill C-51's provisions may act at cross purposes to CVE. For one thing, its new speech offence may chill speech by persons who hold "radical" views. CVE programs depend on speech, not chill. The new advocacy and deletion of terrorist propaganda provisions in bill C-51 may make it more difficult for governments to elicit co-operation from communities most at risk at a time when the available evidence about the allure of ISIL and other groups suggest that it may be most needed.

We are also concerned about some recent comments that risk alienating the Muslim community, which may, with reason, feel it is being tarred with a very broad brush.[29] We note that the government messaging on radicalization and ISIS in Canada differs dramatically from that in the United States. President Obama has recently taken pains to send a message that the issue is violence, not Islam and that Muslims communities are victimized by terrorism and should be full partners in countering violent extremism. [30]

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[27] For a slightly longer version of this discussion, see 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

[28] c.6.

[29] "Muslim groups 'troubled" by Stephen Harper's mosque remark" CBC News Feb. 2, 2015 at http://www.cbc.ca/news/politics/muslim-groups-troubled-by-stephen-harper-s-mosque-remark-1.2940488

[30] President Obama has argued "Groups like al Qaeda and ISIL promote a twisted interpretation of religion that is rejected by the overwhelming majority of the world's Muslims. The world must continue to lift up the voices of Muslim clerics and scholars who teach the true peaceful nature of Islam. We can echo the testimonies of former extremists who know how terrorists betray Islam. We can help Muslim entrepreneurs and youths work with the private sector to develop social media tools to counter extremist narratives on the

When the Canadian government's sometimes awkward political messaging on the threat environment is combined with the unprecedented expansion of CSIS's powers and its new role as a covert "disruption" service, there is significant risk that a frayed government/civil society relationship may become more acute.

Canada is taking this step just as other democracies are recognizing the need for more comprehensive multi-disciplinary strategies.

Criminal offences have a place and should not be ignored. But we already have robust criminal laws, and adding news ones that overreach is not naturally conducive to an effective "hearts and mind" counter-radicalization strategy. At the end of the day, in a democracy, much of the best work in national security depends on consent, not coercion.

We turn now to a discussion of materials we have reviewed on radicalization to violence and the internet.

A. Radicalization and Radicalization to Violence

McCauley and Moskalenko posit that radical Al Qaeda-inspired political discourse arises in a four part "narrative frame": "(1) Islam is under attack by Western crusaders led by the United States; (2) jihadis, whom the West refers to as terrorists, are defending against this attack; (3) the actions they take in defence of Islam are proportional, just, and religiously sanctified; and, therefore (4) it is the duty of good Muslims to support these actions."[31]

These researchers suggest that while 5% of adult UK Muslims (a number that translates to 50,000 persons) seem to believe the AQ world view and told pollsters in 2005 that suicide attacks were justified, there have been only a few hundred terrorism arrests in the United Kingdom since 9/11.[32] It stands to reason that 5% understates those with violent views, since many poll respondents would not willingly espouse such controversial opinions. But even assuming this low percentage is accurate, McCauley and Moskalenko calculate that only 1 in every 100 persons

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Internet... Op Ed Obama: Our Fight Against Violent Extremism LA Times Feb 17, 2015 at http://www.latimes.com/opinion/op-ed/la-oe-obama-terrorism-conference-20150218-story.html He also said "Al Qaeda and ISIL and groups like it are desperate for legitimacy," Mr. Obama said. "They try to portray themselves as religious leaders, holy warriors in defense of Islam. Nor should we grant these terrorists the religious legitimacy they seek—they are not religious leaders, they're terrorists." "Obama: Us, West at War with Extremists, not Muslims" Wall Street Journal Feb 18, 2015 at http://www.wsj.com/articles/obama-were-not-at-war-with-islam-1424296897

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

[32] *Ibid* at 72.

espousing the most extreme AQ-inspired narrative make the move to violence.[33] This is a relatively small (albeit still concerning) number, and it warns about the risks of positing a firm and definitive link between radical views and radicalized to violence.

Although studies on radicalization to violence provide interim conclusions at best, they generally support a thesis that interpersonal social ties – especially with a charismatic "leader" – has in the past been a more important cause of radicalization than more diffuse sources of inspiration, such as those found on the internet

B. The Internet and Radicalization to Violence

Bosco divides internet activities related to terrorism into three classes: use as an organizational tool; waging psychological terror, and, publicity and propaganda.

Organizational use of the internet includes coordination of activities, data mining for publicly available information on a variety of topics including potential targets, means and methods of weapon use and fundraising. Internet social networking features also facilitate recruiting and training across disparate geographical space, a matter discussed further below.[34] As we have argued above, much (and probably all) of this material would already be criminal under existing terrorist offences. And material that counsels terrorism offences could be deleted under bill C-51. We would also be comfortable with the deletion of material that instructs terrorism.

A second category of "waging psychological terror" includes terrorist group communications claiming responsibility for attacks and actions, vilifying and demoralizing target audiences through disinformation, delivering threats with the intent to create fear and a sense of helplessness, and the distribution of horrific images (such as execution videos).[35] Some (if not all) of this material amounts to threats and incitement of terrorist acts, and would already be criminal and could under bill C-51 be deleted from the internet with a judicial order. And if the speech itself was not criminal, the underlying offence it described would be. Indeed, recent charges brought in relation to videos stemming from the Magnotta murder suggests that it might also fall within the ambit of the s.163 "corrupting morals" provision.[36]

A third category identified by Bosco is terrorist publicity and propaganda that aims to generate support for causes, and justify actions. The internet provides a "virtual library of terrorist material, granting easy access to everything from political, ideological and theological literature to videos of assaults and attacks, and even video

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[33] *Ibid*.

[34] Francesca Bosco, "Terrorist Use of the Internet," in U. Gurbuz (ed), *Capacity Building in the Fight against Terrorism* (IOS Press, 2013) at 43. .

[35] Bosco, above note 34 at 41-42. For a similar typology of internet uses by terrorist groups, see Edna Erez, Gabriel Weimann, A. Aaron Weisburd, *Jihad, Crime and the Internet: Content Analysis of Jihadist Forum Discussions* (Report submitted to the US National Institute of Justice, October 2011) at 6, available https://www.ncjrs.gov/pdffiles1/nij/grants/236867.pdf.

[36] Schwartz, above note 15.

games."[37] Terrorist websites may deploy "imagery and symbols of victimization and empowerment to spread their message" and online publications may include everything from art intended to inspire to terrorist "manuals" on everything from bomb-making to email encryption.[38]

The key in this vast category will be to separate material that should be criminal from more general discussions of grievances. The line between the criminal and the permissible is crossed when speech threatens or incites violence or provides operational how to support for it.

Discussion of grievances that may motivate acts of terrorism should be seen as legitimate forms of expression. Direct threats or incitement to commit acts of terrorism and instructions about how to commit acts of terrorism (ie bomb-making) should be criminal. There is of course a vast amount of material between these extremes and inevitable borderline issues.

We should also approach internet regulation focused on so-called "jihadi terrorism" with an appreciation that "jihad" is a religious term and most discussion on such web sites will focus on religion. In the most comprehensive quantitative analysis of AQ-inspired internet discussion forums known to these authors, the most common source of discussion (97%) was religion.[39] Most of these discussion threads focused on Islamic doctrine, and not on espousing hatred towards other groups or traditions. Such findings are relevant when assessing how new offences targeting such material affect fundamental freedoms including freedom of expression and freedom of religion.

Again we stress the potential dangers of a broad brush approachs. One comparison would be to examine anti-abortion material. Strong expressions of religious views about the immorality of abortion and the spiritual fate of those who have or perform abortions should be permissible. Threats, incitement and how to recipes about killing and bombing abortion providers is not. The liberal state should take a strong stand against violence but it should be scrupulously neutral on matters of religion.

At the same time, we do not underestimate the difficulty of separating the criminal from the permissible. A-Q inspired internet activity is not benign. A total of 37% of discussions included "an explicit or implicit call for Jihad",[40] and these threads often attracted high numbers of participants. Again we would warn that the meaning of "Jihad" is complex and for some means simply spiritual struggle. Twenty percent of discussions included explicit "calls or encouragement for future terrorist activities."[41]

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37 Bosco, above note 34.

38 *Ibid*.

39 Edna Erez, Gabriel Weimann, A. Aaron Weisburd, *Jihad, Crime and the Internet: Content Analysis of Jihadist Forum Discussions* (Report submitted to the US National Institute of Justice, October 2011) at 64, available https://www.ncjrs.gov/pdffiles1/nij/grants/236867.pdf.

40 *Ibid* at 68.

41 *Ibid* at 69.

Calls for martyrdom arose in 8% of discussions.[42] Combined, the authors report that calls for jihad, terrorist activity, and martyrdom arose in 2/3 of discussions that they studied.[43] This study underlines the complexity of extremist material on the internet.

In sum, while the internet alone may not be a cause of radicalization to violence, it may serve as a "driver and enabler for the process of radicalization"; a forum for radicalizing propaganda; a venue for social networking with the like-minded; and then, a means of data mining during the turn towards violence.[44]

Put another way, this is an area in which our approach needs to be nuanced. We are not persuaded C-51 contains that nuance.

C. Counter-violent Extremism Approaches

In this same vein, there is a need to make sure that "hard law" approach of new advocacy offence and deletion procedures proposed in bill C-51 did not thwart more nuanced hearts and minds strategies.

Generic anti-radicalization strategies reportedly favoured by Canadian Muslim community leaders include:

> acknowledging the existence of Islamophobia; establishing a dialogue with various Muslim groups; educating policy makers; developing university courses on terrorism; forming positive relationships with local and federal agencies; re-invigorating mosque-based programs; utilizing available tools for new immigrant and refugee integration; devising a multi-party collaborative relationship among local [religious and civil society] community-based organizations [and government]; deepening the role of immigration and multiculturalism ministries ethno-cultural projects; carrying out transparent, responsible security profiling, and stopping the use of terrorism rhetoric as a political tool by media.[45]

We support counter-narrative strategies in which messages contesting the AQ world

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[42] *Ibid* at 69.

[43] *Ibid* at 69.

[44] Craig Espeseth, Jessica Gibson, Andy Jones and Seymour Goodman, "Terrorist Use of Communication Technology and Social Networks," in U.F. Aydogdu (ed) *Technological Dimensions of Defence against Terrorism* (IOS Press, 2013) at 95.

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

view are advanced. We agree, however, that this must not be ham-handed government propaganda.[46]

More specific, internet-related strategies include internet safety and awareness programs, sensitizing young people and their parents to extremist messaging, in addition to online bullying, predators and pornography. Other approaches include cooperation with technology companies willing to provide technical assistance, grants, free advertising or other support that facilitates the online presence of, among things, Muslim thought-leaders with messages contrary to those of AQ-inspired extremists.[47]

Likewise, government might enable connections between community groups and public relations and media professionals able to assist in crafting more compelling messages.[48] Still other initiatives may include such things as government support for victims of terrorism to document on the internet their own suffering in answer to the glorification imagery of terrorist ideologues.[49]

Conclusion

We support the concept of deletion orders in principle. We believe they can have a role as part of a balanced and evidence-based counter-radicalization strategy that aims both to reduce the supply of terrorist material and the demand for it.

The details matter. We remain concerned, as we said in backgrounder #1 that examined the proposed new speech offence, that promotion of "terrorism offences in general" sweeps in too much material that is not tied to violence or threat of violence.

Judicial orders provides important safeguards for fundamental freedoms, but we are concerned that the opportunities for adversarial challenge and appeals in the bill may often not be taken up because of their reliance of persons who posted impugned material coming forward, thereby risk possible prosecution under the proposed advocacy or promotion terrorism offence.

Finally, we are troubled by the image of CBSA customs officials deciding what material is too radical for Canadian consumption.

These procedural shortcomings render our concerns about overbreadth in the definition of "terrorist propaganda" all the more acute.

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[46] Michael Zekulin, "Anti-jihad videos can work – but not if they come from the government," *Globe and Mail* (Feb 17, 2015), online: http://www.theglobeandmail.com/globe-debate/anti-jihad-videos-can-work---but-not-if-they-come-from-the-government/article23024063/.

[47] Peter Neumann, "Options and Strategies for Countering Online Radicalization in the United States," (2013) 36(6) *Studies in Conflict & Terrorism* 431 at 444.

[48] *Ibid*.

[49] Bosco, above note 34 at 45.

The best course of action may be to reject the proposed new speech offence and to remove the same broad language as it appears in the proposed internet deletion provisions.

Such an amendment would not gut the terrorist propaganda provision because it could still be used to obtain deletion orders for material that counsels terrorism offences. We would then recommend an expansion of the deletion procedure to include material that "instructs" the commission of terrorist activities. We also would support an updated and carefully drafted new provision on corrupting morals dealing with execution videos.

We think deletion orders should reach material that threatens the commission of terrorist offences or provides operational information such as bomb making instructions for terrorist offences, or which are truly designed to terrorize or recruit.

Such an approach would ensure that deletion orders were appropriately focused on material proximately related to actual and threatened violence as opposed to extremist and objectionable ideas that advocate (potentially merely) the use of political violence for any number of causes, including ones that many would regard as "mainstream" (e.g., contesting the Assad regime in Syria).