

Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism

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I. INTRODUCTION

In the United Kingdom (“U.K.”), the Terrorism Act 2006 criminalizes statements likely to be understood as encouraging terrorism.¹ Such statements include those that glorify terrorist acts.² This offense is not a necessary response to the very real threat of terrorism. Statements that glorify terrorism may be and have been successfully prosecuted under other, more narrowly tailored statutes. The glorification provision, however, covers a broad range of generalized statements. It is precisely this breadth and definitional vagueness that makes the statute problematic; it is a needless constraint on free expression in a democratic society. The glorification provision should be narrowed to criminalize only statements that either furnish practical information or incite specific crimes.

This note argues that the current glorification offense is not necessary, and that narrower offenses linked to specific crimes can protect against terrorism. Part II describes the statutory basis for the offense of glorifying terrorism. Part III analyzes its implications and problems in more detail. Part IV compares the glorification offense with other relevant restrictions on expression in the U.K. Many “glorifying” statements are in fact covered by, and have been prosecuted under other statutory provisions, some of which are not specifically terrorism-related. Part V makes recommendations for modifying the glorification statute, drawing on the U.S. legal approach to the same problem.³ Part V focuses on pragmatic considerations

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1. Terrorism Act, 2006, c. 11, § 1(1) (Eng.).

2. *Id.* § 1(3)(a).

3. The offense’s compatibility with the European Convention on Human Rights is beyond the scope of this article. This article will assume that the statute is compatible. Until the European Convention on Human Rights (“ECHR”) was incorporated into domestic law, most rights in the U.K. were residual. ERIC BARENDT, AN INTRODUCTION TO CONSTITUTIONAL LAW 46–47 (1998). People were thus free to express what was not otherwise legally restricted, such as libel and obscenity. The Human Rights Act 1998 incorporated the ECHR’s free expression guarantee into domestic law. *See* Human Rights Act, 1998, c. 42, § 1 (Eng.); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, 213 U.N.T.S. 222 (1998). Neither the British courts nor the European Court of Human Rights has definitively ruled on the glorification offense’s compatibility with the

and the general importance of free expression in a democratic society. To protect free expression, the glorification provision should be narrowly targeted to statements that either give out practical information or incite specific crimes.

II. GLORIFICATION CRIMINALIZED AS ENCOURAGEMENT OF TERRORISM

Section 1 of the United Kingdom's Terrorism Act 2006 criminalizes direct or indirect encouragement of terrorist acts:

- (1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.⁴
- (2) A person commits an offence if—
 - (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
 - (b) at the time he publishes it or causes it to be published, he—
 - (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
 - (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.
- (3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—
 - (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
 - (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glo-

ECHR. This note does not further pursue this question, except to note that a domestic court may not invalidate the provision based on ECHR incompatibility; it may only declare the provision incompatible. *See* Human Rights Act, 1998, c. 42, § 4(2) (Eng.).

4. "Convention" refers to the Council of Europe Convention on the Prevention of Terrorism. Explanatory Notes to Terrorism Act, 2006, c. 11, § 11 (Eng.). "Convention offences" include crimes related to weapons, hostage-taking, and terrorist fundraising. *See* Terrorism Act, 2006, c. 11, sched. 1 (Eng.).

rified is being glorified as conduct that should be emulated by them in existing circumstances.⁵

The apparent rationale for this provision was to fill a gap in the existing law. Article 5 of the Council of Europe Convention on the Prevention of Terrorism required states parties to criminalize public provocation to commit a terrorist offense.⁶ The British government believed that existing law covered incitement to commit a *particular* terrorist act, such as “Please bomb a tube train on July 7 in London,” but would not cover a more generalized incitement such as “We encourage everybody to bomb tube trains.”⁷ To this end, section 1 of the 2006 Act deems it irrelevant whether the statement refers to a particular act or to terrorist acts generally.⁸

III. ANALYSIS OF THE GLORIFICATION PROVISION

The scope of the provision is extremely broad, and its definitional vagueness grants substantial discretion to prosecutors and judges. Subsection 1 criminalizes a broad class of statements: those likely to be understood as direct or indirect encouragement or inducement to terrorism. Under subsection 3, such statements *include* statements that glorify terrorism as worthy of emulation. Thus, glorifying statements constitute one, but not the sole, category of criminalized expression. Glorification “includes any form of praise or celebration.”⁹ Again, the word “includes” broadens the scope and increases opportunity for discretionary application. Moreover, “praise” and “celebration” are vague terms. As the Joint Committee on Human Rights noted, reasonable persons could disagree as to whether a particular comment falls within the glorification definition.¹⁰ Lord Goodhart further criticized the fact that glorification was made “a sub-species of encouragement” and argued that the statute should have stopped at a more circumscribed offense of direct or indirect encouragement.¹¹

Although the provision contains certain safeguards, the scope of speech covered is a significant incursion on free expression. Safeguards include a requirement that potential public reaction be determined with regard to “the statement as a whole” and “the circumstances and manner of its publi-

5. Terrorism Act, 2006, c. 11, § 1 (Eng.). In addition, section 2 criminalizes disseminating publications containing matter that falls under section 1. *Id.* § 2. Section 3 covers such statements that are published electronically, when the person has received a police notice to remove or modify the statement. *Id.* § 3.

6. See Explanatory Note to Terrorism Act, 2006, c. 11, § 1 (Eng.).

7. JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, THIRD REPORT OF SESSION 2005–06, H.L. 75-I/H.C. 561-I, ¶ 21 [hereinafter THIRD REPORT].

8. See Terrorism Act, 2006, c. 11, § 1(5)(a) (Eng.).

9. *Id.* § 20(2).

10. THIRD REPORT, *supra* note 7, ¶28.

11. 679 PARL. DEB., H.L. (5th ser.) (2006) 143, cited in HELEN FENWICK & GAVIN PHILLIPSON, MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT 532 (2006).

cation.”¹² There is also a mens rea requirement: the offender must either intend to encourage terrorism or be reckless as to that effect.¹³ For instance, a teacher’s purely academic lecture on the IRA’s history would not fall under the provision. A defense is provided if the accused lacks intent and it is clear that the statement neither expressed his views nor had his endorsement.¹⁴ Yet if the statement *were* self-expressive or endorsed, recklessness as to encouraging terrorism is sufficient mens rea.¹⁵

The glorification provision does not consider whether the statement in fact encouraged any person to engage in a terrorist act.¹⁶ The criminalization of speech is thus explicitly de-linked from its actual effect: it need only be “likely” to be understood as encouraging terrorism. Moreover, the target “public” applies to people either in the U.K. or abroad,¹⁷ and the potential reaction of only “some” of this broad public is sufficient.¹⁸

The wide scope of section 1 of the 2006 Act is further broadened when linked to the U.K.’s expansive definition of terrorism. The Terrorism Act 2000 defines terrorism as the use or threat of action that is both “designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public,” and “made for the purpose of advancing a political, religious, racial, or ideological cause.”¹⁹ The kinds of action covered are “serious violence against a person,” “serious property damage,” endangerment of another person’s life, creating a serious public health or safety risk, and serious interference or disruption to electronic systems.²⁰ Such action need not be carried out in the U.K. to fall under the definition.²¹ This broad definition of terrorism, coupled with the generic language of the glorification statute, effectively criminalize a wide range of speech, thereby limiting free expression.

IV. COMPARISON WITH OTHER RESTRICTIONS ON EXPRESSION

Several other laws in the U.K. also restrict speech in an effort to prevent terrorism. Some of these statutes are explicitly aimed at terrorism; others

12. Terrorism Act, 2006, c. 11, § 1(4) (Eng.).

13. *See id.* § 1(2)(b).

14. *See id.* § 1(6). This defense was intended to cover news broadcasters and related professionals. Explanatory Note to Terrorism Act, 2006, c. 11, § 1(6) (Eng.).

15. *See* Terrorism Act, 2006, c. 11, § 1(2)(b)(ii) (Eng.). This lack of a specific intent requirement has been criticized by the U.N. Human Rights Committee. *See* U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland*, ¶ 26, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008).

16. Terrorism Act, 2006, c. 11, § 1(5)(b) (Eng.).

17. *Id.* § 20(3)(a).

18. *See id.* § 1(1).

19. Terrorism Act, 2000, c. 11, § 1(1) (Eng.).

20. *Id.* § 1(2).

21. *Id.* § 1(4)(a).

are not but have nevertheless been applied in that context. The more significant of these provisions are as follows:

<u>General restrictions</u>	<u>Terrorism-specific restrictions</u>
Soliciting murder (Offences Against the Person Act 1861, § 4)	Inciting terrorism overseas (Terrorism Act 2000, § 59)
Stirring up racial or religious hatred (Public Order Act 1986, § 18; 29B)	Possession of terrorist material (Terrorism Act 2000, §§ 57, 58)
	Collection of terrorist material (Terrorism Act 2000, § 58)
	Encouragement, including glorification, of terrorism (Terrorism Act 2006, § 1)

As discussed above, the glorification provision of the 2006 Act creates several problems for free expression. Furthermore, many statements that fall under that Act are covered by other statutory provisions listed above. There have been several convictions under these statutes for arguably “glorifying” statements. In contrast, no cases have been decided under section 1 of the 2006 Act by either the House of Lords or the Court of Appeal.²² The success of alternative statutes in counterterrorism prosecution will be further analyzed below.

A. General Restrictions on Expression

1. Soliciting Murder

Like the glorification offense, soliciting murder is an expression-related statutory offense with a broad scope—especially as interpreted by a recent Court of Appeal decision.²³ Although applicable beyond the terrorism context, this provision can be used to prosecute the glorification of terrorist killings.

Section 4 of the Offences Against the Person Act 1861 provides: [W]hosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen’s dominions or not, shall be

22. As of September 2009. From October 2009, the Supreme Court of the United Kingdom replaced the Appellate Committee of the House of Lords as the country’s highest court. The Supreme Court of the United Kingdom, <http://www.supremecourt.gov.uk/about/the-supreme-court.html> (last visited Sept. 28, 2009). However, since all cases discussed were decided before this date, this note uses the former “House of Lords” designation.

23. See *R v. Javed*, [2007] EWCA (Crim) 2692, [2008] Cr. App R(S). 12 (Eng.).

guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for life.²⁴

Two Islamic preachers, El-Faisal and Abu Hamza, have been convicted under this provision for their public speeches; the Court of Appeal upheld the convictions.²⁵ El-Faisal urged Muslims to kill non-Muslims and encouraged suicide bombings and the use of chemical weapons. His statements include: “The way forward can never be the ballot. The way forward is the bullet,” and “you can go to India and if you see a Hindu walking down the road you are allowed to kill him and take his money.”²⁶

The case of *R v. Javed*²⁷ also involved this offense. During a protest against a Danish newspaper’s publication of cartoons depicting the prophet Mohammed,²⁸ the three appellants carried placards and chanted via a public address system. One appellant was convicted of soliciting murder under the Offences Against the Person Act, one of stirring up racial hatred under the Public Order Act 1986, and the third of both offenses.²⁹ The appellant convicted only of soliciting murder had carried placards reading: “Behead the one who insults the Prophet” and “Exterminate those who slander Islam.”³⁰ He was denied leave to appeal his conviction.

The statements made in these cases would likely count as glorification of terrorism, but instead they were prosecuted successfully under a statute unrelated to terrorism. Those who heard these statements would likely understand them as praising or celebrating the violence advocated, and could reasonably infer that they should emulate it. Murder falls under the definition of terrorist acts³¹ and the speakers possessed at least a reckless mens rea. As with the glorification offense, the crime of soliciting murder allows the courts to engage in a contextual analysis. The Court of Appeal in *Javed* explained that the seriousness of this offense depends on length of the conduct; sophistication, skill and industry devoted; and likelihood of leading others to commit terrorist acts.³² The court reduced the three anti-cartoon protesters’ sentences, since unlike El-Faisal and Abu Hamza (who made

24. Offences Against the Person Act, 1861, 24 & 25 Vict., c. 100, § 4 (Eng.). This provision reflects several amendments made since 1861.

25. See *R v. Abu Hamza*, [2006] EWCA (Crim) 2918, [2007] Q.B. 659 (Eng.); *R v. El-Faisal*, [2004] EWCA (Crim) 456 (Eng.). In addition, both were convicted of stirring up racial hatred under the Public Order Act 1986. See *infra* Part IV.A.2. Abu Hamza was also convicted under section 58 of the Terrorism Act 2000 for possession of terrorist materials. See *Abu Hamza*, [2006] EWCA (Crim) 2918, [1].

26. *El-Faisal*, [2004] EWCA (Crim) 456, [15].

27. *R v. Javed*, [2007] EWCA (Crim) 2692, [2008] Cr. App R(S). 12 (Eng.).

28. As the Court of Appeal noted, the cartoons “caused widespread upset and offence within the Muslim community around the world, as it is widely believed that Islam forbids the visual depiction of the Prophet Mohammed.” *Javed*, [2007] EWCA (Crim) 2692, [8].

29. See *infra* Part IV.A.2 for discussion of the racial hatred charges in this case.

30. *Javed*, [2007] EWCA (Crim) 2692, [34].

31. See Terrorism Act, 2000, c. 11, § 1(2) (Eng.).

32. See *Javed*, [2007] EWCA (Crim) 2692, [38].

speeches over several years), the protest was a single event at short notice without sophisticated planning.³³

Like glorification, soliciting murder has a broad scope regarding both location and effect. In terms of location, the statute expressly states that the potential murder victim need not be British or reside in Britain. The Court of Appeal has further held that those soliciting or being solicited need not be British subjects.³⁴ With regard to effect, the offensive speech need not identify a particular person to be murdered: note the generality of the statements quoted above. Indeed, the Court of Appeal in *Javed* did not seem to believe actual killing would be incited, stating, “we do not think that [the placards and chants were] likely to persuade those who [viewed them] to resort to killing.”³⁵ This is similar to the glorification offense’s focus on potential rather than actual effect.

There is, however, a limit to using soliciting to murder as a proxy to prosecute glorifying statements. Notably, the offense covers only murder, not other acts of terrorism such as property damage or hostage-taking.

2. *Stirring Up Racial or Religious Hatred*

Provisions of the Public Order Act 1986 criminalize inciting both racial and religious hatred. The two offenses vary in scope and mens rea requirements. Many statements falling under the glorification definition can be prosecuted under one of these two offenses.

Section 18 of the Public Order Act 1986 provides that:

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

- (a) he intends thereby to stir up racial hatred, or
- (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.³⁶

In cases where intent is not shown, a person can be convicted only if he was aware that his words, behavior or writings might be threatening, abusive or insulting.³⁷ The Act defines racial hatred as “hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.”³⁸ British courts have found that Sikhs

33. *See id.* [39]–[45].

34. Thus, the offense of soliciting murder is an exception to the general common law principle that conspiracy and incitement are committed only if the act would (if carried out) be indictable in England. *See R v. Abu Hamza*, [2006] EWCA (Crim) 2918, [2007] Q.B. 659, [17], [37]–[42] (Eng.).

35. *Javed*, [2007] EWCA (Crim) 2692, [45].

36. Public Order Act, 1986, c. 64, § 18(1) (Eng.).

37. *See id.* § 18(5).

38. *Id.* § 17. In the original version, the group to which hatred was directed needed to be in Great Britain. This requirement was removed so the offense could apply to statements and actions directed at a racial group located anywhere in the world. *See Anti-terrorism, Crime and Security Act, 2001*, c. 24, sched. 8, pt. 4 (Eng.).

and Jews are groups of ethnic origin and are therefore considered races.³⁹ However, this is not the case for other religious groups such as Muslims,⁴⁰ who would not be protected by the racial hatred offense.

This gap in the law was addressed by the Racial and Religious Hatred Act 2006, which added the offense of stirring up religious hatred to the Public Order Act. Under this statute, “[a] person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.”⁴¹

This differs from the analogous racial hatred crime in two ways. First, a person guilty of stirring up religious hatred must have *intended* to do so, which is not a requirement for stirring up racial hatred. Second, only threatening words or acts can stir up religious hatred, whereas racial hatred can also be stirred by abusive or insulting speech or action. Religious hatred is defined as “hatred against a group of persons defined by reference to religious belief or lack of religious belief.”⁴² A freedom of expression clause provides that the provisions do not limit “discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents . . . or proselytizing.”⁴³ This would criminalize the statement “We should hate Christians” but not the statement “We should hate the fact that Christians believe in Jesus.”⁴⁴

Abu Hamza and El-Faisal were convicted of stirring up racial hatred.⁴⁵ Abu Hamza’s speeches contained phrases such as “Killing a Kafir [non-Muslim] for any reason, you can say it, it is OK—even if there is no reason for it,” and (referring to Jews) “They are enemies to one another and Allah has cursed them. This is why he sent Hitler for them.”⁴⁶ The appellant in *Javed* convicted only of stirring up racial hatred had uttered chants such as: “Denmark, you will pay!” “With your blood, with your blood!” “Norway, you will pay!” “With your blood, with your blood.” “Europe, you must pay!” “With your blood, with your blood!”⁴⁷

39. See, e.g., *Mandla v. Dowell Lee*, [1983] 2 A.C. 548 (H.L.) (appeal taken from Eng.) (U.K.); *R v. Governing Body of JFS*, [2009] EWCA (Civ) 626, [2009] 4 All E.R. 375 (Eng.).

40. See FENWICK & PHILLIPSON, *supra* note 11, at 512.

41. Public Order Act, 1986, c. 64, § 29B(1) (Eng.).

42. *Id.* § 29A.

43. *Id.* § 29J. Note that the European Court of Human Rights has held that State parties have a wider margin of appreciation in matters concerning morals or religion. See *Murphy v. Ireland*, 38 Eur. Ct. H.R. 13 (2004).

44. See FENWICK & PHILLIPSON, *supra* note 11, at 522 (arguing that this defense threatens to swallow up the offense).

45. See *R v. Abu Hamza*, [2006] EWCA (Crim) 2918, [2007] Q.B. 659 (Eng.); *R v. El-Faisal*, [2004] EWCA (Crim) 456 (Eng.). Abu Hamza was convicted of both the base section 18 offense and of possessing sound recordings of offending speeches under section 23 of the Public Order Act. El-Faisal was convicted of the base offense and of distributing such material under section 21, since tapes of his speeches were sold at specialty bookshops.

46. Jeremy Britton, *Key to Proving Hamza’s Hate*, BBC, Feb. 7, 2006, http://news.bbc.co.uk/2/hi/uk_news/4670906.stm.

47. *R v. Javed* [2007] EWCA (Crim) 2692, [2008] 2 Cr. App. R(S). 12, [30] (Eng.).

These speakers could likely be prosecuted for glorifying terrorism under the 2006 Act. However, they were successfully convicted of stirring up racial hatred—an offense that does not require a link with terrorism. Like glorification, stirring up racial or religious hatred does not have an effect requirement: there is no need to show that hatred was in fact stirred. Furthermore, this offense has proved effective in the particular context of Islamic terrorism. For instance, El-Faisal's comments regarding Jews would fall under racial hatred, while those targeting non-Muslims in general would fall under religious hatred (since they target a group defined by lack of religious belief).

The racial and religious hatred offenses have limits in the terrorism context, and they do not map directly onto the glorification offense. In one sense, the glorification provision is narrower than the other two offenses, being limited to intentional or reckless encouragement of *terrorist acts*, as compared to “hatred.” Yet in another sense, the glorification offense is broader. For instance, the religious hatred offense requires intent, not merely recklessness, and only covers threatening speech or acts. The “praise or celebration” definition of glorification is broader than “threats” and would cover more types of statements. Furthermore, stirring up either racial or religious hatred may be committed with impunity if the words or action is limited to within a “dwelling.”⁴⁸

Even with these limitations, the British offenses of inspiring racial or religious hatred have a much broader reach than, for instance, their U.S. counterparts. In a landmark American case, a city ordinance prohibited the display of a burning cross, swastika, or other symbol that would “arous[e] anger, alarm, or resentment in others” on the basis of race, color, creed, religion, or gender. The Supreme Court ruled that such specification of certain categories (e.g. race, color) amounted to “viewpoint discrimination,” and therefore held the ordinance unconstitutional.⁴⁹ Thus, American courts would likely find the U.K. statutory scheme expressly targeted to “racial” hatred to be unconstitutional. The U.S. Supreme Court has upheld a state statute banning cross burning “with the intent of intimidating any person or group of persons.”⁵⁰ Given the history of the practice in the area, the Court explained, it would constitute a threat. However, under this rationale only physical threats are covered: the Court defined intimidation as a threat of “bodily harm or death.”⁵¹ Statements or acts advocating economic harm would not be covered, such as hate speech in the workplace or Nazi-era advocacy to destroy Jewish stores. Finally, the cross-burning statute upheld by the U.S. Supreme Court covered threats aimed at *intimidating*

48. See Public Order Act, 1986, c. 64, §§ 18(2), 29B(4) (Eng.).

49. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 378 (1992).

50. *Virginia v. Black*, 538 U.S. 343, 348 (2003).

51. *Id.*, at 360. However, the Court held the statute unconstitutional due to a provision that burning a cross would be prima facie evidence of intent to intimidate.

a specific person or group. It did not explicitly address an actor's incitement of "hatred," an intangible emotion, which is the focus of both British offenses.⁵²

B. *Terrorism-Specific Restrictions on Expression*

1. *Inciting Acts of Terrorism Overseas*

The offense of inciting terrorism is narrower in scope than the glorification provision. However, it has proven useful when prosecuting statements directed at overseas and internet audiences.

Under section 59 of the Terrorism Act 2000, it is an offense to "incite[] another person to commit an act of terrorism wholly or partly outside the United Kingdom"⁵³ if the act is one of a list of specified crimes under the law of England and Wales. These crimes are murder, wounding with intent to do grievous bodily harm, poisoning, using explosives, and endangering life by damaging property.⁵⁴ Although the criminal act incited must be committed abroad, the *person* incited may (but need not) be in the U.K. at the time of incitement.⁵⁵

In the *Younes Tsouli* case, three young Muslim men pleaded guilty to inciting terrorism and to conspiracy to defraud, in connection with websites and associated forums funded by credit card fraud.⁵⁶ The online content included videos of beheadings by terrorists and messages urging readers to kill non-Muslims.⁵⁷ Contributors to the chat forums exchanged information on terrorist training.⁵⁸ Of the three appellants, even the one most involved with the websites did not post videos himself; neither did he author the training tips.⁵⁹ He did, however, make comments on others' posts, such as "Proceed with Allah's blessing, blood, blood and destruction, destruction."⁶⁰ On appeal, the convictions were left in place.⁶¹

52. The offense of stirring up religious hatred in the U.K. reaches only "threatening" speech. See Public Order Act, 1986, c. 64, § 29B(1) (Eng.). In the U.S., the constitutionality of restrictions on religious speech is complicated by the inter-relationship of the First Amendment's Free Exercise and Establishment clauses. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

53. Terrorism Act, 2000, c. 11, § 59(1) (Eng.).

54. See *id.* § 59(2). Parallel provisions cover inciting similar acts criminalized under the laws of Northern Ireland and Scotland. See *id.* § 60 (N. Ir.); *id.* § 61 (Scot.).

55. See *id.* § 59(4). Persons "acting on behalf of, or holding office under, the Crown" are exempt from liability. *Id.* § 59(5).

56. Attorney General's References Nos. 85, 86 and 87 of 2007 (*Younes Tsouli and Others*), [2007] EWCA (Crim) 3300, [2008] 2 Cr. App. R(S). 45 (Eng.).

57. *Id.* [26].

58. *Id.*

59. See *id.* [29].

60. *Id.* [17].

61. The Court ruled that the sentences (ranging from six-and-a-half to ten years' imprisonment) were unduly lenient. *Id.* [41]. It further held that a sentence of life imprisonment (mandatory for murder convictions) was not mandatory for the offence of incitement to murder. See *id.* [35].

The major limitation of this offense is its restriction to terrorism committed overseas. The fact that only certain specified crimes may be incited could also be seen as a limitation. In contrast, this can be viewed as a praiseworthy attempt to clarify and contain an incursion on expression. The courts may not choose to use inciting terrorism abroad as a proxy for the glorification offense. The Court of Appeal stated that the material on the *Younes Tsouli* websites were “substantially more serious” than the speeches by El-Faisal and Abu Hamza.⁶² It noted the lower court’s finding that while the website material might count as glorification, “much of it went a good deal further than that and amounted to an incitement to commit murder.”⁶³ Thus, the Court of Appeal seems to view glorification as a separate offense, involving more generalized statements than direct incitement of crimes.

2. Possession or Collection of Terrorist Material

Two provisions of the Terrorism Act 2000 cover expression after it has been documented or otherwise placed in some tangible form. One has been narrowed by the House of Lords in a manner that should be replicated for the glorification offense.

Section 57 of the Terrorism Act 2000 criminalizes “possess[ing] an article in circumstances which give rise to a reasonable suspicion that [the] possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.”⁶⁴ It is a defense to prove that possession was not for such a purpose.⁶⁵ Under section 58 of the Terrorism Act 2000,

- (1) A person commits an offence if—
 - (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
 - (b) he possesses a document or record containing information of that kind.⁶⁶

A defense is provided for those who have a reasonable excuse for their action.⁶⁷

Although the two sections overlap, there are at least four differences. First, section 57 covers only possession, while section 58 covers three ac-

62. *See id.* [40].

63. *Id.* [24].

64. Terrorism Act, 2000, c. 11, § 57(1) (Eng.).

65. *See id.* § 57(2).

66. *Id.* § 58(1). The Terrorism Act 2006 criminalizes disseminating publications that fall under section 58 of the 2000 Act. Terrorism Act, 2006, c. 11, § 2(3)(b) (Eng.).

67. Terrorism Act, 2000, c. 11, § 58(3) (Eng.). The House of Lords has clarified this defense, stating that a non-terrorist but illegal purpose (such as murder) cannot serve as a reasonable excuse. Neither can mental illness. *See R v. G.*, [2009] UKHL 13, [2009] 2 Crim. App. 4, [73]–[79], [87]–[88] (appeal taken from Eng.) (*overruling in part R v. K.*, [2008] EWCA (Crim) 185, [2008] Q.B. 827 (Eng.)) (U.K.); *see also infra* note 81.

tions: possession, collection, and record-making.⁶⁸ Second, section 57 covers instigation of terrorist acts, as well as their preparation and commission.⁶⁹ Third, the focus of section 57 is on the possessor's purpose, while section 58 focuses on whether the material *itself* is likely to be useful for terrorism (irrespective of the person's intent).⁷⁰ Fourth, section 57 covers a wider range of material; it covers any "article,"⁷¹ which the statute defines as "includ[ing] substance and any other thing."⁷² Section 58, however, covers only documents or records (including photographs or electronic records).⁷³ Therefore, as the House of Lords has stated, possession of a document or record could fall under both sections 57 and 58.⁷⁴

Unlike glorification, both these provisions allow convictions for possession of statements created by someone other than the accused. In that sense, they have a broader reach than the glorification offense. However, the House of Lords has ruled that material falling under section 58 must contain information likely to provide *practical* assistance to a person committing or preparing a terrorist act:⁷⁵ "the information must, of its very nature, be designed to provide practical assistance,"⁷⁶ that is, not items such as maps that can also be used for legal, everyday purposes. This practical assistance requirement is drawn from a prior Court of Appeal opinion, which further stated: "A document that simply encourages the commission of acts of terrorism does not fall within section 58."⁷⁷

These limitations are highlighted by the case of Samina Malik, a Muslim woman in her twenties who was prosecuted under sections 57 and 58.⁷⁸ She was acquitted of the former charge, but was the first woman convicted of a section 58 offense.⁷⁹ The charges were based on e-mail correspondence and other material found on her home computer's hard drive. She had downloaded, among other things, two weapons manuals, "The Mujahideen Poisons Handbook," and "[W]hat Role can Sisters Play in Jihad?"⁸⁰ Malik stated that she had been influenced by Abu Hamza but had later regretted this and had not sought out terrorist material for the last two years. She

68. Terrorism Act, 2000, c. 11, §§ 57, 58 (Eng.).

69. *Id.* § 57. See also *R v. M.*, [2007] EWCA (Crim) 298, [22], [36] (Eng.).

70. Terrorism Act, 2000, c. 11, §§ 57, 58 (Eng.). See also *R v. Rowe*, [2007] EWCA (Crim) 635, [2007] Q.B. 975 (C.A.), [35] ("Section 57 includes a specific intention, section 58 does not.") (Eng.).

71. Terrorism Act, 2000, c. 11, § 57 (Eng.).

72. *Id.* § 121.

73. See *id.* § 58(2).

74. See *R v. G.* [2009] UKHL 13, [2009] Crim. App.4, [59] (appeal taken from Eng.) (U.K.). The House of Lords also described the elements necessary to bring a conviction under sections 57 and 58. See *id.* [46]–[54].

75. See *id.* [43], [50].

76. *Id.* [43].

77. *R v. K.*, [2008] EWCA (Crim) 185, [2008] Q.B. 827 (C.A.), [13] (Eng.).

78. *R v. Malik*, [2008] EWCA (Crim) 1450 (Eng.).

79. See 'Lyrical Terrorist' Wins Appeal, BBC, June 17, 2008, http://news.bbc.co.uk/2/hi/uk_news/7459180.stm.

80. See *Malik*, [2008] EWCA (Crim) 1450, [12], [26].

claimed that she had downloaded the documents for writing poetry and out of curiosity.⁸¹

The Court of Appeal found that only some of the documents fell under section 58 and quashed the conviction because the jury had not been properly instructed on the practical assistance requirement.⁸² Part V.A of this article explores whether Malik's poetry could fall under the glorification offense. Note, however, that her poems would not fall under section 58 because of the judicially articulated practical assistance requirement. Nor would a section 57 conviction be likely; if the jury did not find the necessary terrorist purpose in possessing weapons manuals, it would be even less likely to find it in poetry.

V. RECOMMENDATIONS

A. *The Dangers of Criminalizing Glorification*

Statements glorifying terrorism can often be successfully prosecuted under more narrowly defined statutory provisions. In fact, Abu Hamza and El-Faisal were convicted for glorifying statements under statutes that are not terrorism-related. The glorification offense goes further than these other offenses in covering broad, generalized approbation for terrorism. In that sense, the offense does fill a gap in the existing law. However, it goes too far in filling that gap and creates an undue constraint on expression. Furthermore, the very existence of this offense can exert undue influence on terrorism prosecutions, as in the case of Samina Malik.

Malik, the "lyrical terrorist," was not charged with glorifying terrorism through her poetry, but for the possession and collection of documents she had not created herself. There were several references to terrorism in Malik's personal life. One of her listed interests on a social networking site was "Helping the mujaheddin in any way which I can."⁸³ She was also linked with a man who pleaded guilty to several terrorism-related charges; in fact, Malik was initially charged with him, and her indictment was later severed.⁸⁴ Malik had e-mailed him about how to bypass airport security, drawing on her observations while working in a bookshop at Heathrow. She signed the e-mail, "A stranger awaiting martyrdom."⁸⁵

81. See *id.* [4], [15]–[16]. With respect to such an "out of curiosity" defense, the House of Lords has stated that what is a reasonable excuse under section 58(3) must be determined on a case by case basis. See *R v. G.*, [2009] UKHL 13, [2009] Crim. App. 4, [83] (appeal taken from Eng.) (U.K.). The potential success of such a defense is therefore unclear.

82. See Malik, [2008] EWCA (Crim) 1450, [26]–[28], [43].

83. See Haroon Siddique, "Lyrical Terrorist Convicted over Hate Records," *GUARDIAN.CO.UK*, Nov. 8, 2007, available at <http://www.guardian.co.uk/uk/2007/nov/08/terrorism.world>.

84. See *R v. Qureshi*, [2008] EWCA (Crim) 1054, [7] (Eng.).

85. See Dominic Casciani, "The Terrorist and the Shop Girl," *BBC*, Jan. 8, 2008, http://news.bbc.co.uk/2/hi/uk_news/7177702.stm.

Malik's poetry would likely fit the statutory definition of glorification if the poems had been "published,"⁸⁶ instead of remaining on her computer hard drive. One poem, titled "The Living Martyrs," stated: "Let us make Jihad / Move to the front line / To chop chop head of kuffar swine."⁸⁷ Another poem, titled "How to Behead," contained the following lines: "It's better to have at least two or three brothers by your side / Who can hold the fool / Because as soon as the warm sharp knife / Touches his naked flesh / He'll come to know what'll happen."⁸⁸

The existence of the glorification offense may legitimize inquiry even into expression that falls outside the (very broad) ambit of the provision. For instance, Malik's poems were not "published" to anyone besides herself and so could not give rise to a glorification prosecution. Despite this legal reality, media accounts of her trial focused largely on her poetry, which was not a basis for her charges.⁸⁹ Jurors may be influenced by the accused's expressive statements, even in cases that have nothing to do with glorification.

Any offense criminalizing expression should be tied to tangible effects as far as possible. This would permit fair prosecutions of terrorist suspects while safeguarding free expression in a democratic society. One step in the right direction is the judiciary's creation of a practical assistance requirement for section 58 of the Terrorism Act 2000.⁹⁰ Offenses targeting expression should either have a similar requirement of giving out practical information, or should be narrowly targeted to inciting specified crimes. The U.S. seems to follow the latter model quite successfully.

B. *Requiring Intent Unless the Statement Provides Practical Assistance*

In the U.S. it is a violation of the First Amendment⁹¹ to limit pure advocacy, but the government can constitutionally limit incitement. Under the Supreme Court's "*Brandenburg* test," a government can limit only advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁹² The lawless action need not be violent, so the law could cover, for instance, inciting property damage. However, preaching an abstract doctrine is not enough. The illegal action must be both likely to occur and "directed" to that end; that is, it must be intended. Requiring intent may seem an unduly strict standard, but it can aid freedom of speech considerably. For example, the Danish cartoons of

86. See Terrorism Act, 2006, c. 11, § 20(2), (4) (defining publication of a statement in terms of public access to it) (Eng.).

87. Siddique, *supra* note 83.

88. Sean O'Neill, *Poetic Shop Assistant Guilty of Building Library of Terror*, TIMES ONLINE (London), Nov. 9, 2007, at 13, available at <http://www.timesonline.co.uk/tol/news/uk/crime/article2836243.ece>.

89. See, e.g., Siddique, *supra* note 83; O'Neill, *supra* note 88.

90. See *supra* Part IV.B.2.

91. U.S. CONST. amend. I.

92. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

the prophet Mohammed could be barred if the *Brandenburg* test required only recklessness. The publishers may have known the cartoons were likely to trigger violent reactions. However, the cartoons were not “directed to” incite such violence, so they cannot be banned under the *Brandenburg* test.

The *Brandenburg* test’s imminence requirement limits its application to terrorist speech. The U.S. Supreme Court has held that advocacy of violence does not satisfy the *Brandenburg* test when the violence occurs weeks or months after the speech.⁹³ Yet even direct, specific incitement of a terrorist act may be made months before the act is to occur. Some writers have therefore suggested dropping the imminence requirement for terrorist crimes.⁹⁴ Indeed, in terms of mens rea requirements, recklessness should be sufficient for giving out *practical* terrorism-related information. A U.S. appellate court has in fact held the *Brandenburg* test inapplicable to a book giving detailed instructions on contract killings, ruling this kind of speech unprotected by the First Amendment.⁹⁵ In the U.K., the judicially created practical assistance requirement for collection and possession could be exported to a new statutory offense. Such an offense could criminalize “providing information likely to provide practical assistance” for terrorist acts. For this, recklessness could be sufficient. However, when a statement gives no practical assistance, the prosecution should be required to show intent, as under the *Brandenburg* test.

C. Linking to Specified Crimes

Section 59 of the Terrorism Act 2000 criminalizes inciting terrorism overseas if the incited act is one of several listed crimes. This provision could be expanded to include acts occurring within the U.K., and the list of crimes could be increased. Specifying crimes focuses on tangible harmful effects and not merely on expression that is distasteful but not harmful.

Hate crimes legislation is an example of linking expression with a specific crime. As described in Part IV.A.2 above, “stirring up hatred” is not criminalized in the U.S. due to First Amendment concerns. However, U.S. states may constitutionally increase sentences for crimes motivated by bias toward the victim’s group-membership, such as race or religion.⁹⁶ Similar

93. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (“An advocate must be free to stimulate his audience with spontaneous and emotional appeals When such appeals do not incite lawless action, they must be regarded as protected speech.”).

94. See generally Robert S. Tanenbaum, *Preaching Terror: Free Speech or Wartime Incitement*, 55 AM. U. L. REV. 785 (2006).

95. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 244–45 (4th Cir. 1997) (citing *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982)). *Id.* at 246 (“[T]he law is now well established that the First Amendment, and *Brandenburg’s* “imminence” requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting”).

96. See *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993) (“[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.” (quoting *Dawson v. Delaware*, 503 U.S. 159, 165 (1992))).

statutes in the U.K. permit penalty enhancement for bias-motivated crimes.⁹⁷ The approach to hate crimes in both countries punishes expressive acts, but only when tied to a narrowly defined criminal offense.

The U.S. approach to terrorist speech similarly links it to specified crimes. This approach proved successful in the case of Ali Al-Timimi, an American who co-founded a center for Islamic instruction in Virginia. In September 2001, he led a secret meeting of a group of young men, telling them that the 9/11 attacks were justified and that they should fight against U.S. troops in Afghanistan. Some of the men were considering training with a State Department-designated Pakistani terrorist group. Al-Timimi spoke approvingly of the group and later gave advice on how to travel there without drawing undue attention.⁹⁸ At another meeting the following month, Al-Timimi made similar remarks on the duty to fight in Afghanistan.⁹⁹ He was charged with several federal statutory offenses, including inducing others to use firearms in a crime of violence, inducing others to carry explosives in commission of a felony, soliciting others to levy war against the U.S., and inducing others to conspire to levy war.¹⁰⁰ He was convicted on all counts and sentenced to life imprisonment.¹⁰¹

None of the charges against Al-Timimi involved glorifying terrorism. He was nevertheless convicted and sentenced to life imprisonment for his verbal statements. This demonstrates that a glorification offense is not necessary, and that narrower offenses linked to specific crimes can protect against terrorism. Two crimes of which Al-Timimi was convicted are especially worth noting. The first, solicitation to commit a crime of violence, requires that the defendant, with intent, “solicits, commands, induces, or otherwise endeavors to persuade” the commission of a felony involving illegal physical force.¹⁰² Felonies are, of course, specified in ordinary criminal law. The second crime, seditious conspiracy, criminalizes “conspir[ing] to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority

97. See, e.g., Crime and Disorder Act, 1998, c. 37, §§ 28–32 (providing mandatory and specific sentence enhancements when listed crimes are “racially aggravated”) (Eng.); *id.* § 82 (Courts must consider all other crimes as more serious if racially aggravated.).

98. The court decision in the Al-Timimi case was not obtainable. The facts are therefore drawn from his grand jury indictment (he was convicted on all counts listed) and a related case that convicted nine of his followers of terrorism-related charges. See Indictment of Defendant at 5–6, *United States v. Al-Timimi*, No. 1:04cr385 (E.D. Va. 2004); *United States v. Kahn*, 309 F. Supp. 2d 789, 809–11 (E.D. Va. 2004), *aff’d in part* 461 F.3d 477 (4th Cir. 2006); see also Tanenbaum, *supra* note 94, at 786 n.1 (stating that “no formal court opinion” was available).

99. See Indictment of Defendant at 7, *United States v. Al-Timimi*, No. 1:04cr385 (E.D. Va. 2004).

100. See *id.* at 1.

101. On appeal, his conviction was vacated and remanded to consider issues related to government surveillance and classified evidence. See *United States v. Al-Timimi*, No. 05-4761, 2006 US App. LEXIS 32554, at *1–2 (4th Cir. Apr. 25, 2006).

102. 18 U.S.C. § 373(a) (2006).

thereof.”¹⁰³ This crime does not link to ordinary criminal law, but is more narrowly defined than merely linking to a broad definition of terrorism.

The U.S. definition of terrorism itself is tied to ordinary criminal law. Although several definitions seem to be used in various statutes and executive agencies,¹⁰⁴ at least one statutory definition is tied to acts violating federal or state criminal law.¹⁰⁵ With regard to international terrorism, a “federal crime of terrorism” is defined as “an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and . . . is a violation of [several listed federal statutes].”¹⁰⁶ These statutes include offenses such as providing material support to terrorists or to terrorist organizations.¹⁰⁷ None of the listed offenses parallels the U.K. offense of encouraging terrorism.

VI. CONCLUSION

Although the U.K.’s offense of glorifying terrorism may fill a gap in the existing statutory scheme, its breadth and vagueness are problematic. It covers expression that need not be criminalized, and overlaps with more narrowly tailored offenses that have been successfully used in terrorism prosecutions. The very existence of this offense may lead to unwarranted scrutiny into expression that should be protected in a democratic society, however repulsive it may be. Therefore, the glorification offense should be modified to more closely match the U.S. legal approach. It should be narrowly targeted to statements that either incite specific crimes or provide practical information. Such a provision would achieve a balance in safeguarding both property and principle, both life and liberty.

103. 18 U.S.C. § 2384 (2006).

104. Compare, e.g., DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 550 (2009) (defining “terrorism” as “[t]he calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological”), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf, and 22 U.S.C. § 2656f(d)(2) (2006) (applying to annual country reports on terrorism, and defining “terrorism” as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”).

105. Under this definition, terrorism must “appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.” 18 U.S.C. § 2331(1)(B), (5)(B) (2006). The acts and locations covered depend on whether the terrorism is international, see *id.* § 2331(1), or domestic, see *id.* § 2331(5). For both kinds of terrorism, the acts involved are defined as violations of federal or state criminal law. See *id.* § 2331(1)(A), (5)(A).

106. 18 U.S.C. § 2332b(g)(5) (2006).

107. See 18 U.S.C. §§ 2339A, 2339B (2006).

