NOTE

AN AMBIGUOUS RESPONSE TO A REAL THREAT: CRIMINALIZING THE GLORIFICATION OF TERRORISM IN BRITAIN

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I. INTRODUCTION

"Western society is decadent and immoral, and Muslims should seek to bring it to an end."

Following the suicide bombings in London on July 7, 2005,[1] 32 percent of British Muslims surveyed agreed with the above quotation, while 24 percent "expressed some sympathy" with the bombers' motives.[2] A year later, 7 percent of British Muslims surveyed stated that suicide bombings targeting civilians in the United Kingdom could be justified.[3] In different times, if such opinions were expressed publicly, these opinions might be considered distasteful but tolerable in the name of freedom of expression. In the aftermath of the July 2005 bombings, however, the potential for statements sympathizing with terrorists to incite—even indirectly—terrorist acts appeared to be a real threat requiring swift response. These survey results, which provide a snapshot of a minority of British Muslims' beliefs, raise the question: to what extent should British citizens be free to publicly glorify, praise, or celebrate terrorism when it may indirectly incite or encourage others to commit acts of terrorism? In March 2006, the U.K. Parliament (Parliament)

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1. On July 7, 2005, four suicide bombers affiliated with and inspired by al-Qaeda detonated bombs on the London Underground system and a London bus. These bombings are regarded as the first successful attacks by an Islamist extremist group against the United Kingdom. Fifty-two people were killed. *See infra* notes 87–90.

2. *See* Richard Woods & David Leppard, *How Liberal Britain Let Hate Flourish*, SUNDAY TIMES (London), Feb. 12, 2006, at 13.

3. *See* Alexandra Frean & Rajeev Syal, *Muslim Britain Split over 'Martyrs' of 7/7*, TIMES (London), July 4, 2006, at 1. In the same poll, 13 percent of those surveyed considered the July 7 suicide bombers as "martyrs." *Id.*

responded to this question by criminalizing "indirect encouragement" and "glorification" of terrorism.[4] The criminal statute, however, failed to clearly define which types of statements actually indirectly encourage terrorism and, therefore, constitute a violation.[5]

This criminalization of indirect encouragement, including glorification, of terrorism in the United Kingdom violates the principle of freedom of expression guaranteed by the European Convention on Human Rights (ECHR) because this criminalization is too ambiguous and discretionary to meet the test of legal certainty and is a disproportionate response to the threat of radicalization. Parliament should amend the criminal statute to provide more clarity regarding the prohibited actions. Part II of this Note examines the U.K. legislative process and the right to freedom of expression under Article 10 of the ECHR. Next, this Note analyzes the language of and justifications for section 1 of the Terrorism Act 2006 (section 1), which criminalizes statements that may indirectly encourage terrorism. Part III of this Note applies the European Court of Human Rights' case law to argue that section 1 is incompatible with the Article 10 of the ECHR, which provides for the right to freedom of expression. Finally, Part IV provides suggested amendments that Parliament can make to the Terrorism Act 2006 to provide a clearer definition of which statements constitute "indirect encouragement" of terrorism. This Note concludes that such changes, proposed through the amendments, would not only align the crime with the freedom of expression protected by the ECHR, but they would also expand the effectiveness of section 1 by improving the perceived legitimacy of the law itself, both domestically and internationally.

II. Background

The impact of section 1 on the right to freedom of expression in the United Kingdom must be understood in the context of Parliament's role as the supreme authority in the United Kingdom.[6] Parliament, rather than a constitution, guarantees the freedom of expression through the Human Rights Act 1998.[7] Further, in the aftermath of the July 7 bombings, Parliament passed the Terrorism

4. *See infra* Part II.C.
5. *See infra* Part III.A.
6. *See infra* notes 27–32 and accompanying text.
7. *See infra* notes 33–35 and accompanying text.

Act 2006, including section 1, which criminalizes indirect incitement of terrorism.[8]

A. *Parliamentary Supremacy and the Legislative Process in the United Kingdom*

The United Kingdom of Great Britain and Northern Ireland[9] Parliament is comprised of two Chambers—the House of Commons and the House of Lords—and the sovereign (or Monarch), who is currently Queen Elizabeth II.[10] The Monarch plays a primarily symbolic role in parliament, remaining "above politics" in most cases.[11] The House of Commons is comprised of 646 Ministers of Parliament (MP) who are elected by British citizens.[12] The House of Lords, however, is not an elected body.[13] Instead, it is comprised of clergy, hereditary peers whose positions are secured through lineage, and life peers who are appointed by the prime minister for a lifetime appointment.[14]

Upon introduction of a bill in either the House of Commons or the House of Lords, the respective Chamber discusses the bill under general debate ("second reading"); however, during this time, amendments to the bill are not permitted.[15] Following debate, a committee, consisting of a smaller number of MPs, considers the bill clause-by-clause, at which time specific amendments are debated and considered.[16] The committee, then, reports the bill back to the House, which considers the bill as a whole for further amendment.[17] After a final discussion on the bill without opportunity for amendment, the House votes on passage of the

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

9. The U.K.—or Britain, as it is commonly referred to—is comprised of Great Britain and Northern Ireland. Great Britain is itself comprised of England, Scotland, and Wales.

10. HOUSE OF COMMONS INFORMATION OFFICE, THE HOUSE OF COMMONS AND THE RIGHT TO VOTE, 2008, H.C. FS No. G1, at 2 (U.K.) [hereinafter THE HOUSE OF COMMONS AND THE RIGHT TO VOTE]; THE OFFICIAL WEBSITE OF THE BRITISH MONARCHY, http://www.royal.gov.uk/Home.aspx (last visited Mar. 18, 2011).

11. *See* ROBERT ROGERS & RHODI WALTERS, HOW PARLIAMENT WORKS 40 (6th ed. 2006).

12. One Minister of Parliament (MP) represents approximately 90,995 people. By comparison, the 435 United States Representatives each represent approximately 673,600 people. *Id.* at 21–22.

13. *Id.* at 34.

14. *See id.* at 35–38.

15. *See* HOUSE OF COMMONS INFORMATION OFFICE, PARLIAMENTARY STAGES OF A GOVERNMENT BILL, 2008, H.C. FS No. L1, at 4 (U.K.); *see also* ROGERS & WALTERS, *supra* note 11, at 209.

16. *See* HOUSE OF COMMONS INFORMATION OFFICE, *supra* note 15, at 5.

17. *See* ROGERS & WALTERS, *supra* note 11, at 203.

bill.[18] Once a bill is passed in one House, the bill moves to the other Chamber and undergoes a similar procedure.[19] If each Chamber passes differing versions of the bill, the legislation returns to the originating House for consideration of the differences.[20] At this point, the bill may "ping-pong" from House to House until an agreement is reached.[21] Once both Houses agree on the text of the bill, for the bill to become law or an "Act of parliament," the Queen is required to formally sign it through a process known as Royal Assent—the formal signature of the Queen is the third element of parliament.[22]

As a result of the differences in the composition and election of the two Houses, the House of Lords "tacitly recogni[z]es the right . . . of the House of Commons to see its will prevail most of the time."[23] The Parliament Acts 1911 and 1949 formally acknowledge this right of the House of Commons, by providing a method for a bill to become law *without* the House of Lords' consent.[24] An additional limitation on the House of Lords is based on an understanding between the two Houses known as the "Salisbury doctrine," which gives priority to a bill based on an election commitment made by the government party.[25] Although in practice the "Salisbury doctrine" cannot be enforced and does not prevent amendment by the House of Lords, the principle of the doctrine recognizes the importance of the Lords not preventing

18. *See* HOUSE OF COMMONS INFORMATION OFFICE, *supra* note 15, at 6.

19. ROGERS & WALTERS, *supra* note 11, at 203.

20. *See* HOUSE OF COMMONS INFORMATION OFFICE, *supra* note 15, at 7.

21. *See, e.g.*, Will Woodward, *Terror Bill Ping-Pong Over as Tory Peers Back 'Glorification' Clause*, GUARDIAN (London), Mar. 23, 2006, at 5 (describing the back and forth between Houses as a "game of parliamentary ping-pong"). *But see* ROGERS & WALTERS, *supra* note 11, at 243 (arguing that while the exchange between Houses can be indefinite, the process is less like "ping-pong" and more like "poker" given the political considerations).

22. Today, Royal Assent is largely symbolic, with the last sovereign who refused to sign a bill that passed both Chambers being Queen Anne in the early 1700s. *See* ROGERS & WALTERS, *supra* note 11, at 40.

23. *See id.* at 130.

24. Parliament Act, 1911, 2 Geo. 5, c. 13, § 2 (Eng.) *amended by* Parliament Act, 1949, 13 Geo. 6, c. 103, § 1 (Eng.). The Act requires the bill be approved by the House of Commons and be rejected by the House of Lords in two successive sessions amongst other minor requirements. The procedure is generally viewed as a "nuclear deterrent" and the House of Lords will generally concede to the Commons' amendments before the Parliament Acts are invoked. *See* ROGERS & WALTERS, *supra* note 11, at 246.

25. *See* HOUSE OF LORDS LIBRARY, THE SALISBURY DOCTRINE, 2006, H.L. LLN 2006/006, at 1 (U.K.). Prior to elections, each party publishes a manifesto, committing itself to certain principles and reforms should the party be elected. The election manifesto of the majority party generally becomes the basis for the initial legislative agenda. *See* ROGERS & WALTERS, *supra* note 11, at 192.

the democratically elected MPs in the House of Commons from fulfilling these commitments to the public.[26]

Parliament is the highest legislative authority in the country; its power does not devolve from a constitution, but rather from the sovereign authority of the Monarch.[27] An Act of Parliament is effectively the supreme law of the land and cannot be overturned by any judicial court due to the courts' lack of judicial review over legislation.[28] Current Acts of Parliament, however, cannot bind future parliaments, which are free to amend or repeal previous Acts.[29]

While Acts of Parliament are the supreme law of the land, there are some practical limitations to parliament's legislative supremacy, including the Human Rights Act 1998 (HRA), which enables a U.K. court to determine if an Act of Parliament violates an individual right guaranteed by the ECHR.[30] Because U.K. courts lack the inherent or delegated power to overturn an Act of Parliament, if an Act is found to violate ECHR rights, the U.K. court may issue a "declaration of incompatibility."[31] When a declaration of incompatibility occurs, parliament can address the issue, but is not bound to do so.[32]

B. *The Right to Freedom of Expression in the United Kingdom*

In the United Kingdom, the right to freedom of expression is not an immutable guarantee protected by a constitution; rather, it is secured to British citizens through Acts of Parliament.[33] Specifically, the HRA incorporates the ECHR into U.K. domestic law by

26. *See* ROGERS & WALTERS, *supra* note 11, at 246; HOUSE OF COMMONS INFORMATION OFFICE, *supra* note 10, at 2.

27. ROGERS & WALTERS, *supra* note 11, at 80–81.

28. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 186–87 (2006). Judicial review is a court's power to review and invalidate legislative and executive actions as unconstitutional. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

29. *See* ROGERS & WALTERS, *supra* note 11, at 81.

30. *See* Human Rights Act (HRA), 1998, c. 42, § 4 (Eng.). For additional details on the European Convention on Human Rights (ECHR), see *infra* note 35 and accompanying text.

31. *See* Human Rights Act § 4; ROGERS & WALTERS, *supra* note 11, at 83.

32. *See* KROTOSZYNSKI, *supra* note 28, at 184. A declaration of incompatibility empowers a Minister of the Crown (an MP selected to serve in the Monarch's government) to offer a fast tracked "remedial order" that amends the offending legislation. *See* Human Rights Act § 10. Of course, any MP is also free to offer legislation through regular order that removes the incompatibility.

33. *See* KROTOSZYNSKI, *supra* note 28, at 183–84, 186 (arguing that these absences do not accurately predict the actual disposition of human rights, in general, or free speech, in particular, within the United Kingdom).

prohibiting "a public authority [from acting] in a way which is incompatible with a Convention right."[34] The ECHR secures a number of individual rights and freedoms, including the freedom of expression.[35] The HRA permits an individual to bring a claim in a U.K. court challenging a public act that violates a right secured by the ECHR.[36] The HRA requires any Act of Parliament to be read and given effect by U.K. courts in a way compatible with the ECHR, if possible.[37] If such a reading is not possible, the U.K. court may issue a declaration of incompatibility.[38] At least one decision by the European Court of Human Rights (the European Court), however, has held that a declaration of incompatibility is an ineffective remedy to address violations of ECHR rights because there is no guarantee that parliament will amend the offending legislation.[39]

The HRA requires U.K. courts to consider not only individual rights protected by the ECHR, but also relevant judgments by the European Court.[40] European Court decisions, however, only bind the parties involved in the particular case in international law. Each state is free to implement decisions in accordance with its own legal system.[41]

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34. Human Rights Act § 6(1). As with all other Acts, Parliament could repeal the HRA, preserving the legislative supremacy that Parliament claims; however, such repeal would be politically difficult. *See* ROGERS & WALTERS, *supra* note 11, at 85; KROTOSZYNSKI, *supra* note 28, at 187.

35. *See* Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1, 10, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. The ECHR was established in 1950 following World War II to protect a number of fundamental rights and freedoms. It includes the right to life, freedom of religion and expression, an abolishment of the death penalty, as well as prohibitions against torture and discrimination. This convention established the European Court of Human Rights (European Court) as an enforcement mechanism. All forty-seven members of the Council of Europe are signatories of the convention.

36. *See* Human Rights Act § 7.

37. *See id.* § 3.

38. *See supra* notes 30–32. Since 2000, twenty-six findings of incompatibility have been made, sixteen of which are final and not subject to further appeal. RESPONDING TO HUMAN RIGHTS JUDGMENTS: GOVERNMENT RESPONSE TO THE JOINT COMMITTEE ON HUMAN RIGHTS' THIRTY-FIRST REPORT OF SESSION 2007–08, 2009, Cm. 7524, at 5 (U.K.).

39. *See* Burden v. United Kingdom, 2006 Eur. Ct. H.R. 1064, ¶ 36 (2006) (implying that the process may be found effective in the future through "evidence of a long-standing and established practice" of parliament amending offending legislation in response to declarations of incompatibility).

40. *See* Human Rights Act § 2. Prior to the passage of the HRA, the European Court was the primary venue to challenge compliance of the Contracting Parties with the convention. *See* European Convention on Human Rights, *supra* note 35, art. 19.

41. *See* DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 26 (2d ed. 1995).

Article 10 of the ECHR ensures individuals the right to freedom of expression, which includes the right "to receive and impart information and ideas."[42] The European Court has stated that the freedom of expression constitutes an "essential foundation[ ]" of a democratic society, even when the information or ideas "offend, shock or disturb the State or any sector of the population."[43] This freedom, however, is not absolute and may be restricted or criminalized if a state can demonstrate that the specific restriction meets certain exceptions.[44] A state will not be found in violation of the ECHR if the restriction on the freedom of expression is prescribed by law and furthers an identified legitimate aim necessary in a democratic society.[45]

1. Restrictions on Freedom of Expression Must Be Sufficiently Prescribed by Law.

First, a permissible restriction on freedom of expression must be prescribed by law; this requires more than merely being set forth in, or based on, domestic statutory, regulatory, or common law.[46] To meet the requirement, a restriction must also meet the test of legal certainty: it must be "accessible" and "foreseeable."[47] The term "accessible" means that a person must have an indication of the applicable legal rules in a given circumstance.[48] The term "foreseeable" means that a law must be precise enough that a citizen can reasonably foresee the consequences of his actions in any given circumstance, although absolute certainty regarding the consequences is not required.[49]

Broad restrictions may be too vague to be considered legally certain under this test. For example, in *Hashman & Harrup v. United Kingdom*, the challenged restriction, which prohibited the individuals from acting in a way *contra bonos mores*—behavior considered "wrong rather than right in the judgment of the majority of contemporary fellow citizens,"—was found to be too vague and thus not "prescribed by law."[50] In *Hashman*, the U.K. government

42. European Convention on Human Rights, *supra* note 35, art. 10.
43. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).
44. *See* European Convention on Human Rights, *supra* note 35, art. 10, ¶ 2.
45. *See id.* art. 10.
46. *See* Silver v. United Kingdom, 61 Eur. Ct. H.R. (ser. A) at 33 (1983).
47. *See* Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) at 31 (1979).
48. *See id.* at 31.
49. *See Silver*, 61 Eur. Ct. H.R. (ser. A) at 33 (noting with regard to prison guidelines that it would "scarcely be possible to formulate a law to cover every eventuality" when screening over ten million pieces of mail per year).
50. *See* Hashman v. United Kingdom, 1999-VIII Eur. Ct. H.R. 1, 15–16.

acknowledged that such a restriction was broad, but argued it was necessary given the goal of restricting "anti-social behavior," which could change over time.[51] The European Court reasoned that such a vague definition of prohibited conduct, which is dependent on the subjective view of citizens, would not allow an individual to reasonably regulate his conduct and, therefore, the definition violated Article 10 of the ECHR.[52]

If a law restricting the freedom of expression provides the state with discretion to punish certain speech, the scope and manner in which the state may exercise such discretion must be clearly defined to avoid arbitrary interference.[53] General, unrestrained discretion to prosecute any speech will not meet the requirements of the ECHR.[54] In *Malone v. United Kingdom*, the European Court analyzed a telephone tapping statute and accompanying regulations.[55] In that case, the law afforded the executive wide discretion to intercept communications for the purpose of detecting "serious crime."[56] Although there were detailed procedures available to the police, the European Court found the enabling statute "obscure and open to differing interpretations" to the average citizen, in part due to the vague language of the enabling legislation.[57] This vagueness violated the ECHR because the law did not indicate with "reasonable clarity" how the executive discretion would be exercised, nor the scope of the discretion conferred on public authorities.[58]

2. Restrictions on Freedom of Expression Must Further a Legitimate Aim Identified by the Government.

The second part of the test to determine whether a restriction on freedom of expression violates the ECHR is whether the law is in furtherance of a legitimate aim.[59] Article 10 of the ECHR

51. *Id.* at 13.

52. *See id.* at 14–16.

53. *See* Malone v. United Kingdom, 82 Eur. Ct. H.R. (ser. A) at 32 (1984); *Silver*, 61 Eur. Ct. H.R. (ser. A) at 33.

54. *See* HARRIS ET AL., *supra* note 41, at 346.

55. *See Malone*, 82 Eur. Ct. H.R. (ser. A) at 28 (analyzing the statute's compliance with Article 8 of the ECHR, which protects the right to privacy subject to certain restrictions "prescribed by law"). The European Court interprets the phrase "prescribed by law" in Article 8 with the same general principles as those applied to the comparable phrase in Article 10. *See id.* at 31.

56. *See id.* at 21.

57. *See id.* at 36.

58. *See id.*

59. *See* CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 226 (4th ed. 2006).

includes a list of broad legitimate aims, including national security, public safety, prevention of disorder or crime, and protection of morals.[60] Generally, the European Court is willing to accept a state's assessment that a particular restriction is designed for one of these legitimate aims.[61] For example, in *Handyside v. United Kingdom*, the European Court accepted the seizure of a book targeted at schoolchildren that included advice on sex and drug use as being in pursuit of the legitimate aim of the protection of morals.[62] In the rare case where the European Court finds that a restriction is not for a legitimate aim, it is usually clear from all of the facts of the case that the restriction could not serve the proposed legitimate aim.[63] While the European Court rarely examines this second prong in-depth, it looks more closely at the third prong of the test: whether the restriction is "necessary in a democratic society" to achieve that legitimate aim.[64]

3. Restrictions on Freedom of Expression Must Be Necessary in a Democratic Society to Achieve the Identified Aim.

Aside from having a legitimate aim for interfering with an individual's right, the state must also demonstrate that the restriction is necessary in a democratic society to achieve that aim.[65] The European Court recognizes that a state may be in the best position to determine its interests and thus, a certain "margin of appreciation" is given to a state assessment of whether a restriction is necessary.[66] This principle, however, is, at best, an ambiguous framework for the European Court to balance the broad interests of the state with the personal rights of individuals.[67]

The European Court has interpreted the word "necessary" neither strictly nor generously—finding the term "not synonymous with 'indispensable,'" but not as lenient as the terms "ordinary," "reasonable," or "desirable."[68] Rather, there are two tests to determine whether a restriction is necessary in a democratic society:

60. European Convention on Human Rights, *supra* note 35, art. 10.

61. *See* Harris et al., *supra* note 41, at 348.

62. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 15–16, 21 (1976).

63. *See, e.g.*, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 24 (1981) (finding criminalization of certain sexual activities between consenting male adults in Northern Ireland was not in pursuit of a legitimate aim—the protection of morals—where the acts were legal in the rest of the United Kingdom).

64. *See* OVEY & WHITE, *supra* note 59, at 232.

65. *See* HARRIS ET AL., *supra* note 41, at 349.

66. *See id.* at 11–12, 349.

67. *See* OVEY & WHITE, *supra* note 59, at 233–34.

68. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

first, the law must correspond to a "pressing social need;"[69] second, the particular restriction must be "proportionate to the legitimate aim pursued."[70]

Under the first test—whether there is a pressing social need—when the stated need is national security, the European Court must be satisfied that "there exist adequate and effective guarantees against abuse."[71] More specifically, in applying these principles to cases in which the pressing social need is preventing incitement of violence, the European Court will examine whether the statement has demonstrable harmful effects.[72] In *Surek & Ozdemir v. Turkey*, the leader of an illegal organization advocated "intransigence" against the Turkish government.[73] The European Court found that Turkey violated Article 10 of the ECHR by criminalizing such statements because there was no pressing social need absent an indication that the statements could be construed as an incitement to violence.[74]

Similarly, in *Ozturk v. Turkey*, the author of a book that indirectly gave moral support to Marxism, which was then illegal in Turkey, was convicted of "inciting the people to hatred and hostility."[75] The European Court found, however, that the book could not "have had the harmful effect on the prevention of disorder and crime" that was argued by Turkey.[76] This lack of harmful effect was in part because the book had been available to the public for years and there was no evidence that it had "aggravated" a threat of disorder during that time.[77] Without such a threat, the European Court found there was no pressing social need to punish the author.[78]

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69. *Compare id.* at 22–25 (finding government seizure of a book targeting children containing passages promoting sex and drug use served a necessary social purpose of preventing the depravation and corruption of children's morals), *with* Smith v. United Kingdom, 1999-VI Eur. Ct. H.R. 45, 81, 87 (1999) (finding government policy against homosexuals in the military did not serve a necessary social purpose of maintaining national security through an effective fighting force).

70. *See Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23.

71. *See* Klass v. Germany, 28 Eur. Ct. H.R. (ser. A) at 23 (1978).

72. *See generally* Surek v. Turkey, App. Nos. 23927/94 & 24277/94, Eur. Ct. H.R. (1999); Ozturk v. Turkey, 1999-VI Eur. Ct. H.R. 277, 306–07 (1999).

73. *See Surek*, App. Nos. 23927/94 & 24277/94, ¶ 61. The leader made statements such as: "The war will go on until there is only one single individual left on our side"; and: "If [the Turkish] want us to leave our territory, they must know we will never agree to it." *Id.*

74. *See id.*

75. *See Ozturk*, 1999-VI Eur. Ct. H.R. at 286–88.

76. *Id.* at 306.

77. *See id.*

78. *See id.* at 307.

The second test of the European Court to determine if a challenged law is necessary in a democratic society is whether the restriction is proportionate to the pressing social need.[79] The principle of proportionality applies throughout the ECHR, which recognizes the need to balance individual rights with general state interests.[80] One measure of proportionality is the degree to which the restriction is effective in achieving its stated goal.[81] An additional measure of proportionality is whether there is an "alternative, less intrusive" means of protecting the social need.[82]

Additionally, the European Court will examine proportionality in terms of the potential punishment measured against the crime itself.[83] If the punishment is disproportionate to the harm caused by the statement, it is unlikely that the European Court will find that the restriction is necessary in a democratic society.[84] In *Arslan v. Turkey*, the court found that twenty months imprisonment for publication of a book that glorified Kurdish rebels fighting in Turkey was disproportionate.[85] The European Court found it particularly significant that the book did not constitute an incitement to violence, "a factor which is essential to take into consideration" when determining proportionality.[86]

C. *The History of the Terrorism Act 2006*

In the early morning of July 7, 2005, four suicide bombers detonated bombs that killed fifty-two people on the London Underground system and a London bus.[87] Hundreds of other individuals were injured in the first successful attack within the United Kingdom by an Islamist terrorist cell.[88] Just two weeks later, on July 21,

79. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

80. *See* HARRIS ET AL., *supra* note 41, at 10–11.

81. *See* Observer v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 34 (1991) (finding it unnecessary to protect confidential information by restricting freedom of expression where the material was already public); HARRIS ET AL., *supra* note 41, at 359.

82. HARRIS ET AL., *supra* note 41, at 359; *see also* Campbell v. United Kingdom, 233 Eur. Ct. H.R. (ser. A) at 22 (1992) (finding that the government opening every piece of prisoner mail to detect fraud was disproportionate because the risk was "negligible" and could have been accomplished if narrowly based on reasonable suspicion).

83. *See* HARRIS ET AL., *supra* note 41, at 357–58.

84. *See* Arslan v. Turkey, App. No. 23462/94, ¶ 49, Eur. Ct. H.R. (1999) ("[T]he nature and severity of the penalties imposed are also factors to be taken into account when assessing whether the interference was proportionate.").

85. *See id.*

86. *See id.*

87. INTELLIGENCE & SECURITY COMMITTEE, REPORT INTO THE LONDON TERRORIST ATTACKS ON 7 JULY 2005, 2006, Cm. 6785, at 2 (U.K.).

88. *Id.* at 8.

four men unsuccessfully attempted to detonate four bombs against similar targets.[89] Although the two plots were developed independently, they were both found to have been "inspired and controlled by al-Qaeda."[90]

On August 5, 2005, Prime Minister Tony Blair announced at a press conference the government's intention to introduce a counter-terrorism bill in Parliament to address issues arising from the July 7 (7/7) terrorist acts.[91] The bill, which would become known as the Terrorism Act 2006, was introduced in the House of Commons on October 12, 2005.[92] The bill included provisions on the length of pre-charge detention of terrorist suspects, as well as expanded search, seizure, and investigatory powers for police officers.[93] One of the more controversial sections, garnering heated debate in Parliament and the press,[94] was section 1, which criminalized "indirect encouragement" of acts of terrorism, including the "glorifi[cation]" of terrorism.[95] The government justified section 1 not only based on the terrorist acts of 7/7, but also on the link between extremist speech and the radicalization of young men into terrorists.[96]

Over the next five months following the introduction of the bill, the House of Commons and the House of Lords spent hours debating the bill and in particular, section 1.[97] Disagreements about the appropriate extent of section 1 resulted in the bill being exchanged between the two chambers multiple times.[98] Specifically, some individuals in the House of Lords sought to remove the "glorification" provision from the House of Chambers' version, arguing it was too vague.[99] Ultimately, the House of Lords

89. *See* Nicola Woolcock, *Failed Bombers Will Serve at Least 40 Years for Terror Plot*, TIMES (London), July 12, 2007, at 13.

90. Dominic Casciani, *21/7: Was it Linked to 7/7?*, BBC NEWS (July 11, 2007), http://news.bbc.co.uk/2/hi/uk_news/6249118.stm.

91. Prime Minister Tony Blair, PMs Press Conference (Aug. 5, 2005), *available at* http://www.number10.gov.uk/Page8041.

92. HOUSE OF COMMONS LIBRARY, THE TERRORISM BILL 2005–06, H.C. Research Paper 05/66, at 1.

93. *See generally* Terrorism Act, 2006, c. 11 (Eng.).

94. *See* ALUN JONES ET AL., BLACKSTONE'S GUIDE TO THE TERRORISM ACT 2006, at 17 (2006).

95. Terrorism Act, 2006, c. 11, § 1.

96. *See infra* Part II.E.3.

97. For a discussion of the debates on section 1, see *infra* Part II.E.

98. *See* Woodward, *supra* note 21, at 5.

99. 680 PARL. DEB., H.L. (5th ser.) (2005) 248 (U.K.) (statement of Lord Goodhart) ("There are two possible interpretations involved in including references to glorification . . . [and] it follows that there is enormous uncertainty about the effect of the Bill.").

relented to the House of Chambers' version of section 1 when it became apparent that any further dissent would prolong passage of the overall bill by at least nine months.[100] Additionally, the House of Lords gave some consideration to the fact that outlawing "glorification" of terrorism was a one-line election commitment made by the Labour party prior to the 2005 election.[101] The Terrorism Act 2006 received Royal Assent on March 30, 2006.[102]

D. *Section 1: Indirect Encouragement and Glorification of Terrorism*

Section 1 makes it a criminal offense for an individual to publish a "statement" if he intends for "members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism . . . ."[103] The crime also covers individuals who make statements recklessly, which is when they make a statement that risks encouraging or inciting members of the public to commit acts of terrorism and the person making the statement is aware, it is unreasonable to take such a risk.[104] Indirect incitement of terrorism under section 1 is punishable by imprisonment for up to seven years.[105]

A criminalized "statement" under section 1 is broadly defined as those that are "likely to be understood by some . . . members of the public to whom it is published as a direct or indirect encouragement or other inducement" to acts of terrorism.[106] Thus, whether a particular statement is criminal depends on how members of the public understand such a statement. In interpreting how members of the public "likely" understand a statement, an individual must consider the contents of the statement as a whole and the circumstances and manner of its publication.[107] The Act, however, explicitly states that it is "irrelevant" whether the statement actually has

100. *See id.* at 247 (statement of Lord Goodhart that there is no desire to force the Government to invoke the Parliament Acts to pass the bill); Woodward, *supra* note 21, at 5.

101. THE LABOUR PARTY, BRITAIN: *Forward*, Not Back 53 (2005) ("So we will introduce new laws to help catch and convict those . . . who glorify or condone acts of terror."); 676 PARL. DEB., H.L. (5th ser.) (2005) 455 (U.K.) (statement of Baroness Scotland) ("[Our] second obligation is, of course, to the electorate. The manifesto on which the Labour Party fought, and won . . . contained a clear commitment to create a new offen[s]e of glorification.").

102. Terrorism Act, 2006, c. 11 (Eng.).

103. *Id.* § 1(2).

104. *See* JONES ET AL., *supra* note 94, at 20–21. The term "reckless" was interpreted in the case *Regina v. G* to be a subjective test, rather than an objective one. *See generally* Regina v. G, [2004] 1 A.C. 1034 (H.L.).

105. Terrorism Act, 2006, c. 11, § 1(7).

106. *Id.* § 1(1).

107. *Id.* § 1(4).

an effect on any recipient.[108] There are not any examples of what a statement that indirectly encourages terrorism might be; however, the Act specifically states that such statements include—but are not limited to—every statement that "glorifies" acts of terrorism.[109]

The term "glorification" includes "any form of praise or celebration"[110] and may apply to acts of terrorism "in the past, in the future[,] or generally."[111] The glorifying statements must be those "from which . . . members of the public could reasonably be expected to infer" that they should emulate the acts being glorified.[112] The term "terrorism" is defined by reference to the Terrorism Act 2000 to include certain actions (for example, violence to people, damage to property, or risk to public health or safety) that are designed to influence the government or intimidate the public for the "purpose of advancing a political, religious[,] or ideological cause."[113]

Other than the definition of glorification, what constitutes a statement that indirectly incites terrorism is largely left to juries to decide based on whether the recipients would likely understand the statement to encourage terrorism.[114] There is no requirement, however, that a statement create an actual danger or that a person actually be encouraged or induced by the statement;[115] therefore, the jury will likely have to assess the impact of the statement by putting themselves in the mindset of the recipients of the statement.[116]

Finally, the Act provides that prosecution for an offense of indirect encouragement may only commence with the consent of the Director of Public Prosecutions (DPP) of the appropriate jurisdiction,[117] as the head of the Criminal Prosecution Service (CPS).[118] The CPS is the primary public prosecuting authority for England

108. *Id.* § 1(5).

109. *See id.* § 1(3).

110. *Id.* § 20(2).

111. *Id.* § 1(3).

112. *Id.*

113. *See* Terrorism Act, 2000, c. 11, § 1 (Eng.).

114. *See* JONES ET AL., *supra* note 94, at 19.

115. Terrorism Act, 2006, c. 11, § 1(5) (stating that it is irrelevant whether any person is actually encouraged or induced by a statement).

116. *Cf.* JONES ET AL., *supra* note 94, at 17 ("Section 1(1) . . . requires the jury to assess qualitatively the impact of statements . . . on members of a particular community which is not its own.").

117. *See* Terrorism Act, 2006, c. 11, § 19.

118. CROWN PROSECUTION SERV., THE CODE FOR CROWN PROSECUTORS, 2010, at 1 (U.K.).

and Wales.[119] This consent provision removes the decision to prosecute from the local prosecutors and requires that the DPP provide consent to commence a proceeding in each case.[120] This requirement is intended to act as a safeguard against unjust or unfair prosecutions because the DPP should consider the "public interest" before prosecuting.[121]

E. *The Goals and Justifications for Section 1*

During debate of the Terrorism Act 2006 in Parliament, three primary reasons justified the inclusion of the crime of indirect encouragement and glorification of terrorism: (1) it is a direct response to the 7/7 attacks; (2) it enables the United Kingdom to ratify the Council of Europe Convention on the Prevention of Terrorism; and (3) it prevents the spread of extremist ideology and recruitment of terrorists.

1. Section 1 Responds Directly to the July 7 Terrorist Attacks.

The 7/7 bombings rocked the British perception of the security of the United Kingdom with regard to terrorism.[122] For many, the attacks revealed that the United Kingdom had been "soft on extremists and soft on terrorism."[123] In the aftermath of 9/11, British authorities knew that young Britons were being recruited for jihad, but there was a perception by the U.K. government that those individuals recruited would target countries overseas and not Britain.[124] The 7/7 bombings shattered the perception that terrorists who had grown up in the United Kingdom would not target

119. *See id.*

120. *See Consents to Prosecute*, CROWN PROSECUTION SERVICE, http://cps.gov.uk/legal/a_to_c/consent_to_prosecute (last updated July 21, 2010).

121. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 335; *see also* JOINT COMM. ON HUMAN RIGHTS, GOVERNMENT RESPONSE TO THE COMMITTEE'S THIRD REPORT OF THIS SESSION: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005–06, H.C. 888, H.L. Paper 114, at 6.

122. *See* Mark Rice-Oxley, *A Year After Bombings, London Still on Alert*, CHRISTIAN SCIENCE MONITOR, July 7, 2006, at 6 ("The most important thing that has changed was the perception . . . that Islamic terrorism was not something that would happen in the [United Kingdom] . . . .").

123. *See* 675 PARL. DEB., H.L. (5th ser.) (2005) 1399; *see also* MELANIE PHILLIPS, LONDONISTAN 4–7 (2006) (cataloguing some of the terrorist acts that have been carried out by U.K.-based terrorists).

124. PHILLIPS, *supra* note 123, at 50; *see also* Richard Ford & Sean O'Neill, *Preachers May Face Treason Charges over 7/7*, TIMES (London), Aug. 8, 2005, at 6 (including statement by a leader of a terrorist organization that there was a "covenant of security," which meant that they would not resort to violence in the U.K. because they were not threatened).

their own country.[125] The Terrorism Act 2006 became a way to send a message that terrorism would be aggressively countered[126] and to assure the public that the government and police were actively taking steps to ensure their future safety.[127]

Beyond protecting British citizens from the newly realized physical threat, there was a sense that victims' relatives and the public needed protection from speech that praised the 7/7 bombers.[128] Grief turned to outrage as some radical preachers openly celebrated the attackers who targeted Britons.[129] In particular, Sheikh Bakri Mohammed hailed the 7/7 bombers as the "fantastic four,"[130] after previously calling the 9/11 attackers the "Magnificent 19."[131] Beyond this general glorification of terrorists, Mohammed encouraged further acts of terrorism, stating: "The banner has been risen . . . for jihad inside the U.K."[132] Despite calls for Mohammed to be charged with the common law crime of incitement, the U.K. government claimed that both the law and the evidence were insufficient to prosecute him.[133]

The crime of indirect encouragement in section 1 served to fill this gap in the inchoate crime of incitement.[134] Incitement in U.K. common law criminalizes the conduct of a person who encourages another individual to commit a *specific* offense.[135] This does not,

125. *See* PHILLIPS, *supra* note 123, at 45–46 (citing an interview with a British security officer who stated: "There was a deal with these guys. We told them if you don't cause us any problems, then we won't bother you.").

126. *See* LAURA DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 296 (2008) (stating that in the face of opposition to the bill, the prime minister "emphasized the propaganda aspect of the legislation: it was part of being seen as tough on terror").

127. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 390; 675 PARL. DEB., H.L. (5th ser.) (2005) 1392.

128. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 855 (statement of Mr. Kenneth Clarke citing the offensiveness of such speech to the public and the grief caused to the victims of terrorist attacks).

129. *See, e.g.*, Ford & O'Neill, *supra* note 124, at 6 (citing outrage after a militant Islamic leader said he would not warn U.K. police if he knew of an impending attack in Britain and that he supported attacks on British troops).

130. *See* Sean O'Neill, *Radical Cleric Kept up Inflammatory Rhetoric Despite Becoming an Outcast*, TIMES (London), Aug. 9, 2005, at 7.

131. Ford & O'Neill, *supra* note 124, at 6.

132. *See id.*

133. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 847 (statement of Mr. Gerald Howarth).

134. *See* HOME OFFICE, EXPLANATORY NOTES TO TERRORISM ACT 2006, at 4 (2006).

135. *See* THE LAW COMMISSION, INCHOATE LIABILITY FOR ASSISTING AND ENCOURAGING CRIME, 2006, Cm. 6878, at 26 (U.K.); 438 PARL. DEB., H.C. (6th ser.) (2005) 373.

however, address people who do so "obliquely,"[136] nor does it address those individuals who incite others to commit acts of terrorism generally.[137] Parliament justified expanding the crime to include these oblique and general statements because indirect incitement may create an equally dangerous environment as that created by direct incitement.[138] In its review of the Terrorist Act 2006, the U.K. Joint Committee on Human Rights agreed that because of the gap in incitement law, there is a need for "a new, narrowly defined criminal offen[s]e of indirect incitement to terrorist acts."[139]

2. Section 1 Implements a Requirement of the Council of Europe Convention on the Prevention of Terrorism.

In May 2005, the Council of Europe, which also developed and implemented the ECHR, signed the Convention on the Prevention of Terrorism (CECPT).[140] The CECPT requires Council of Europe member states, including the United Kingdom, to criminalize "public provocation to commit a terrorist offence."[141] Article 5 of the CECPT describes public provocation as intentionally distributing a message to the public with the intent to incite a terrorist act either directly or indirectly, where such a message causes a danger that a terrorist offense will be committed.[142] To ratify the treaty,

136. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 334. For example, incitement would include the statement: "Blow yourself up on the airplane" but not: "You should strive to imitate Richard Reid" (who tried to blow up an airplane).

137. *See id.* at 373. For example, incitement would include the statement: "Go attack the subway tomorrow" but not: "Attacks on civilians are praised."

138. *See, e.g., id.* at 334 ("We now want to be able to deal with those . . . who nevertheless contribute to the creation of a climate in which impressionable people might believe that terrorism was acceptable.").

139. JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005–06, H.C. 561-I, H.L. Paper 75-I, at 18. The Joint Committee on Human Rights is comprised of twelve members of the House of Commons and House of Lords. It is responsible for analyzing all legislation considered by Parliament for its compliance with human rights obligations. *See Joint Committee on Human Rights*, UK PARLIAMENT, http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm (last visited Mar. 18, 2011).

140. Council of Europe Convention on the Prevention of Terrorism, May 16, 2005, C.E.T.S. No. 196 [hereinafter CECPT]. The CECPT treaty establishes as criminal offenses actions that may lead to the commission of terrorist acts and reinforces cooperation among member states. The treaty has been signed by forty-three of the forty-seven states in the Council of Europe. As of March 2011, however, only twenty-three states had ratified the treaty. *See Council of Europe Convention on the Prevention of Terrorism*, COUNCIL OF EUROPE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=196&CM=8&DF=11/03/2010&CL=ENG (last visited Mar. 18, 2011).

141. CECPT, *supra* note 140, art. 5, ¶ 2.

142. *See id.* ¶ 1.

the United Kingdom needed to meet the requirement of criminalizing indirect incitement, given that the common law of incitement was considered insufficient.[143]

The CECPT requires that in implementing Article 5 on public provocation, parties respect human rights obligations, specifically "freedom of expression," as set forth in the ECHR.[144] The convention further requires that domestic law criminalizing public provocation be proportionate, "with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness."[145] With this language, the CECPT specifically incorporates the principles of Article 10 of the ECHR.[146]

While the CECPT requires that the incitement be intentional and create an actual danger that a terrorist act may result, section 1 criminalizes reckless incitement without a requirement that a danger be created.[147] Despite key differences from the ultimate language of the Terrorism Act 2006, Article 5 of the CECPT was frequently cited as a justification for the inclusion of section 1.[148]

3. Section 1 Prevents the Spread of Extremist Ideology and the Recruitment of Terrorists.

Beyond immediately responding to the 7/7 bombings, the United Kingdom sought to address the sources of terrorism as well. Investigations into the 7/7 suicide bombers revealed that all four men were born and educated in the United Kingdom, but at some point turned toward extremism.[149] This realization was jarring to a British public that wanted to believe terrorists were the product of harsh living conditions in distant countries that fermented a hatred towards the West—not the product of a free, democratic, and accepting society like Britain.[150] This forced the British people to

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143. *See supra* notes 134–39 and accompanying text.

144. *See* CECPT, *supra* note 140, art. 12, ¶ 1.

145. *See id.* ¶ 2.

146. *See, e.g.*, European Convention on Human Rights, *supra* note 35, art. 10; *see also Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism* ¶ 88, *available at* http://conventions.coe.int/Treaty/en/Reports/Html/196.htm.

147. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 358.

148. *See id.* at 334; HOME OFFICE, *supra* note 134, at 4.

149. *See* HOUSE OF COMMONS, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2005–6, H.C. 1087, at 13–15.

150. *See* PHILLIPS, *supra* note 123, at viii–ix. *See* Christopher Caldwell, *After Londonistan*, N.Y. TIMES, June 25, 2006, (Magazine), at 42 ("Especially demoralizing was the posthumous video message of [the ringleader of the attacks]. . . . [His] thick, native Yorkshire accent . . . was disheartening to British viewers.").

ask a difficult question: how was it possible for these young men and others to become so radicalized that they were willing to take their own lives as well as the lives of dozens of their fellow citizens?[151] Answering that question required an understanding of the nature of the new threat as well as the underlying causes of terrorism.[152]

The U.K. government repeatedly stated that the bombings "changed the rules" and the new terrorist threat that presented itself was unlike anything Britain had previously faced.[153] While the United Kingdom dealt with Irish terrorism for years, the type of violent extremism that resulted in 7/7 was fundamentally different—not only in the use of suicide bombers, but also in the attacks' intended objective. While Irish terrorism was aimed at effecting political change, for the 7/7 attackers, "mass killing [was] in itself an objective."[154] This new terrorist threat is not driven by negotiable goals, such as liberation or political and civil equality, but rather by "emotion and hatred."[155] Islamist extremists are driven by a radical ideology whose goal is "violent and destructive opposition to democracy in any form."[156] This required new powers specifically designed to target terrorism because existing laws designed to combat crime were insufficient.[157]

This "movement-based terrorism," as opposed to organization-based crime syndicates, is fluid and without structure or hierarchies.[158] Dismantling the leadership alone does not eliminate the threat because the motivating ideology can survive and individual terrorist cells can operate independently.[159] For instance, one study based on open source information available on the Internet

151. *See* PHILLIPS, *supra* note 123, at viii.

152. *See* 675 PARL. DEB., H.L. (5th ser.) (2005) 1397.

153. *See* Prime Minister Tony Blair, *supra* note 91; 439 PARL. DEB., H.C. (6th ser.) (2005) 523.

154. *See* 675 PARL. DEB., H.L. (5th ser.) (2005) 1478; Martha Crenshaw, *'New' vs. 'Old' Terrorism: A Critical Appraisal*, *in* JIHADI TERRORISM AND THE RADICALISATION CHALLENGE IN EUROPE 30 (Rik Coolsaet ed., 2008) (noting this distinction while acknowledging that "old" terrorists had the capacity to inflict mass casualties, but were more selective and discriminating).

155. *See* Paul R. Pillar, *Jihadi Terrorism: A Global Assessment of the Threat in the Post al-Qaeda Era*, *in* JIHADI TERRORISM AND THE RADICALISATION CHALLENGE IN EUROPE, *supra* note 154, at 7–8.

156. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 325–26 (U.K.); ROBERT IMRE ET AL., RESPONDING TO TERRORISM: POLITICAL, PHILOSOPHICAL AND LEGAL PERSPECTIVES 37 (2008).

157. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 378 (statement of Mr. William Cash) ("This legislation is about terrorism, and I would make the case strongly that we verge closely in that context on the problems that exist in a state of war.").

158. *See* 675 PARL. DEB., H.L. (5th ser.) (2005) 1399; Crenshaw, *supra* note 154, at 34.

159. *See* Pillar, *supra* note 155, at 10–11.

indicates that in the case of al-Qaeda, the problem is never one of recruitment because there are plenty of volunteers; rather the problem is one of selection of loyal and trustworthy individuals to serve al-Qaeda.[160] By virtue of the fact that the nature of the new threat is driven by violent extremist ideology, combating that ideology is a necessary part of countering terrorism.[161]

There are a number of ways to combat violent extremist ideology, including by targeting those who spread it. Violent extremist ideology spreads and recruits new members, in part, through the preaching or publication of extremist and radical language.[162] A classified report prepared by the U.K. government in 2004—and leaked to the press in 2005—found "extremist recruiters" targeting "well educated undergraduates" on university campuses while extremist preachers target "under-achievers" and criminals.[163]

Parliament viewed the radicalization of "young and impressionable" Britons as a steady supply of potential terrorists, therefore section 1 was viewed as a necessary measure to curb this radicalization and protect potential recruits from messages of hate.[164] By one estimate, as many as 60 percent of al-Qaeda's membership joined after being radicalized by militant messages at mosques.[165] The best way to contest this new threat, the MPs argued, is to "isolate[e] extremism in its various manifestations [and to] strengthen[ ] the legal framework" to combat terrorism.[166] Otherwise, according to

160. *See* Marc Sageman, *Islam and al Qaeda, in* ROOT CAUSES OF SUICIDE TERRORISM: THE GLOBALIZATION OF MARTYRDOM 122, 124–28 (Ami Pedahzur ed., 2006).

161. Indeed, disrupting "those who promote violent extremism" is one of the United Kingdom's five main objectives to reduce the risk of terrorism. Other methods identified by the U.K. government include: challenging the ideology and its interpretations of Islam; supporting individuals who are vulnerable to recruitment; community outreach; and addressing the grievances exploited by such ideologies. THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, 2009, Cm. 7547, at 80 (U.K.).

162. *See, e.g.*, Abul Taher, *Third of Muslim Students Back Killings*, SUNDAY TIMES (London), July 27, 2008, at 8 (finding "a number of terrorists have been radicali[z]ed at British universities" by extremist preachers using inflammatory language); *cf.* Alan Travis, *MI5 Report Challenges Views on Terrorism in Britain*, GUARDIAN, Aug. 21, 2008, at 1 (reporting British Security Service unit MI-5 concludes that there is no "single pathway to violent extremism" and downplaying "the importance of radical extremist clerics").

163. FOREIGN AND COMMONWEALTH OFFICE & HOME OFFICE, DRAFT REPORT ON YOUNG MUSLIMS AND EXTREMISM, 2004, at 13 (U.K.); *see also* Robert Winnett & David Leppard, *Leaked No 10 Dossier Reveals Al-Qaeda's British Recruits*, SUNDAY TIMES (London), July 10, 2005, at 1.

164. *See* 439 PARL. DEB., H.C. (6th ser.) (2005) 430 (statement of Hazel Blears) (referencing the effect of statements on radicalization: "That is what we are trying to tackle with this offence.").

165. *See* Sageman, *supra* note 160, at 127.

166. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 327.

the MPs, those who have the freedom to incite young people have "a huge advantage over" those in the government trying to combat terrorism.[167] Ultimately, it was this goal of curbing radicalization that weighed most heavily in parliament: "[T]he test of it will be whether the number of young people in this country brought into terrorism is reduced by at least one. The test is not one of elegance or of accord with international treaties."[168]

III. SECTION 1 IS INCOMPATIBLE WITH THE FREEDOM OF EXPRESSION PROTECTED BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In determining whether section 1 is compatible with the ECHR's Article 10 right to freedom of expression, the prohibition on indirect encouragement or glorification of terrorism must be: (1) prescribed by law; (2) in furtherance of a legitimate aim; and (3) necessary in a democratic society. If any of these requirements are not met, the section will be found in violation of the ECHR.[169] Considering each part, section 1 is in violation of Article 10 of the ECHR because it is too ambiguous to be sufficiently prescribed by law. Additionally, although combating radicalization is a legitimate aim, the current section 1 is a disproportionate response to this pressing social need.

A. *The Criminalization of Statements that Indirectly Incite Terrorism Is Insufficiently "Prescribed by Law"*

The criminalization of statements that may indirectly encourage acts of terrorism is not sufficiently prescribed by law because although the prohibition is in statute, the conduct that is prohibited is not sufficiently foreseeable, nor is the executive discretion to prosecute sufficiently described.

1. The Types of Statements Criminalized by Section 1 Are Not Easily Foreseeable to Citizens.

The European Court's requirement that a restriction on freedom of expression be foreseeable is designed to permit a citizen to reasonably anticipate the consequences of their actions.[170] The criminalization of indirect incitement of terrorism under section 1, however, is too vague, too broad, and too removed from its actual

167. *See* 675 PARL. DEB., H.L. (5th ser.) (2005) 1399.
168. *See* 438 PARL. DEB., H.C. (6th ser.) (2005) 863 (statement of Mr. John Denham).
169. *See supra* Part II.B.
170. *See supra* notes 49–52 and accompanying text.

effects to allow a citizen to foresee whether a specific statement will be punished.

First, the definition of statements that indirectly incite terrorism is vaguely defined. Indirect incitement is defined in statute based on whether members of the public are "likely" to understand that a statement is an indirect incitement to terrorism.[171] An individual looking to predict the consequences of his speech would need to consider how potential recipients might interpret the statement. A statement may reach a large and diverse population, especially if published online. As a result of the wide scope of the audience, the way in which recipients understand statements could be equally diverse. Further, given that the statute only requires that "members of the public" understand a statement to encourage terrorism, the statute could be enforced in situations where, of thousands of recipients, only two would likely interpret the statement in a threatening manner.[172] It is unreasonable to expect an individual to foresee or ascertain how a statement will be perceived due to the diverse potential audience and subjective, personal interpretation of a statement. By basing the universe of criminalized statements on such vague and unforeseeable concepts, the definition is also potentially too broad because it applies to a wide-range of statements.[173]

Second, the statute indicates that regardless of how indirect encouragement might be interpreted, "glorification" of terrorism is always a crime under section 1.[174] This does not, however, circumscribe the already broad definition of indirect encouragement, but rather enlarges it. The term "glorification" is itself broadly defined to include praise or celebration of past terrorist acts.[175] As an example of how broadly this term might be interpreted, the Home Secretary responsible for shepherding the bill through parliament stated that "glorification" includes the phrase: "Terrorists go straight to paradise when they die."[176] He went on to explain

171. *See supra* notes 106–08 and accompanying text.

172. *See supra* notes 103–04 and accompanying text.

173. As Justice Brandeis once stated:

> Every idea is an incitement. It offers itself for belief and if believed[,] it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.

Gitlow v. New York, 268 U.S. 652, 673 (1925) (Brandeis, J., dissenting).

174. *See supra* notes 109–13 and accompanying text.

175. *See* Terrorism Act, 2006, c. 11, § (20)(2) (Eng.).

176. *See* Caldwell, *supra* note 150, at 46.

that nothing "would prevent anyone from expressing understanding [or] from discussing why something had happened."[177] While courts and juries will have difficulty distinguishing between "expressions of understanding" versus praising or celebrating an act of terrorism, it will be even more difficult for the average citizen to reasonably foresee what statements would be punished as "glorifying" terrorism.

The definition of statements that indirectly encourage or glorify terrorism is further complicated and broadened by the definition of "terrorism" itself.[178] Debates about section 1 frequently recognized that reasonable people disagree about whether legitimate political separatist movements should be labeled as "terrorist" in modern times, including the Irish fight for independence from the British.[179] Under the broad definition of terrorism, even past events such as the actions of Robin Hood or the American Revolution could be considered terrorist acts.[180]

Thus, praising Guy Fawkes who attempted to blow up the parliament in 1605 in the Gunpowder Plot[181]; praising the 7/7 bombers; or celebrating Palestinians who sacrifice themselves for their country are all actions that could potentially be considered "glorification."[182] If "glorification" could potentially include statements this broad, the statute with the inclusion of "glorification" does not pro-

177. 438 PARL. DEB., H.C. (6th ser.) (2005) 336.

178. *See* Terrorism Act, 2000, c. 11, § 1.

179. *See* 439 PARL. DEB., H.C. (6th ser.) (2005) 412 (statement by Mr. Dominic Grieve that Irish citizens involved in the Easter Rising were regarded as terrorists at the time, but are now considered heroes); *cf. Calls for Probe into Guildhall Event*, BELFAST TODAY, Oct. 27, 2009 (describing an organization's call for prosecution under section 1 for an event at a town hall that "commemorated dead [Irish Republican Army] members").

180. *See* 442 PARL. DEB., H.C. (6th ser.) (2006) 1442. The United Kingdom is not alone in finding it difficult to define "terrorism" as there is no internationally accepted definition. For a review of national, international, and academic discussions of the definition of "terrorism," as well as the adequacy of the U.K. definition, see generally LORD CARLILE, THE DEFINITION OF TERRORISM, 2007, Cm. 7052 (U.K.).

181. This, ironically, is now an annual holiday celebrated on November 5 with fireworks and bonfires. Popular literature hails Guy Fawkes as a hero: "the only man to get into Parliament with the right intentions." ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT 287 (1997). In 2002, the British Broadcasting Corporation (BBC) named Guy Fawkes one of the "top 100 British heroes" along with Winston Churchill and Princess Diana. *100 Great British Heroes*, BBC NEWS (Aug. 21, 2002), http://news.bbc.co.uk/2/hi/entertainment/2208671.stm.

182. Members of Parliament argued that this provision would capture a statement by Cherie Blair (wife of then Prime Minister Tony Blair) that young Palestinians felt they had "'no hope' but to blow themselves up." *PM's Wife 'Sorry' in Suicide Bomb Row*, BBC NEWS (June 18, 2002), http://news.bbc.co.uk/2/hi/uk_news/politics/2051372.stm; *see also* 438 PARL. DEB., H.C. (6th ser.) (2005) 386.

vide enough legal clarity for average citizens to foresee the consequences of their statements.

Third, the crime of indirect incitement may be committed regardless of the likelihood that it will actually indirectly incite terrorism.[183] Unlike the criminalization of public provocation under the CECPT, section 1 disregards any consideration of whether the statement is likely to incite terrorism.[184] The result under section 1 is that if a hypothetical recipient likely would understand a statement to be indirect incitement to terrorism, even if no *actual* recipient would ever act on such an incitement, the individual making the statement could still be prosecuted under section 1.[185] This low threshold for what constitutes an indirect incitement makes it even more difficult for an individual to know whether a particular statement is indirectly encouraging terrorism under the statute.

The result of all of these issues is a vague statutory definition with no guidance for the average citizen to moderate his conduct. The ambiguity as to which statements might constitute "indirect encouragement of terrorist acts" does not give the predictability to citizens required by the ECHR. Ironically, parliament acknowledged the vague nature of the legislation during debates.[186] In an attempt to restrict the potential misuse of this offense or an overly broad interpretation of the section, the law includes a requirement that the DPP approve any prosecution under section 1.[187] This requirement, however, provides too much discretion, without clear guidance, to the U.K. government, and thus violates the European Court's requirement that discretion be defined to comply with Article 10 of the ECHR.

2. The Scope and Method of the Discretion in Section 1 Is Insufficiently Defined in the Statute.

When a statute provides discretion to a state to restrict the freedom of expression, the European Court requires that the methods and the scope of the discretion be clearly defined.[188] The Terrorism Act 2006, however, lacks such details on the DPP's discretion to

183. *See* Terrorism Act, 2006, c. 11, § 1(5) (Eng.).

184. *Compare* CECPT, *supra* note 140, art. 5 ("[W]here such conduct . . . causes a danger that one or more terrorist offen[s]es may be committed."), *with* Terrorism Act 2006, c. 11, § 1(5) ("It is irrelevant . . . whether any person is in fact encouraged or induced by the statement.").

185. *See* Terrorism Act, 2006, c. 11, § 1(5).

186. *See supra* note 99 and accompanying text.

187. *See supra* notes 117–21 and accompanying text.

188. *See supra* note 53 and accompanying text.

prosecute.[189] There is no indication in the statute of how the DPP will balance this discretion, or the limits of such discretion, in the face of a broad definition of indirect encouragement and glorification of terrorism.[190] To this point, the U.K. Joint Committee on Human Rights stated: "[T]here will be enormous scope for disagreement between reasonable people as to whether a particular comment . . . amounts to glorification."[191] Further, the decision on when to prosecute could differ between DPPs who may take into account potential political or public backlash.[192] The silence of the statute on the role of the DPP does not provide the type of legal clarity European Courts require for discretionary authority.

Legal clarity, however, need not come solely from the statutes; the European Court also looks at implementing guidelines and regulations.[193] Following the passage of the Terrorism Act 2006, the U.K. Home Office issued guidance to all chief police officers detailing the changes in law that the Act made, including the new crime of indirect encouragement of terrorism.[194] This document, however, lacked any specificity on what statements could actually constitute an offense and provided little more than repetition of the language provided in section 1.[195] As a result, even this guidance to police officers is vague as to what statements constitute indirect encouragement of terrorism.

The discretionary nature of the section is further evidenced by the infrequency of prosecutions, despite public acts that could be considered indirect encouragement of terrorism.[196] While there is

189. *See* Terrorism Act, 2006, c. 11, §§ 1, 19.

190. *See id.*

191. JOINT COMMITTEE ON HUMAN RIGHTS, *supra* note 139, at 18–19.

192. For an example of how personal politics can shape a DPP's policies, see generally Frances Gibb, *Sir Ken MacDonald: The QC Who Came to the Prosecutors' Defence*, TIMES (London), Oct. 30, 2008, at 63 (quoting the "outspoken" DPP as cautioning against a way of life where "freedom's back is broken by the relentless pressure of a security State").

193. *See, e.g.*, Silver v. United Kingdom, 61 Eur. Ct. H.R. (ser. A) at 33–34 (1983) (finding that although orders and instructions did not have the force of law, they could be considered when determining whether the restrictions on defendant's actions were prescribed by law).

194. U.K. HOME OFFICE, THE TERRORISM ACT 2006 – HOME OFFICE CIRCULAR, No. 08/2006, Apr. 6, 2006. The U.K. Home Office is the lead government department for securing the British public, including counterterrorism efforts, reducing crime, policing, and immigration and border control. *See generally About Us*, HOMEOFFICE.GOV.UK, www.homeoffice.gov.uk/about-us (last visited Mar. 21, 2011).

195. *See* U.K. HOME OFFICE, *supra* note 194.

196. *See, e.g.*, Tom Harper, *Islamists 'Urge Young Muslims to use Violence'*, TELEGRAPH (London), Sept. 30, 2007, at 10 (detailing an extremist Islamist group distributing fliers to British Muslim students urging they "destroy the new crusaders"); GLORIFYING TERRORISM: AN ANTHOLOGY (Farah Mendlesohn ed., 2007) (an anthology of short stories and poems

a noticeable lack of centralized, accessible data on prosecutions under section 1,[197] two prosecutions of individuals for crimes under section 1 were widely reported in the U.K. press.

In July 2007, Abu Izzadeen was charged with indirect encouragement of a terrorist act for praising statements made by a 7/7 bomber as "the answer to our problems" and mocking the victims of 9/11 and attacks in Iraq.[198] He was the first person arrested under section 1.[199] Although found guilty on other charges, including material support of terrorism, Izzadeen was found not guilty of a violation of section 1.[200] In the second prosecution widely reported, Malcolm Hodges pled guilty to a violation of section 1 for urging attacks against accountants by writing: "Striking at these targets will be striking at the infidels where it hurts most."[201]

Despite the much-cited urgency of the need for legislation, very few individuals have been charged with crimes under section 1 in the years since its enactment. This lack of consistent enforcement serves as further evidence that the section is too discretionary to be considered adequately "prescribed by law" by the European Court. Furthermore, nothing in the statute indicates with reasonable clarity, which the European Court requires, the scope and manner regarding how the U.K. government should exercise the discretion conferred on it. Thus, the restriction, established by section 1, fails

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whose stated purpose is "to glorify terrorism" and includes an entry entitled, "Reasons why terrorism is preferable to just war").

197. In June 2008, Lord Carlile found an "absence of meaningful statistics to date" on the application of section 1. LORD CARLILE, REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND OF PART I OF THE TERRORISM ACT 2006 ¶ 286 (2008). At the same time, the U.K. government stated that they do "not hold records of the number of people prosecuted under section 1 of the Terrorism Act 2006." U.N. Human Rights Comm., *Replies to the List of Issues to be Taken Up in Connection with the Consideration of the Sixth Periodic Report of the Government of the United Kingdom*, ¶ 174, U.N. Doc. CCPR/C/GBR/Q/6/Add.1 (June 18, 2008).

198. *See* John Steele, *Terror Police Hold Firebrand who Praised Bombers*, TELEGRAPH (London), Feb. 9, 2007, at 11.

199. *Id.*

200. *See* Sean O'Neill, *Reid Heckler Abu Izzadeen Guilty of Terror Offences*, TIMES ONLINE (London) (Apr. 17, 2008), http://www.timesonline.co.uk/tol/news/uk/crime/article3766768.ece; *Six Men Convicted of Terrorism Offenses*, METROPOLITAN POLICE SERVICE Apr. 17, 2008), http://content.met.police.uk/News/Six-men-convicted-of-terrorism-offences/1260267570077/1257246842383. The hung jury on section 1 charges may be attributed to Izzadeen repeatedly stating that he did not support terrorism. *See* John Steele, *Militant Blamed Britain for July 7 Bombings*, TELEGRAPH (London), Apr. 25, 2007, at 13. This allowed Izzadeen to argue that those receiving his statements could not likely understand his statements to indirectly encourage terrorism.

201. *See 'Jihad on Accountants' Man Jailed*, BBC NEWS, Feb. 19, 2008), http://news.bbc.co.uk/2/hi/uk_news/england/7253780.stm.

the first test required by the European Court to be an acceptable restriction on freedom of expression.

B. *Criminalizing Indirect Incitement of Terrorism Is in Furtherance of a Legitimate Aim*

The second requirement of the ECHR for a permissible restriction on the freedom of expression is that the restriction be in furtherance of a legitimate aim.[202] The European Court rarely spends much time analyzing whether a restriction is in furtherance of a legitimate aim.[203] One of the legitimate aims cited in Article 10 of the ECHR is "national security . . . or public safety."[204] Parliament directly cited the goal of national security when criminalizing the indirect incitement of terrorism.[205] Both the Council of Europe and the United Nations have recognized the dangers to national security of indirect incitement to terrorism.[206] Further, there is no evidence that section 1 is actually being used for other purposes and not to ensure national security.[207] Here, section 1 meets the requirement that a restriction be in pursuance of a legitimate aim.

While the European Court will generally defer to a state's determination that a restriction is in furtherance of a legitimate aim, the court engages in a more strenuous review of the related question whether the prohibition is necessary in a democratic society to actually further the identified aim.

C. *Section 1 in its Current Form Is Not Necessary in a Democratic Society*

The European Court engages in a two-part test to determine if a restriction on the freedom of expression meets the final requirement of being necessary in a democratic society under Article 10 of the ECHR. First, the European Court examines whether the restriction responds to a pressing social need.[208] Second, the Euro-

202. *See* European Convention on Human Rights, *supra* note 35, art. 10.

203. *See supra* notes 61–64 and accompanying text.

204. European Convention on Human Rights, *supra* note 35, art. 10.

205. *See* HOME OFFICE, *supra* note 134, at 1.

206. *See* S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005) ("*Condemning also* in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts."); *supra* Part II.E.2 on the Council of Europe Convention on the Prevention of Terrorism.

207. *Cf.* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 24 (1981) (finding criminalization of certain sexual activities between consenting male adults in Northern Ireland was not in pursuit of a legitimate aim—the protection of morals—where the acts were legal in the rest of the United Kingdom).

208. *See supra* notes 71–78 and accompanying text.

pean Court inquires whether the restriction is proportionate to that need.[209] The crime of indirect encouragement and glorification of terrorism is not necessary in a democratic society because it is not currently proportionate, despite that it responds to a pressing social need.

1. Section 1 Responds to the Pressing Social Need of Addressing the Threat Posed by Radicalization.

Parliament justified section 1 as necessary in response to a number of pressing social concerns: (1) a direct response to the 7/7 bombings; (2) to comply with international treaties, specifically, the Convention on the Prevention of Terrorism; and (3) to address the growing threat of radicalization.[210] While the first two are insufficiently convincing as pressing social needs, the need to address the threat of radicalization is a legitimate social need requiring a response.

The first justification for section 1 was to send a message to the public that attacks like the 7/7 bombings would not be tolerated and to satisfy the government's desire to appear tough on terrorism.[211] Parliament also wanted to shield the victims of the attacks from radicalized individuals' statements glorifying the attackers and other offensive language.[212] The European Court, however, has not found that speech can be restricted merely because it is offensive;[213] nor would a desire to appear "tough" justify restrictions on freedom of expression. In short, while the 7/7 bombings may have motivated parliament to act quickly and may have illuminated the threat of terrorism within the United Kingdom, neither the 7/7 bombings nor the offensive speech, in and of themselves, equate to the type of "pressing social need" necessitating restrictions on freedom of expression.

Second, parliament repeatedly cited the need to meet its international obligations as justifications for section 1.[214] The CECPT, to which Britain is a signatory, requires that member states take

209. *See supra* notes 79–86 and accompanying text.

210. *See supra* Part II.E.

211. *See supra* notes 122–27 and accompanying text.

212. *See supra* notes 128–31 and accompanying text.

213. *See* Surek v. Turkey, App. Nos. 23927/94 & 24277/94, ¶ 61, Eur. Ct. H.R. (1999) (finding that "irrespective of how unpalatable that perspective may be," the Turkish government may not prohibit speech supporting Kurdish separatists in violation of Article 10 because it would not likely lead to violence).

214. *See supra* notes 147–48 and accompanying text.

steps to criminalize public provocation of terrorism.[215] Generally, the need to meet international treaty obligations through implementing legislation would serve a legitimate pressing social need; however, the inclusion of glorification as indirect encouragement is significantly broader than the CECPT provision.[216] Additionally, section 1 disregards the actual impact of a statement while the CECPT specifically requires that danger result from a criminalized statement.[217] The United Kingdom has yet to ratify the CECPT, despite the passage of the Terrorism Act 2006, due at least in part to these differences between section 1 and the CECPT.[218] Thus, while parliament cited the convention to justify the passage of section 1, the differences between the Terrorism Act 2006 and the convention may actually prevent the United Kingdom from ratifying the CECPT.

As many MPs stated, however, the threat of radicalizing potential recruits or inciting more attacks within the United Kingdom was the primary justification for section 1.[219] The threat of terrorism remains a serious and long-term danger to the United Kingdom.[220] U.K. intelligence assessed in 2004 that "the number of British Muslims actively engaged in terrorist activity . . . [is] estimated at less than 1%,"[221] or approximately "16,000 potential terrorists and supporters" in the United Kingdom.[222] Within this population, "the number who are prepared to commit terrorist attacks may run into hundreds."[223]

Multiple government reports following the 7/7 bombings documented the link between radicalization of individuals and the threat of terrorism.[224] One U.K. adviser to the Prime Minister for counterterrorism estimates that solving the radicalization problem

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215. *See* CECPT, *supra* note 140, art. 5.

216. *See* U.K. JOINT COMMITTEE ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM, 2006–07, H.C. 247, at 14 (U.K.) [hereinafter U.K. JOINT COMMITTEE, CECPT].

217. *See supra* note 184 and accompanying text.

218. *See* U.K. JOINT COMMITTEE, CECPT, *supra* note 216, at 17.

219. *See supra* note 168 and accompanying text.

220. *See* Caldwell, *supra* note 150, at 42 (stating that from the attacks on 9/11 to the summer of 2006 more than eleven terrorist plots were broken up in the United Kingdom, including a planned biological attack on a train using ricin); *Men tried over 'plane bomb plot'*, BBC NEWS (Feb. 17, 2009), http://news.bbc.co.uk/2/hi/uk_news/7894755.stm (detailing how eight British Islamists plotted to cause death "on an unprecedented scale" by using liquid explosives to bring down seven airliners over the Atlantic Ocean).

221. FOREIGN AND COMMONWEALTH OFFICE & HOME OFFICE, *supra* note 163, at 12.

222. *See* Winnett & Leppard, *supra* note 163, at 1.

223. *Id.*

224. *See supra* notes 163–68 and accompanying text.

will take decades.[225] Based on this prediction, it is reasonable to conclude that the threat of violent extremist ideology being used to radicalize youth, recruit new terrorists, and encourage future acts of terrorism is a pressing social need, thus requiring a response.

While there are many ways that the government could address the threat of radicalization, one method is to directly confront those individuals that indirectly incite acts of terror.[226] Both the Council of Europe and the United Nations recognized the importance in combating statements that indirectly encourage and glorify acts of terrorism.[227] In total, the primary justification of curbing radicalization of individuals to prevent future attacks represents a legitimate pressing social need that may be addressed through restrictions of freedom of expression. The inquiry for whether a law is "necessary in a democratic society," however, does not end with that determination. The European Court also requires that restrictions on Article 10 rights are "proportionate to the legitimate aim pursued."[228]

2. Section 1 Is Not Currently Proportionate to the Threat Posed by Radicalization nor for the Purpose of Complying with the CECPT.

The basic test of proportionality is that a restriction is no greater than necessary to address the pressing social need.[229] Since its passage in 2006, section 1 has rarely been used to prosecute individuals, indicating that such a broad restriction is likely unnecessary to achieve the goal of reducing radicalization.[230] One might argue that the impact of the statute on the freedom of expression is minimal given the small number of individuals consequently prosecuted under the section. This argument, however, overlooks the chilling impact that the statute might have on legitimate speech.[231] Given the potential for the section to apply to a wide range of state-

225. *UK: Beating Radicalization will take 30 Years*, ASSOCIATED PRESS, Oct. 21, 2008, *available at* 10/21/08 AP Worldstream 18:04:15.

226. *See* THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, *supra* note 161, at 80, 88.

227. *See supra* note 206 and accompanying text.

228. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); *see also supra* note 70 and accompanying text.

229. *See supra* notes 79–82 and accompanying text.

230. *See supra* notes 197–201 (noting a lack of statistics, but only two apparent prosecutions).

231. *See* U.K. JOINT COMMITTEE, CECPT, *supra* note 216, at 14–16 (finding that a lack of direct evidence of a chilling effect does not dispel community concerns of such an effect,

ments, individuals may be hesitant to make lawful statements for fear that they might be prosecuted under this section.

Another indication of whether the statute is proportionate is the degree to which it is effective in achieving its stated purpose.[232] While measuring radicalization is difficult, publicly available reports indicate that radicalization in the United Kingdom persists despite passage of section 1 and individuals who glorify terrorism have not been silenced.[233] The controversial nature of the section and the perceived illegitimacy of the broadly defined crime may be one reason that the statute has rarely been used to prosecute individuals.[234] Some scholars argue that section 1 may have the effect of further isolating the Muslim community due to a perception that the law unfairly targets Islamic speech.[235] If this view is true, section 1 could have the unintended consequence of further isolating and driving towards radicalization the very individuals it seeks to protect. Although limited, this evidence indicates that, at best, section 1 currently does not deter radicalization. At worst, section 1 may further radicalize and isolate communities.

Aside from the degree to which a restriction is effective, the European Court also considers the proportionality of the penalty to the crime.[236] In *Arslan,* the European Court was struck by the twenty-month imprisonment of an author who glorified Kurdish rebels against Turkey.[237] The European Court was especially concerned with the punishment because the author's act did not constitute an "incitement to violence," which the European Court viewed as an essential consideration in determining the proper

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given that the nature of a chilling effect—that a statement that otherwise would be said, is not said—is inherently difficult to document).

232. *See supra* note 81 and accompanying text.

233. *See, e.g., Counter-terrorism Police Station on Campuses,* GUARDIAN (London), Feb. 4, 2010, http://www.guardian.co.uk/education/2010/feb/04/police-stationed-on-campuses ("Speculation that the alleged 'underpants bomber' Umar Farouk Abdulmutallab was radicalized at University College London has raised concerns about campus extremism."); *see also* Patrick Sawer, *Young Muslims 'are turning to extremism',* TELEGRAPH (London), (June 21, 2008), http://www.telegraph.co.uk/news/uknews/2171300/Young-Muslims-are-turning-to-extremism.html ("[T]he radicali[z]ation of young British Muslims [is] more widespread than previously feared, with 'a disturbing proportion' expressing support for extremist elements."); Taher, *supra* note 162, at 8 (finding that a third of Muslim students justify killing in the name of Islam and raising "concerns about the extent of campus radicalism"); *supra* note 196 and accompanying text (noting instances of glorification of terrorism since the passage of section 1).

234. In June 2006, the *New York Times Magazine* noted that section 1 "has probably been too undermined by ridicule to serve for much." Caldwell, *supra* note 150, at 46.

235. *See generally id.*

236. *See supra* note 83 and accompanying text.

237. *See* Arslan v. Turkey, App. No. 23462/94, ¶ 47, Eur. Ct. H.R. (1999).

punishment.[238] For those who are guilty of indirect encouragement of a terrorist act under section 1, the penalty is up to seven years imprisonment regardless of whether the statements actually result in the incitement of violence.[239]

Section 1 specifically states that the actual effects of the statement are "irrelevant" for the purposes of the section.[240] This statement, however, contradicts the practice of the European Court, which, when the restriction is on the freedom of expression as in section 1, examines whether the statement could have "any harmful effect."[241] In *Ozturk v. Turkey*, the European Court found that the banning of a book was disproportionate where the book *indirectly* supported outlawed Marxist ideology because the book did not cause an actual threat of violence.[242] Section 1 does not require an actual harmful effect and actually disregards consideration of a statement's actual effect. The statute will likely criminalize even statements that do not result in a "harmful effect." In such instances, the punishment of up to seven years imprisonment will certainly be disproportionate.

Some individuals might argue that the threat of terrorism is so severe, that any measure to reduce radicalization—even if imperfect—should be afforded deference. Moreover, a U.K. government review of the Terrorism Act 2006 prior to its passage determined that section 1 formed "a proportionate response to the real and present danger of young radically minded people being persuaded towards terrorism by apparently authoritative tracts wrapped in a religious or quasi-religious context."[243] This review, however, examined section 1 primarily in comparison to previous bill drafts that were more stringent and vague. Thus, the reviewers found section 1 as more proportionate in comparison to the original drafts—but not necessarily proportionate in its own right.

Additionally, the government review did not consider any alternatives to the section, including whether a more clearly defined statute would be more proportionate while still achieving the goal of reducing radicalization.[244] Finally, at the time of the report in October 2005, the shock and impact of 7/7 still weighed heavily on

238. *See id.*
239. Terrorism Act, 2006, c. 11, § 1(5)–(7).
240. *Id.* § 1(5).
241. *See supra* note 72 and accompanying text.
242. *See supra* notes 75–78 and accompanying text.
243. LORD CARLILE, PROPOSALS BY HER MAJESTY'S GOVERNMENT FOR CHANGES TO THE LAWS AGAINST TERRORISM 8 (2005).
244. *See generally id.*

the U.K. government.[245] In the aftermath of the 7/7 bombings, it certainly may have seemed that such broad, sweeping criminalization of speech was necessary and proportionate. After years of little use and continuing radicalization, however, people must begin to realize that section 1 should be amended to comply with the U.K.'s human rights obligations.

IV. Section 1 Should Be Amended to Comply with the Freedom of Expression Guaranteed by the European Convention on Human Rights

Under the Human Rights Act of 1998, which incorporates into U.K. domestic law the rights secured by the ECHR, all U.K. courts are required to interpret U.K. legislation as compatible with the ECHR to the extent practicable.[246] The source of conflict between section 1 and the ECHR lies directly in the Terrorism Act 2006 itself, including the broad and vague nature of criminalized statements, the inclusion of glorification of terrorism, and the requirement that the actual impact of the statement is immaterial. As a result of these direct conflicts, U.K. courts would be unable to interpret section 1 as compatible with the ECHR. Thus, the appropriate remedy to make section 1 compatible with the right to freedom of expression is for parliament to amend section 1 in three ways: (1) provide a precise definition of indirect incitement that requires some danger result; (2) eliminate the term "glorification" from the definition; and (3) clarify the government's discretion to prosecute.

First, an amendment by parliament should include a more precise definition of which statements indirectly encourage or incite acts of terrorism. Such a definition would include a requirement that the statement, in question, causes a danger that a terrorist act may be committed or that violence will result. This amendment would not go so far as requiring that an "imminent" danger be created, recognizing the need for the U.K. government to act with sufficient time to prevent a terrorist attack. This amendment would, however, significantly narrow the potential statements criminalized under the Act while still capturing the category of statements that actually cause a danger to the public. The amendment would also move the focus of the definition away from the difficult interpretation of whether recipients would likely receive

245. *See, e.g., id.* at 1–6.
246. Human Rights Act § 3(1).

such a statement as encouraging terrorist acts. Instead, the definition would focus on the actual impact of the statement in creating a danger of violence. Such a change to the definition would create more legal certainty as to the crime and allow an individual to more accurately predict and ascertain the consequences of his actions. Furthermore, this amendment to the definition would help meet the ECHR requirement that a restriction be sufficiently prescribed by law.

Such a definition, based on the actual impact of the statement, would also reflect a more proportionate response to the threat of radicalization because it would clearly link the criminalized statements to a threat that violence could result. The new definition would also bring the statute in line with the CECPT, which would address at least one concern that has prevented the United Kingdom from ratifying the convention.

Second, parliament should eliminate the inclusion of the term "glorification" as an example of statements that may indirectly encourage terrorism. The term "glorification" is simply too broad to be effective or considered legitimate.[247] In the few cases where praising or celebrating acts of terrorism may actually lead to violence, these situations would be incorporated into the more precise definition of "indirect encouragement" as amended above. Other statements that praise or celebrate terrorism, while they might be offensive, should not be criminalized under the guise of national security unless they actually present a threat of violence. The importance of freedom of expression to the very nature of a democratic society includes a tolerance of ideas that the government, or a majority of the public, finds offensive or does not support.[248] This change in the definition regarding which acts indirectly incite or encourage acts of terrorism would also render section 1 more clearly prescribed by law and more proportionate and, therefore, enable section 1 to meet the tests of the ECHR for restrictions of freedom of expression.

Finally, parliament should amend the statute to require that the DPP issue guidance about its use of discretion to prosecute this crime, established in section 1. The guidance should be available to the public and clearly outline the types of statements that will be prosecuted. This guidance would provide additional legal clarity

247. See *supra* notes 174–77 and accompanying text for some of the potentially absurd results of such a broad definition of glorification.

248. *See* Surek v. Turkey, App. Nos. 23927/94 & 24277/94, Eur. Ct. H.R. (1999); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

regarding statements that are considered criminal; making the criminalized acts more foreseeable to any citizen. Furthermore, the guidance would clearly define the method and scope of the DPP's discretion, which the European Court requires.

Given the limited enforcement and arrests of section 1 to this point,[249] such amendments would not negatively affect the ability of the U.K. government to combat radicalization. Rather, by bringing the statute into compliance with human rights obligations and the CECPT and thus, legitimatizing section 1, the U.K. government may be more free to use the statute without a fear of public backlash.

V. CONCLUSION

The threat of terrorism to the United Kingdom and other countries will likely continue for decades. As countries struggle to develop measures to address immediate threats, many people recognize that one long-term solution must be to address the root causes of terrorism itself. While there are a myriad of paths that can drive an individual to take up arms against his country as a terrorist, violent extremist ideologies serve to both recruit attackers and motivate the execution of attacks.

In the immediate aftermath of any terrorist attack, the natural inclination of the attacked country is to respond swiftly and forcefully. A country, however, risks undermining an effective response to a legitimate threat if the country responds without regard for human rights obligations. Although section 1 would currently be considered non-compliant with Article 10 of the ECHR, with a few reasonable amendments, parliament could bring the statute into compliance. In so doing, the United Kingdom could also ratify the Council of Europe Convention on the Prevention of Terrorism, which is long overdue. Finally, such changes, including those to the definition in section 1, would likely make section 1 more acceptable to the public because, generally, a narrowly tailored statute is less likely to be abused and the revised statue would comply with international human rights standards. Rather than completely repealing section 1, the suggested amendments would allow the United Kingdom to continue the legitimate aim of combating radicalization that leads to terrorism.

249. As of June 2010, only two high-profile cases had been brought under section 1. *See supra* notes 197–201 and accompanying text.