Of Haunted Speech

A critical examination of incitement to terrorism laws and speech regulatory practices in the post-9/11-7/7 continuum

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Submitted in partial fulfillment of the requirements of the degree of Doctor of Philosophy of the University of London, June 2019

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Declaration

I Peter Kalulé confirm that the research included within this thesis is my own work or that where it has been carried out in collaboration with, or supported by others, that this is duly acknowledged below and my contribution indicated. Previously published material is also acknowledged below.

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Some of the work in chapters one, two and three of this thesis appears in an article I have published entitled "On the Undecidability of Legal and Technological Regulation", in the second issue of Volume 30 of Law and Critique, 2019.

100,000 words including footnotes *excluding the bibliography and appendix.*

Abstract

The preponderance of thinking in UK counterterrorism circles is that speech that incites terrorism (at least online) is not only a contributor to terrorism but it is also a form of terrorism/radicalisation/extremism in and of itself. Thus, there is a perceived need to pre-emptively suppress such speech. Accordingly, counterterrorism laws and regimes in the post 9/11-7/7 era are marked with a distinct urgency or vigilance that seeks to pre-empt speech that incites terrorism. However, inasmuch as these incitement to terrorism legal and regulatory regimes (e.g., the incitement to terrorism provisions under the Terrorism Act 2000, the Terrorism Act 2006 and the Public Order Act 1986) appear to be stable, they are still marked with traces of indeterminability or undecidability that not only expand law's exclusionary violence but also makes law self-inadequating. Such traces of undecidability are reflected in the opacity of the law and its overlaps with other criminal laws such as soliciting murder, malicious communications and incitement to racial hatred. Another key trace of undecidability is evident in the arena of online regulation, which seems to flounder in the sense that it struggles to contain the cross-territorial ephemerality and polyphony of online speech.

Consequently, this thesis seeks to examine and verify two hypothetical claims, that: 1) speech that incites terrorism cannot be contained because speech is inherently divergent and iterable. In this sense, regulating speech is thus inescapably confusing, mistake-laden (e.g. with false positives online) and inoperable at times; and 2) incitement to terrorism legal provisions and policies as well as the fair balancing principles of human rights law are undecidable and self-inadequating because they are irretrievably troubled by aporetic conceptual operations.

In an attempt to destabilise the calculability and stability that pervades much of contemporary thinking on incitement to terrorism regulation enforcement and criminalisation in the UK. These claims are critically unpacked through the concept of hauntology, a deconstructive concept derived from critically engaging with Jacques Derrida's scholarship on spectres, différance, dissemination, autoimmunity and undecidability. By showing that incitement to terrorism laws and practices bear the deep imprint of a pervasive lack of definitive determinability, this thesis allows for the tentative ethical possibility of reconfiguring what calculable absolutist frames of "incitement to terrorism", law enforcement, and regulation currently disavow.

Acknowledgments

This thinking and writing would not have happened without a summoning and gatherage of generous ghosts (family, chosen family, friends, interlocutors, teachers, readers, and re-readers) who have provided and continue to provide me with gifts of nourishment, criticism, care, and inspiration.

Friends and loves are the secret beyond the politics/police of citation. I owe endless debts of gratitude to them all.

Thanks to my supervisors Dr. Saskia Hufnagel and Prof Julia Hörnle who have supported and engaged passionately with my ideas. Thanks to my examiners Dr. Liora Lazarus and Prof Hans Lindhal for their insightful comments and feedback.

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Unless you can goad in boats and throw flowers on that ocean, you are encouraging ghosts to haunt you forever; you are encouraging cries in the psychic night.
— Kamau Brathwaite

I finally know how not to have to distinguish any longer between promise and terror.
—- Jacques Derrida

You cannot be conscious unless you are haunted.
—- Renée Bergland

How imprisoned we are in their ghosts.
— Dionne Brand

For all my Jajjas & parents
—— who only arrive
dreaming:

Introduction

> *"The Spectre of 'the Terrorist' has taken on a god-like power, equivalent to the plague of earlier times or the Satan of religion."—Joanna Bourke.*[1]

Background and context

Terrorism (the use or display of violence for political gains) has gained currency as a method (and an area of scholarship) that holds an incessant "hyper-real"[2] resonance of uncertainty, insecurity and fear. The last eighteen years since 9/11 suggest that we, in Western Europe, are experiencing an interminable spectre of terror,[3] a monumental catastrophe of global proportions that keeps unsettling us with palpable collective emotions of uncertainty, anxiety and imminent precarity. These emotions tend to be most evident in the aftermath of terrorist attacks that have occurred in Continental Europe (i.e., Madrid, Bulgaria, Paris, Brussels, Berlin and Copenhagen) and in the UK (the 7/7 bombings, Lee Rigby's murder and the Manchester and Westminster attacks) in recent years.

In addition to "real world" terrorist incidents and fears like bombs and attacks, the spectre of terror today also manifests itself online through all forms of extremist propaganda that keep proliferating through the ephemeral infinitude and temporality of social media as if to remind us that terrorism has become an inescapable part of our modern psyche (albeit one that we can observe and feel) but not touch.[4] Concerned with this state of events, western governments have been preoccupied with efforts to intercept and take down terrorist propaganda with the rationally calculated view[5] that the control and removal of these forms of

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[1] Bourke, J. *Fear: A cultural history* (Counterpoint Press, 2005) preface

[2] For Baudrillard, "hyper-reality" relates to signs, symbols, and messages that engender a modern state in which fantasy, desire and reality are indistinguishable Baudrillard, J. "Simulacra and simulations in Poster, M.(Ed.). Jean Baudrillard: selected writings (1988). pp.166-184

[3] This in a somewhat violent gesture ignores the fact that people elsewhere in different geo-histories around the world have always/already been experiencing the spectre of terror pre-9/11 (and post 9/11) as a result of western invasions etc.

[4] May, T. Speech to the UN General Assembly 2017 Delivered on:
20 September 2017 available at: < https://www.gov.uk/government/speeches/theresa-mays-speech-to-the-un-general-assembly-2017>

[5] For the purposes of this thesis, calculation or the calculable refers to an episteme/method/programme of risk-benefit or harm–welfare analysis/appraisal that is aimed at achieving a liberal-utilitarian end. See: Saghafi, K. "*Calculus*" in (eds) Oliver, K and Straub, S. Deconstructing the Death Penalty: Derrida's Seminars and the New Abolitionism, (Fordham University Press, 2018): 139-155

extremist speech will counter their dissemination and thus stop terrorism.[6] Whilst this is a commendable course of action, it is one that seems to always be compromised by the fact that the very foundational frameworks for regulating and countering terrorism i.e., terms like "terrorism", "radicalisation" and "extremism" and the ways in which they are deployed and transmitted are extensive and definitionally opaque hence making it practically difficult to identify, apprehend and pre-empt speech that incites terrorism.

Moreover, in the event that such enforcement is effective (although in a sense, all enforcement is effective in its use of violence and force), the practical cross-territorial, fast, resurfacing, and ever-changing characteristics of online content means that regulators are always belatedly unable to contain extremist or radical speech. Despite the law's efforts at containment, extremist speech keeps regenerating, multiplying, detonating like an information bomb, and never ceasing, on end.

It appears then, that the very unpredictable nature of terrorism and the reverberative affective sensations it induces somewhat psychically complicate lawmaking and regulation processes further. This is to say; terrorist attacks can be infrequent but can have such a phantasmic or strong symbolic significance that insinuates a feeling of inadequacy, helplessness and insecurity. As such, governments may feel that they need to do more in order to protect their citizens. This is usually done in legislative terms more specifically through counter terrorism laws that are disseminated and supplemented by a bio-diversity of players from lawyers to the police and law enforcement, to AI design, to regulation. But as this thesis will show, these laws bear an irreconcilable conceptual tension an inadequation that is displayed in their inability to make distinctions about what terrorism is or what speech that incites terrorism is. This is a tension that is also evidenced in laws singular desire to capture the incommensurability and unpredictability of something as indefinable and insurrective as terror, a phenomena that keeps returning. "It begins by coming back"[7] interminably in all manner of guises always already befuddling the systems that seek to contain or capture it. At any rate, "the threat level always already remains substantial, severe or "highly likely", — *imminent*.[8] The worst always still remains to come, spectrally, interminably.

[6] The EU maintains that there are links between the continued high level of terrorist threat in the EU and internet in its aiding of terrorist organisations to pursue and fulfill their objectives to radicalise, recruit, facilitate and direct terrorist activity. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online Brussels, 12.9.2018, available at: < http://www.statewatch.org/news/2018/sep/eu-com-terrorist-content-online-ia-swd-18-408.pdf>. The UK's Counter-Terrorism and Border Security Act 2019 is also framed on this kind of assumption although it also limits its scope to proscribed organisations.
[7] Derrida, J. *Specters of Marx* (Routledge, 1994)
[8] See MI5 threat levels, available at: < https://www.mi5.gov.uk/threat-levels>

Thus, terrorism and indeed the desire or impulse to contain speech that incites terrorism becomes a ghostly and spectral encounter as it takes on and evokes a symbolic collective post-traumatic limbo,[9] leaving us in a position where we simply cannot get over what has (not yet) happened.

Research questions

The problems this thesis is concerned with are generally problems of undecidability, opacity and uncontainability of speech with respect to incitement to terrorism laws and regulatory practices in the post 9/11 continuum. Hence, this thesis seeks to explore the following set of questions:

1) What are the origins of incitement to terrorism legislation in the UK?
2) How and why did this legislation come about when it did? What factors shaped it and continue to shape it?
3) Why is it that speech that incites terrorism is conceptualised as a cause of violence in and of itself? How is such "violent speech" distinguished from innocuous speech both in law and practice?
4) What ethical and human rights issues arise when trying to identify, apprehend and contain speech that incites terrorism?
5) How do (and how could) human rights tread the difficult line of having to ensure a justifiable balance between countering speech that incites terrorism on the one hand and the right to freedom of speech and its related rights on the other hand?

Aims and objectives of the thesis

The objective of this thesis is to act as a deconstructive intervention[10] against much legal positivist scholarship (on terrorism and online and offline speech regulation as well as human rights) that has sought to examine terrorism legislation and speech regulation and enforcement as though they are "determinist", "stable", "monolithic" and perfectly capable of calculating and containing terrorism and speech that incites terrorism, that views failures to regulate as slight aberrations —which through the right mixture of government policy and legal adjustments could ultimately be excised. This thesis argues that such legal

[9] Habermas, J. & Derrida, J. *Philosophy in a Time of Terror* (The University of Chicago, 2003) pp.97-103
[10] As Davies observes, mainstream legal philosophy and scholarship tends to concentrate on positive institutionalized law, and not on the multiplicity of the possible dimensions of law which inform our multiple existences, Davies, M. "Derrida and law: legitimate fictions." In (ed) Legrand, P. Derrida and Law pp. 71-95 (Routledge, 2017); Cornell, D. "Time, deconstruction, and the challenge to legal positivism: the call for judicial responsibility." Yale JL & Human 2 (1990): 267

perfectibility/determinism is necessarily impossible. It does this by exposing the non-eliminable undecidability of lawmaking and regulation in the UK particularly with regard to incitement to terrorism in the post 9/11-7/7 continuum. Such an exposition is done through a critical-interdisciplinary analysis, more specifically through a critical-deconstructive reading. In using a critical-deconstructive approach that synthesizes and cross-pollinates disciplines,[11] this thesis intends to show that the problems of lawmaking and regulation (as they pertain to incitement to terrorism) do not free-float or exist singularly and disconnectedly but that they are plural or plurivocal, in the world with others.[12] The rationale of this approach is not to dissolve the identity of law, but is to enhance the quality of this thesis as an analysis of society and social life[13] by gathering together and appropriating helpful insights from other disciplines in order to understand the multifaceted and interconnected problems of speech regulation and counterterrorism "because law, [by] itself can understand nothing".[14]

Literature review and concerns of thesis

Although excellent scholarship (within anthropology,[15] feminist jurisprudence, critical race theory and critical legal discourses) has been done in the area of counterterrorism,[16] human rights,[17]security,[18] and regulation,[19]not many connections between the existing and varied fields and sources of study in relation to law and speech regulation have been drawn in the existing literature using critical-deconstructive conceptual frameworks. The only exceptions within legal scholarship that I have come across are Judith Butler's scholarship on injurious speech[20] (although one could argue that Butler's work is not a legal enquiry) and Uladzislau Belavusau's critical examination of speech in transitional Democracies.[21] Discounting these texts, many analyses of freedom of speech or freedom of expression in general are still formulated within a liberal-utilitarian or liberal-humanist[22] (usually a Millian) conceptualisation

[11] Cotterrell, R. Law, culture and society: Legal ideas in the mirror of social theory (Routledge, 2016) p.6
[12] Critchley, S. *Being and Time: 'Being-in-the-world'* The Guardian (06/06/ 2009) available at:<http://www.guardian.co.uk/commentisfree/belief/2009/jun/22/heidegger-religion-philosophy?intcmp=239>
[13] Derrida, *Philosophy in a Time of Terror*
[14] Ibid p.5
[15] Pohjonen, M,and Udupa, S."Extreme speech online: An anthropological critique of hate speech debates." *International Journal of Communication* 11 (2017): 19
[16] Edwards, P. Counter-terrorism and counter-law: An archetypal critique. Legal Studies 38, no. 2 (2018): 279–97
[17] Gearty, C. Terrorism and human rights. Government and Opposition 42, no. 3 (2007): 340-362
[18] See Goold, B. J., and Lazarus, L. (eds) *Security and human rights* (Bloomsbury Publishing, 2019)
[19] Mythen, G. and Walklat, S. "Pre-crime, regulation, and counter-terrorism: interrogating anticipatory risk: Gabe Mythen and Sandra Walklate explore the extent to which risk is being utilised more intensively in the development of crime control policies." *Criminal Justice Matters* 81, no. 1 (2010): 34-36; Beck, U. *World at Risk*
[20] Butler, J. *Excitable Speech: A politics of the performative* (Psychology Press, 1997)
[21] Belavusau, U. Freedom of speech: Importing European and US constitutional models in transitional democracies. (Routledge, London 2013)
[22] The right to free expression is grounded in liberal-utilitarian framings of the individual, and based on

of speech that in my view pre-calculates/presumes specific kinds of subjects that correspond to normative modes of life, law making and governance at play within specific geopolitical as well as historical frames of understanding the human,[23]and hence fails to give credence to (or pre-limits) the iterable divergence and heterogeneity of speech. In this sense, most normative legal conceptualisations of speech fail to capture the complexity of speech as a social, legal, and cultural phenomenon. And even in places where critiques are compelling such as Eric Heinze's critique of normative liberal-utilitarianism in *Hate speech and Democratic Citizenship,*[24] Heinze's reformulation of the familial notion of citizenship or rights still reenacts the violence and homo-hegemony of the very liberal frameworks of speech that he is trying to critique. Thus, by upholding a reworked notion of autochthony, sovereignty and statehood what he calls "citizenship", Heinze does not address the plural coming/absence of the other, and all their heterogeneous and iterable speech. This thesis seeks to attend to this lacuna.

Further, conceptual frames like "security and insecurity",[25] "panic",[26]"crisis",[27] "racialising surveillance",[28] and "peril"[29] are used to analyse terrorism in contemporary scholarship. But although these analyses touch on the power and control dynamics[30] as well as the psychic, perceptive, cognitive and emotional impacts of terrorism generally,[31] they do not provide a critical-deconstructive frame that allows us to reflect more specifically on the interminable phantasmic nature of "speech" or indeed speech that incites terrorism. Put another way, these conceptual frames do not explore the ability of terrorist speech[32] to spectrally elude ethico-legal and regulatory structures in the post 9/11-7/7 continuum. This thesis seeks to question the ethical horizons enclosed within these frames (especially with regard to the

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the foundational liberal ideas such as autonomy and human dignity see for example Barendt, E. *Freedom of Speech* (Oxford University Press, 2005) Notwithstanding, the problem with liberalism as this thesis highlights is that it is predisposed to disavowing the heterogeneous difference of the other.

[23] Butler, J. Frames of War: When is Life Grievable? (Verso, 2009) pp.137-139

[24] Heinze, E. *Hate speech and democratic citizenship* (Oxford University Press, 2016)

[25] Armborst, A. "Countering Terrorism and Violent Extremism: The Security–Prevention Complex In eds B. Goold and L. Lazarus Security and Human Rights (Hart Bloomsbury Publishing, 2019); Loader, I. "Ice cream and incarceration: On appetites for security and punishment." Punishment & Society 11, no. 2 (2009): 241-257; Bigo, D. & Tsoukala, A. (eds) Terror, insecurity and liberty: Illiberal practices of liberal regimes after 9/11 (Routledge, 2008) Bigo, D. Illiberal practices of liberal regimes: The (in) security games (Editions L'Harmattan, 2006); Huysmans, J. The politics of insecurity: Fear, migration and asylum in the EU (Routledge, 2006); Chebel d'Appollonia, A. Frontiers of fear: Immigration and insecurity in the United States and Europe (Cornell University Press, 2012); Grewal, I. Saving the Security State: Exceptional Citizens in Twenty-First-Century America. (Duke University Press, 2017)

[26] Cohen, S. Folk Devils and Moral Panics: The Creation of the Mods and Rockers (Routledge, 1972); Goode, E. and Ben-Yehuda, N. Moral Panics: The Social Construction of Deviance (John Wiley & Sons 2010)

[27] Hall, S., et.al Policing the crisis: Mugging, the state and law and order (Macmillan Press Ltd, 1982)

[28] Browne, S. Dark matters: On the surveillance of blackness (Duke University Press, 2015)

[29] Stone, G. R. Perilous times: free speech in wartime from the Sedition Act of 1798 to the war on terrorism. (WW Norton & Company, 2004)

[30] Bigo, *Terror insecurity and liberty*, 2008: Bigo's analyses on terrorism and insecurity draw heavily from Foucault's work on power, biopolitics and control.

[31] Ahmed, S. The 'emotionalization of the war on terror': Counter-terrorism, fear, risk, insecurity and helplessness." Criminology & Criminal Justice 15, no. 5 (2015): 545-560

[32] The "terms terrorist speech"/ "incitement to terrorism" are interchangeable in this thesis.

disavowal of the alterity of the other and the other's speech) as well as the ideals of certainty and coherence that they project by exposing and probing the impossible "contradictions"[33] that plague and sustain their very regulatory structures and lawmaking processes.[34]

Much of this approach to studying terrorism is indebted to Derrida's scholarship on terrorism as enumerated in texts like *Rogues*,[35] *Spectres of Marx,* and in *Philosophy in a time of terror*,[36]where Derrida offers us the language of autoimmunity [37]and haunting[38] (as concepts that tie into other deconstructive concepts such as the heterogeneous, the incalculable, the absented, and the unanticipatable like dissemination,[39]speech, *différance*, amongst others) to show how the sovereign and political-legal orders of nation states become epistemically imperiled or unsettled by their desire to capture i.e., "punish or acquit rationally"[40] an un-identifiable terrorist threat. With autoimmunity and haunting, Derrida is able to show how the state/sovereign is always already –– "in a quasi-suicidal fashion"[41] –– compromised and made vulnerable, by its very grammars of capture and securitisation. In the context of contemporary post 9/11-7/7 counter-terrorism discourse, these grammars of containment/capture are particularly blurred. They are used in a substantially broadened and abstract or unrecognisable manner i.e., through what Agamben has called the state of exception.[42]

The work of scholars like Derek Gregory,[43] de londras,[44] and Conor Gearty[45] has already done the important work of articulating how these pre-emptive rubrics lead to a draconian state of emergency that truncates the liberty and fundamental rights of individuals[46] in a wide range of contexts e.g., from stop and search to extra-legal detention and internment. This thesis does not seek to address these particular aspects of rights and terrorism but it draws from them, extends, and situates their critical observations within the context of speech that incites terrorism. I am specifically concerned about articulating how these overdetermined or

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[33] These contradictions are not a *tout court* rejection of law. Rather, they seek to highlight that a certain degree of ethical impossibility operates within the structure of law itself.
[34] n.10
[35] Derrida, J. *Rogues: Two essays on Reason* (Stanford University Press 2005)
[36] Derrida, *Philosophy in a Time of Terror*; Derrida J, Dissemination (Athlone Press, 1981); Derrida, J. *Signature event context* 1972 Glyph I, 1977; Butler, *Excitable Speech*
[37] An autoimmune/autoimmunary logic is at play where a system or being "in quasi-suicidal fashion, works to destroy its own protection, to immunize itself against its own immunity". Derrida, *Philosophy in a Time of Terror*, p.94
[38] Derrida, *Specters of Marx*
[39] Ibid
[40] Spivak, G.C, "Terror: A speech after 9-11." boundary 2 31, no. 2 (2004): 81-111
[41] n.37
[42] Agamben, G. State of Exception (The University of Chicago, 2005)
[43] Gregory, D. "The black flag: Guantánamo Bay and the space of exception." Geografiska Annaler: Series B, Human Geography 88, no. 4 (2006): 405-427
[44] de Londras, F. "Can Counter-Terrorist Internment Ever Be Legitimate." Hum. Rts. Q. 33 (2011): 593
[45] Gearty, C. Liberty and Security (Polity Press 2013)
[46] Byrne, E. F., "The Post-9/11 State Of Emergency: Reality versus Rhetoric." Social Philosophy Today 19 (2003): 193-215

exceptional grammars of capture are tethered to a particular exclusivist calculation of emergency/terror/harm that[47] ignores and forecloses the heterogeneous speech and multiple subjectivities of the other. Which is to say, I am interested in how the discourse on terrorism/counter-terrorism [48] in the post 9/11-7/7 continuum inscribes a monolithic conceptualisation of harm, terror, citizenship, and ideology that makes certain minoritarian opinions unsayable. I am concerned about what this may mean for the right to freedom of expression especially for the most marginalised in society.

I am also interested in how the counterterrorism and securitisation discourse of the post 9/11 continuum (particularly the global war on terror) requires individuals and law enforcement to be on guard and alert for even though what they are on guard against is unclear, "abstract"[49] and ubiquitous.[50] I thus open out and expand on Zedner's notion of pre-crime[51] to make the claim that criminal determinations of terrorism occur within and through a pre-calculated homo-hegemonic liberal-utilitarian logic, of deterrence and utility that associates particular racialised forms of minoritarian speech[52] to "terrorism" even when the very notion of terrorism is conceptually inscrutable.[53] All these issues and their discursive iterations (i.e., the undecidability of harm or risk, the uncontainability of speech, especially as it is transmitted multi-jurisdictionally online, and the heightened affective hyper-vigilance or speculative diagnostic paranoia of counterterrorism discourse and hence its anti-Muslim racism)[54] inform my thinking on terrorism in this thesis. I weave into and out of them polyphonically using the conceptual framework of hauntology in order to suggest that they compromise and supplant the seemingly stable post 9/11-7/7 structures of lawmaking, counterterrorism and speech regulation, recurringly, — without closure.

On the issue of lawmaking, my thinking on law and human rights in this thesis borrows from the scholarship of Saidiya Hartman In *Scenes of Subjection,*[55] where Hartman argues that the Black subject comes into existence as the object of the law's violence without ever being

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[47] n.45: Gearty observes that assessments of liberty and security in democracies under a human rights calculus can push for "exclusivist priorities in efforts to defend themselves ; See also Baxter, Kimberly. "The Enlightenment's Post-9/11 Legacy." In *Civility, Nonviolent Resistance, and the New Struggle for Social Justice*, pp. 142-162 (Brill Rodopi, 2019)

[48] Chowdhury, K. *Human Rights Discourse in the Post-9/11 Age* (Springer, 2019); Kostakopoulou, D. "How to do things with security post 9/11." Oxford Journal of Legal Studies 28, no. 2 (2008): 317-342

[49] n.40

[50] I demonstrate in Chapter one that the "unclear" and "ubiquitous" signify a particular incommensurable spectral/haunting/visor effect especially when read within the context of online regulation.

[51] Zedner, L "Pre-crime and post-criminology?." Theoretical criminology 11, no. 2 (2007): 261-281

[52] Kundnani, A. The Muslims are coming!: Islamophobia, extremism, and the domestic war on terror (Verso 2014); Abbas, M S. "Producing 'internal suspect bodies': divisive effects of UK counter-terrorism measures on Muslim communities in Leeds and Bradford." *The British journal of sociology* 70, no. 1 (2019): 261-282; Nguyen, N. Suspect communities: Anti-Muslim racism and the domestic war on terror. (U of Minnesota Press, 2019)

[53] Derrida, *Philosophy in a time of Terror* p.29

[54] n.40: pp.91-92

[55] Hartman, S. Scenes of subjection: Terror, slavery, and self-making in nineteenth-century America (Oxford University Press 1997)

considered as fully human by the law. I read Hartman as a critical theorist of law in tandem with Derrida.[56] I align them both with other critical legal scholars like Kapur,[57] Golder,[58] and Simmons[59] as critics of the liberal-utilitarian legal project and its violence, its recursivity of unfreedoms, as well as its inadequacy to grasp both new subject formations and new forms of political imagination in so far as marginalised people are concerned.[60] I draw from and take their critiques of law's liberal-utilitarian impulses[61] as generative points from which I can analyse the regulation of speech in the post 9/11 continuum and the kinds of speech it absents.

To address what I am calling here absented speech, I probe how the liberal-utilitarian tradition functions in order to absent such speech. This thesis does not claim to offer a comprehensive critique of the concept of liberalism or even a critique of its inseparable and ongoing advancements into neoliberalism.[62] Rather, it focuses on certain mergings of liberalism and utilitarianism (hence the conjugation "liberal-utilitarianism") to probe how they shape and continue to shape as well as sustain the current order and system of law making, rights assessments, and risk assessment of "terrorist speech"[63] related crimes in the post 9/11-7/7 continuum. This is done by looking at J.S. Mill's harm principle, which acts as a norm of free expression and guides most thinking on speech and harm analyses within western legal-juridical orders.[64] My overarching claim here is that J.S. Mill's harm principle genealogically scaffolds "harm" under a wider utilitarian calculus of liberty that then forms the conceptual basis of what I refer to as liberal-utilitarian speech.

[56]Derrida, J. *The Death Penalty* Vol ii (The University of Chicago Press 2017); Derrida, J. *Force of Law: The Mystical Foundation of Authority* 11 Cardozo L. Rev. 920 (1990); Goldberg, J. A. "James Baldwin and the Anti-Black Force of Law: On Excessive Violence and Exceeding Violence." Public Culture 31, no. 3 (2019): 521-538

[57] Kapur, R. "On Gender, Alterity and Human Rights: Freedom in a Fishbowl." *Feminist Review* 122, no. 2 (2019): 167-171

[58] Golder, B. "Beyond redemption? Problematising the critique of human rights in contemporary international legal thought." London Review of International Law 2, no. 1 (2014): 77-114

[59] Simmons, W. P. *Human rights law and the marginalized other* (Cambridge University Press, 2011)

[60] Butler, *Frames of War* p.146

[61] Under a liberal-utilitarian framework law and indeed justice are turned into a utilitarian calculation/transaction for the security or utility of society. Thus, the categorical imperatives of Justice and indeed law (both criminal and human rights law) in liberal-utilitarian terms then become turned into a kind of bio-power deployed to punish some over others: Derrida, *The Death Penalty p.68*

[62] Kapur n.57; Flikschuh, K. Freedom: Contemporary Liberal Perspectives (Cambridge: Polity, 2007) Shnayderman, R. 'On "Being Forced to Be Free" between Republican and Liberal Freedom', Ethical Perspectives: Journal of the European Ethics Network 22, no. 2 (2015): 247–70; Svendsen, L.A. Philosophy of Freedom (Reaktion Books, 2014)

[63] n.32

[64] Kapur n.57: p.29 Kapur draws us to the symbiotic relationship between human rights and the liberal tradition

I want to illustrate briefly here, how, and why this thesis addresses and focuses on Mill's harm principle,[65] which stipulates that the law must not penalise the sheer expression of repugnant ideas except ideas that cause harm. If read closely, Mill's conceptualisation of harm has an inherent tension in the sense that it emphasises commitments to self-determination and egalitarianism whilst at the same time upholding and requiring the idea that moral character[66] and virtue need to be upheld for the *sensus communis/* good of society/sovereign. Singular divergent desires and autonomies are thus enmeshed and obfuscated within a greater idea of homohegemonic ideas dependent on virtue, morality, and economic interests.[67] For Mill, harm thus becomes a calculated formulation of discipline, "a standard of virtue and that maintains political stability",[68] measured, rationally distributed, and justified by utility, exemplarity or deterrence for the security or well being of society.[69] What such a utilitarian grid of political-legal-ethical calculation means in practical terms is that in most cases the majority (i.e., the commonwealth, the parliament, or the sovereign) will be responsible for establishing interventions, constraints or laws based on what they will consider to be harmful to the society as a whole. These laws determine the extent of grantable privileges and rights (such as speech).

Crucially, these rights and privileges are all-inclusive, which means that they are granted to minorities also, however, they carry with them a *logos*/reason and ratio[70] of inherent "distributive bias,"[71] which means that such rights and privileges always already "trade off the liberties of a few against the security [*and logos, reason, and ratio*][72] of the majority".[73]Harm thus becomes a regulatory intervention or a moral-legal-ethical barometer for the sovereign/the monolithic whole that demarcates a consensus that differentiates unacceptable or wrong conduct and speech from that which is right or acceptable. In the context of this thesis, this means looking at harm, as a measure or charge of what speech is "sayable" and what speech is "unsayable"; it means having to look at forms of speech (such as ideological speech or speech that incites terrorism) that are restricted and criminalised because they are

[65] I return to this discussion in chapter two in my analysis of Millian speech and harm.
[66] Harcourt, B. E. "The collapse of the harm principle." J. Crim. L. & Criminology 90 (1999): 109
[67] Wolff, J. "Mill, indecency and the liberty principle." Utilitas 10, no. 1 (1998): 1-16
[68] Berkowitz, P. Virtue and the Making of Modern Liberalism (Princeton University Press, 1999)
[69] Mill, J.S. *On Liberty, 1859* (*Broadview* Press, 1999)
[70]Derrida, *The Death Penalty* pp.197-198
[71] Goold, B J., and Lazarus, L Introduction in *Security and human rights* (Bloomsbury Publishing, 2019) p. 9; Waldron, J. "Security and liberty: The image of balance." Journal of Political Philosophy 11, no. 2 (2003): 191-210
[72] Derrida, *Rogues* p.214 Derrida reading Heidegger's *The Principle of Reason* draws us to the fact that reason, ratio, reckoning, security [*recht richting rechtfertigen*] and cognition are all interlinked to the homohegemonic command and control of the sovereign.
[73] Waldron, *Security and liberty*

justified/calculated as a cause of substantial harm to the majority interests of "representable subjects".[74]

What concerns me then in this thesis is an exposition of how the sovereign's monolithic and paternalistic Millian conceptualisation of harm in the context of responds to (or fails to respond interminably to) the unanticipatable alterity of the other and why/how it is that such a response is sustained. I am thus interested in examining why it is that Mill's harm principle, (and indeed other liberal-positivist frameworks of rights and justice), seems to always already eschew an ethics of relation to the other in the sense that when calculating or rationalising /justifying harm they privilege questions of utility, i.e., of a closed ends-oriented justice[75] in opposition to a demand of unanticipatable justice to come that can not be subsumed under any teleological schema and is open to the alterity of the other.[76] Similarly, I am interested in probing how such a calculated, conceptualised determination of harm in the context of speech that incites terrorism could be deconstructed (and perhaps "affirmatively sabotaged")[77] especially if we are in a position where we want to conjure an unanticipatable ethics of justice that is open to the heterogeneous alterity of the other.

Following from my foregoing discussion on Mill's harm principle and drawing/building from and upon the scholarship of Ramshaw[78] and Fitzpatrick,[79] I want to suggest that Millian liberal utilitarian conceptualisations of speech and harm highlight a problematic tension or aporetic relation between the singular and the heterogeneous, when calculating harm in relation to rights. Because of this inescapable structural tension (of the *singular v. the incommensurable/ heterogeneous*), the heterogeneous other cannot and does not get to fully participate in such a deliberative democracy as their rights and identities are always delineated through a monopoly of violence and its singular legal-regulatory frame. And in the rare event that the other gets to participate, the other only participates under prescribed or pre-calculated notions

[74] Riley, Jonathan. "J S mill's doctrine of freedom of expression." Utilitas 17, no. 2 (2005): 147-179; See also Hart, H. L. A. Law, Liberty and Morality (Stanford University Press 1963) Hart's conception of harm is similarly Millian. But one wonders which subjects remain "representable" under their particularly liberal-European schema. See also n.86-n.93

[75] Despite his insightful critique, Waldron in his discussion of rights and harm constantly makes positivist claims that are grounded in liberal-utilitarian reason. He for example, emphasises that "we must insist that those who talk the balancing-talk step up to the plate with some actual predictions about effectiveness": n.73, p.210. This is a critique that does not interrupt the "double-bind" economy of the force of law, which provides rights/liberties whilst at the same time engenders unfreedom. Further, Waldron's analysis is still pre-occupied with undoing calculations of rights as utility and it does not address an unanticipatable justice to come that embraces to the alterity of the other.

[76] Derrida, *The Death Penalty* p.62

[77] "I write in the conviction that sometimes it is best to sabotage what is inexorably at hand, than to invent a tool that no one will test, while mouthing varieties of liberal pluralism": Spivak, G.C. A critique of postcolonial reason (Harvard university press, 1999) p.9; Spivak, G.C. An aesthetic education in the era of globalization (Harvard University Press 2012) p.510

[78] Ramshaw, S. *Justice as Improvisation: The law of the extempore* (Routledge, 2013) pp.38-43

[79] Fitzpatrick, P. Is Law Cosmopolitan? in de Vries, U and Francot, L. Law's Environment: Critical Legal Perspectives (Eleven International Publishing, 2011)

of liberal pluralism that assimilate the other's difference in a violent singular/monolithic fashion by prioritising the needs of the greatest number, the majority of citizens. To this end, whatever harms the marginalised or dispossessed experience is never accounted for. This accounting for is a kind of rights recognition that as Ratna Kapur observes is contingent on the subject's "recognisability".[80]

If we were to stretch the aporia of the *singular v. heterogeneous* further, wherein law is a singular monopoly structure that seeks to define and also to contain the heterogeneous like crime, harm, terrorism or speech, we encounter a moment of legal-regulatory slippage wherein the singular/authoritative/calculating structure of law fails irreparably because it remains haunted by an originary autoimmune lack to contain the incalculable.[81] As such, the heterogeneous or multiplicitous (i.e., terrorism, or speech) become especially non-reducible problems for law. They remain spectrally or inescapably present, escalated, always already present, (*before/ after*), and in the very moment of their containment or exclusion, — despite law's best efforts to apprehend, define, identify, or pre-empt them.[82] This non-reducibility by law of these problems, combined with the resolute liberal reason and insistence of law to define/contain and apprehend their heterogeneity, is of critical concern to this thesis. I explain how this happens further in chapter one using the notion of deferred speech (*différance*) or the iterability of speech as a synecdoche for the heterogeneous — i.e., terrorism, incitement to terrorism, harm, and speech.

It could be argued that my reading of liberalism so far is reductive that liberalism or indeed liberal-utilitarianism as democratic and liberal concepts do have within them a radical bearing that holds out a space for the heterogeneity of the other. This is the same line of thinking that has been taken up by thinkers like Hans Blumenberg,[83] (and Richard Rorty,[84] and Chantal Mouffe)[85] who defend the idea that the modern liberal age possesses a novel quality in the form of the idea of "self-assertion" a rational idea that is distinct from a medieval or modern secularised religious position that attempts to affirm a more progressive egalitarian and inclusive liberal politics. Blumenberg's concept of the "self-assertion of liberal reason" (which provides man with a potentiality for his own fate) is arguably what could lead to the inauguration of self-transformative conceptualisations of global citizenship and sovereignty that do away with older historical-political horizons. Inasmuch as Blumenberg's analysis of liberalism is luminous and insightful, I find it limiting for my study mainly for the reason that

[80] Kapur, *Gender, Alterity, and Human rights* p.58
[81] n.75; n.76; Kalulé, P. On the Undecidability of Legal and Technological Regulation." *Law and Critique* 30, no. 2 (2019): 137-158
[82] Ibid: The irreducibility of terrorism as a problem of law is why I do not set out to define terrorism in this thesis.
[83] Blumenberg, H. The legitimacy of the modern age (Mit Press, 1985)
[84] See Hall, D. L. *Richard Rorty: Prophet and poet of the new pragmatism* (SUNY Press, 1994); Rorty, R. "A world without substances and essences." Philosophy and social hope (Penguin Books 1999)
[85] Mouffe, C. The return of the political (Verso, 1993) p.3

Blumenberg's idea of self-assertion gestures toward a historical fictionalisation of "man" that prevents him from acknowledging the structural origins and transcendental continuities of epistemic as well as ontological violence within western modernity that continue to subjugate non-European others.[86] Put another way, in Blumenberg's formulations of secularism, freedom, liberty and self-assertion, western human "man" still remains "overrepresented"[87] (i.e., historically embedded, contingent and epistemologically grounded) through a particular progressive western self-presencing framework of post-Enlightenment bourgeois liberalism that attempts to rewrite yet at the same time negates the brutal on-going architectonic history of modernity. Thus, Blumenberg's framework does not attend to the rise of the plantation and enslavement, colonialism, and new forms of empire; that centre "rational self-interested subjects" as possible outcomes of a cultural epistemology and sovereign force of such self-assertion.[88] And so, following Hortense Spillers, it can be argued that the social mechanisms at work within Blumenberg's homogeneous formation of self-assertion (and thus "*difference in, and as, hierarchy*" and "race") remain reformulated self-referentially as "venerable master signs"[89] that are never addressed.[90] Simply put, Blumenberg's unified formulation of the human/ of a society that "self asserts" is parochial, Eurocentric, and continues to conceal, or disavow the alterity and heterogeneity of the other.

In light of this, I want to take on a differently critical reading of liberalism that is also at once a critique of law and regulation as norms of governance. I position my thought in line with a number of critical thinkers on liberalism like Derrida, Hartman and Wynter who analyse law, liberty, and freedom from outside and beyond Eurocentric or Logocentric frames of modernity.

Accordingly, my reading of liberalism in this thesis maintains that liberalism in relation to the other is aporetic. This is to say that liberty under a liberal-utilitarian norm, normative

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[86] For Blumenberg, "it is in fact possible for totally heterogeneous contents to take on identical functions in specific positions in the system of man's interpretation of the world and of himself. In our history this system has been decisively determined by Christian theology." n.80: p.64. How Blumenberg's theoretical positions are structurally legitimised and hierarchically allocated is never addressed. Blumenberg seems to take a position, which does not examine the conditions of dispossession, the epistemic recursivity, and violence that self-assertion could engender. Could Blumenberg's notion of self-assertion then not be read as a legal and extra-legal self-assertion of self-same power, *ipseity* and violence over/against the non-European other, and to colonial/imperial ends? Doesn't self-assertion allow for the exclusion of other possible subject formations in the name of a politics of progress as Butler might ask? See Butler, *Frames of War* p.141

[87] Wynter, S. "Unsettling the coloniality of being/power/truth/freedom: Towards the human, after man, its overrepresentation—An argument." CR: The new centennial review 3, no. 3 (2003): 257-337

[88] Bogues, A. *Black heretics, black prophets: Radical political intellectuals*. (Routledge, 2015) p.1; Grosfoguel, R. "Decolonizing post-colonial studies and paradigms of political-economy: Transmodernity, decolonial thinking, and global coloniality." Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World 1, no. 1 (2011)

[89] Spillers, H. J. "All the Things You Could Be by Now If Sigmund Freud's Wife Was Your Mother": Psychoanalysis and Race." Critical Inquiry 22, no. 4 (1996): 710-734

[90] Ibid

governance or regulation purports freedom and yet at the same time, it establishes a hierarchy of the human subject and the desires of such a human subject. To illustrate this problematic, I pay particular attention to Saidiya Hartman's[91] and Rinaldo Walcott's[92] formulations of liberalism as a tension of *freedom v. unfreedom* or *subjectivity vs. subjection*.

Reading Hartman and Walcott draws light to the fact that within a liberal framework, individuals can fit within the state's vision of law as citizens but they can also *still at once* remain outside the law's reach of protection insofar as they are not counted as fully human. Indeed for Hartman and Walcott, Black individuals and indeed all minoritised/racialised subjects are inscribed within the liberal freedoms and unfreedoms of law. They are inside the law, yet at the same time also outside it, as managed, racialised and disciplined subjects, "no-bodies"[93] or deviant "monstrous excess[es]".[94] Their liberal "human" freedoms are determined by law and at the same time inhibited and truncated by law. Indeed for Walcott "enlightenment and post-enlightenment modernist legislative and juridical practices inhibit freedom rather than endow it or provide for its proliferation or its coming into to being."[95]Thus, even where law under the auspices of liberalism claims to have an emancipatory and egalitarian effect, such law is still imbricated within precalculated legal-juridical limits and unilateral coercions that engender quotidian instances of unhumaning which preclude certain *incommensurable* subjects from equally partaking "of the resplendent, plenipotent, indivisible, and steely *singularity* [i.e., abstract universality] that liberalism proffers.[96]Hartman and Walcott's critical reading of law and rights within liberal modernity is significant exposes the auto-violence/ force of law and resists a presentation of legal liberalism as something wholly desirable for the common good through its highlighting of law's inherent impulse to unfreedom and its "curtailment of sovereign personhood".[97] This is an inescapable structural dialectic, aporia, or double bind (*of freedom vs. unfreedom/subjectivity vs. subjugation or subjection*) that marks all liberal legal-juridical signatures from laws criminalising incitement to terrorism, to internet regulation, to human rights law.

I seek to identify, trace and unpack these aporias through my interrogation of criminal law and human rights law as mechanisms of preserving, regulating and governing an ongoing liberal-utilitarian order in the post 9/11-7/7 continuum. I do this so as to move away from a particular

[91] Hartman, *Scenes of subjection*
[92] Walcott, R. "Freedom Now Suite: Black Feminist Turns of Voice." Small Axe: A Caribbean Journal of Criticism 22, no. 3 (57) (2018): 151-159
[93] Ferreira da Silva, D. No-bodies: Law, raciality and violence. Griffith Law Review 18, no. 2 (2009): 212-236
[94] Puar, J.*Terrorist assemblages Terrorist Assemblages: homonationalism in queer times* (Duke University Press, 2007) p.99 ; See also Puar, J., and Rai, A. *Monster, terrorist, fag: The war on terrorism and the production of docile patriots* Social Text 20, no. 3 (2002): 117-148; Grewal, *Saving the Security State*
[95] Walcott, *Freedom Now Suite* p.157
[96] Hartman, *Scenes of subjection* p.122; Young, I, M. *The logic of masculinist protection: Reflections on the current security state*. Signs: journal of women in culture and society 29, no.1 (2003): 1-25
[97] Walcott, *Freedom Now Suite*

trajectory of legal scholarship that proposes and sustains a linear/universal liberal/globalised[98] framework of progression and egalitarianism for all human subjects without examining the historical and ongoing social, epistemic, material, and ethical disavowals sustained and engendered by such liberal-utilitarian modes of thinking.[99]

In a related and inseparable mode of inquiry, I also want to problematise the penal logics of criminal law, as they are currently enforced, in particular their pre-determination of what constitutes harm by offering a deconstructive reading of it. I want to suggest that the impulse toward calculation and programmability, or what Zedner calls pre-crime,[100] within incitement to terrorism regulation and indeed all forms of legal-juridical ordering carries within its text an autoimmune "death drive against the autos"[101] (i.e., against the state sovereign's monopoly on violence) that is in fact self-inadequating.[102] The inability of the law to affirm the stability of what it calculates or determines exceedingly[103] on "*a scale without scales"*[104] (e.g. through ambiguous and vague terms like "terrorism", "encouragement", and "glorification". terms that hide a "nonunifiable multiplicity of concepts"[105] contradictions and questions) suggests that the signature of law remains haunted by the very incommensurable structure of the offences it inscribes and seeks to regulate.

There is of course an important body of work that deals with the ambiguity thresholds of law and the difficulties of its interpretation,[106] particularly in the arena of terrorism and counterterrorism law.[107] This thesis draws from and expands on such scholarship (especially

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[98] For Derrida globalization has a tendency to maintain a programme of terror that concentrates and preserves wealth, rights, and teletechnologies for only a fraction of the western world. Derrida, *Rogues* p.155

[99] Douzinas, C. The End of Human Rights: Critical Legal Thought at the Turn of the Century (Hart, 2000); Douzinas, Human rights and empire: the political philosophy of cosmopolitanism (Routledge-Cavendish, 2007)

[100] Zedner, *Pre-crime and post-criminology?*

[101] Derrida, *Rogues* p.123

[102] Ibid

[103] Goldberg *James Baldwin and the Anti-Black Force of Law*

[104] Derrida, *The Death Penalty*, p.119

[105] Arguably, for the law be able to enforce/adjudicate incitement and terrorism) it requires unreason i.e., definitions that in the strict sense cannot be reasoned or made reasonable.
Ibid p.40

[106] Endicott, T. "Law is necessarily vague." *Legal theory* 7, no. 4 (2001): 379-385 and Endicott, T. "Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law." Jerusalem Review of Legal Studies 10, no. 1 (2014): 46-56; Endicott, T. *Proportionality and Incommensurability* in Huscroft G, Miller BW and Webber, G eds. Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press, 2014); Raz, J. The morality of freedom (Clarendon Press, 1986); Winter, S L. "Indeterminacy and incommensurability in constitutional law." Calif. L. Rev. 78 (1990): 1441; Collier, D, Daniel Hidalgo, F and Olivia Maciuceanu. A. "Essentially contested concepts: Debates and applications." Journal of political ideologies 11, no. 3 (2006): 211-246

[107] Saul, B. "Defining Terrorism: A Conceptual Minefield." (2017); Ekaratne, S. C. "Redundant Restriction: The UK's Offense of Glorifying Terrorism." Harv. Hum. Rts. J. 23 (2010): 205; Weinberg, L. et. al "The challenges of conceptualizing terrorism." Terrorism and Political Violence 16, no. 4 (2004):

that of a critical theoretical register like Agamben's and Vismann's) by linking the ambiguity and non-determinability of law[108] and terrorism to notions of autoimmunity and self-inadequation. Thus, through a deconstructive critique of the vagueness of law, it attempts to trace and articulate the autoimmune drive at work within law that undoes and "works against law's sovereign structure leaving ruins" or a sense of socio-political precarity/vulnerability.[109] Further, I link this notion of auto-immunity to an interminable/ spectral precarity (on the part of the sovereign) that engenders and sustains modes of discrimination and censorship that are conceptually inscribed and instituted by the very inescapable legal/liberal-utilitarian overdetermination of what constitutes harm.

In addition to examining laws as they apply to the "real world", I am also interested in using a critical-deconstructive approach to study issues within contemporary technology and Internet regulation in the context of terrorist speech. My focus on the iterability and heterogeneity of speech and online texts is a preliminary and modest attempt to go beyond common ethico-legal/regulatory frames of intelligibility[110] concerning the Internet and indeed AI,[111] that for example still (*despite their powerful insights*) ethically and conceptually subtract problems of regulation to liberal-utilitarian norms/rubrics of reason such as the ethics of transparency,[112] diversity as representation, privacy,[113]the right to be forgotten,[114] and the independent

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777-794; Crenshaw, M "Terrorism research: The record." International Interactions 40, no. 4 (2014): 556-567; Young, J K. "Measuring terrorism." Terrorism and Political Violence 31, no. 2 (2019): 323-345.

[108] Agamben, *State of Exception*; Vismann, C. Jurisprudence: a transfer science. Law and Critique 10, no. 3 (1999) p.281

[109] n.37; Joque, J and Kalule, P *Law & Critique: Technology elsewhere, (yet) phantasmically present*, Critical Legal Thinking (2019): < http://criticallegalthinking.com/2019/08/16/law-critique-technology-elsewhere-yet-phantasmically-present/ >

[110] Gillies' discussion of online digital rights seeks to overturn the limits of Article 10 and yet, it still works within a liberal normative human rights framework that is guided by a notion of "what--we-expect-states-to-do". Gillies, L.E. "Getting the balance right: human rights in residual jurisdiction rules of English courts for cross-border torts via social media" In Mangan D and Gillies, LE. (eds)*The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017) Murray's liberal positivist paradigm does not deal with criteria like a recognition of global heterogeneity. Murray, A D. "Mapping the rule of law for the internet."In Mangan D and Gillies, LE. (eds)*The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017)

[111] Noble, S. Algorithms of oppression: How search engines reinforce racism (nyu Press, 2018); Eubanks, V. Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (St. Martin's Press, 2018); O'Neil, C. *Weapons of math destruction: How big data increases inequality and threatens democracy* (Broadway Books, 2017); Franklin, S. *Control: Digitality as Cultural Logic* (MIT Press, 2015)

[112] Laidlaw, E. B. Regulating speech in cyberspace: gatekeepers, human rights and corporate responsibility (Cambridge University Press, 2015)

[113] Bernal, P. Internet privacy rights: rights to protect autonomy (Cambridge University Press, 2014)

[114] Rowbottom's ideas offer rights solutions that are similar to Gillies' (n.104) above: Rowbottom, J. "Crime and communication: do legal controls leave enough space for freedom of expression?" In Mangan D and Gillies, LE. (eds)*The Legal Challenges of Social Media* (Edward Elgar Publishing, 2017); Villaronga, E. F., Kieseberg, P., & Li, T. Humans forget, machines remember: Artificial intelligence and the right to be forgotten. *Computer Law & Security Review* 34, no. 2 (2018): 304-313

verification of data.[115] Using the concept of speech (and indeed the ambiguous of concept of speech that incites terrorism) as a centre of analysis, I seek to problematise such calculable liberal-utilitarian rubrics of regulation further by arguing that the regulation of Internet as a textual medium is encumbered by a multiplication of textual/speech relations and concepts such as: difference, heterogeneity, sovereign power, control, uncontainability, dissemination, and indeterminacy. Drawing from the scholarship of Justin Joque,[116] I look at how these concepts problematise mechanisms of technology and Internet regulation like filtering, blocking, and Notice and Takedowns. The use of these concepts in turn makes way for me to undertake a critical consideration of the "ghosts" (or oft-ignored and disavowed yet recurring issues) within contemporary studies on Internet and technology regulation.[117] It also allows me to simultaneously critique the calculating (i.e., penal/panoptic/banoptic) structure[118] of Internet regulation and its propensity to disavow the heterogeneous speech and alterity of the other.[119]

Conceptual framework: Theorising hauntology

In the subsequent sections, I show how hauntology functions and how it conceptually undergirds this thesis. But before this is done, we must talk about the analytical method of deconstruction, from which the concept of hauntology is derived.

i) A note on deconstruction

Hauntology as a conceptual/theoretical lens derived from deconstruction is a method of reading and analysis that draws from the scholarship of Jacques Derrida. Deconstruction at its core rejects post-enlightenment absolutist interpretations of progress and teleology that claim to possess clarity and a hold on the truth.[120] It pays particular attention to the

[115] Yeung, K. "'Hypernudge': Big Data as a mode of regulation by design." Information, Communication & Society 20, no. 1 (2017): 118-136; Pasquale, F. "Beyond innovation and competition: The need for qualified transparency in Internet intermediaries." *Nw. UL Rev.* 104 (2010): 105; Land, M. "Toward an international law of the internet." Harv. Int'l LJ 54 (2013): 393

[116] Joque, J. *Deconstruction machines: writing in the age of cyberwar* (U of Minnesota Press, 2018); n.109

[117] Supra n.109-n.115

[118] Bigo, D. Security, exception, ban and surveillance Theorizing surveillance: The panopticon and beyond (2006): 46-68; Foucault, M, Discipline and Punish: The Birth of the Prison, (London: Penguin, 1991); Haggerty, K.D, & Ericson, R.V. "The surveillant assemblage. The British journal of sociology 51, no. 4 (2000): 605-622; Haggerty, K.D., Wilson, D. & Smith, J.D. Theorizing surveillance in crime control Theoretical Criminology 15, no. 3 (2011): 231-237; Browne, Simone. Dark matters: On the surveillance of blackness (Duke University Press, 2015); Weheliye, A. G. *Habeas viscus: Racializing assemblages, biopolitics, and black feminist theories of the human*. (Duke University Press 2014); Puar, *Terrorist assemblages*

[119] n.111; n.109

[120] Curran, V. G. Deconstruction, structuralism, anti-Semitism and the law *BCL Rev.* 36 (1994): 1

disappearances, mutations, disturbances, silences, recurrences and failings that liberal, democratic, and post-enlightenment interpretations and framings tend to overlook.

Crucially, deconstruction is not a question of controversy but one of deciphering,[121] one that seeks to open up portals of entry for thinking about law and its relation to justice, and to the disavowed. By showing how legal regulatory logics bear the deep imprint of a pervasive lack of definitive legitimacy and indeed clarity; deconstruction allows for the possibility of justice through its critique of what liberal-utilitarian frames of thinking disavow. As Barbara Johnson elaborates: "it can thus be seen that deconstruction is a form of what has long been called a *critique*. A critique of any theoretical system is not an examination of its flaws or imperfections. It is not a set of criticisms designed to make a system better [or more precise /efficient]. It is an analysis that focuses on the grounds of a system's [ethical] im-possibility".[122]

Criticisms may arise as to the objectivity or one-sidedness of this thesis in respect of its deconstructive approach. This accusation of one-sidedness is in fact not a new criticism of deconstruction. But it is a significant misreading of deconstruction, for the function of deconstruction is to do the work of epistemological and methodological decentering.[123] This is to say that deconstruction essentially provides us with the tools to turn away from what we might take to be the central focus of our problem and to carefully look at the "taken-for-granted" network of justifications, excuses and expressions within which such problems are embedded. In this sense, deconstruction is an analytical exercise that frustrates single and dominant expressions of one-sidedness by opening us up to the unarticulated heterological connections of problems and the pervasive intersections, mergings, crossings, and relations therein.[124]

ii) Hauntology

Hauntology or *hauntologie* in French is a critical-deconstructive reading concept or tool coined by Jacques Derrida in *Spectres of Marx*. It is an "ontological" disjunction that is "haunted" by, as Derrida puts it, "spectrality" (the concept of a ghost, or spectre[125] that makes its reappearance and appearance in a traumatic way)[126] exposing the "grey ontology"[127]and

[121] Derrida, J. *Resistances of psychoanalysis* (Stanford University Press, 1998)
[122] Johnson, B. 'Translators introduction' in Derrida, J. 'Dissemination' (Athlone Press, 1981) p.xv
[123] Norris, C. Deconstruction: Theory and Practice (New York: Methuen, 1982) and also Wood, D. *Interview with Yubraj Aryal: Derrida and Deconstruction,* available at: <http://www.writing.upenn.edu/library/Aryal-Huamanities_2008_text.pdf >
[124] Cain, W. Deconstruction: An Assessment. (1984): 811-820
[125] Derrida, *Specters of Marx*, p.5
[126] Ibid pp.8-11

linearity of progression of western logocentrism, or in other words capturing the persistent troubling ghosts of western modes of thinking and enquiry.[128] Thus, hauntology is "a logic of haunting" [129] that seeks to articulate and capture troubling intensities and intricacies and taken-for-granted practices of knowledge-making and production in contemporary times by foregrounding the disenchanting i.e., the in-between or the undecidable or the "unnamable or almost unnamable thing: something, between something and someone, anyone or anything, some thing, 'this thing'")[130] the "paradoxical phenomenality"[131] that haunts and interrupts western norms of law and regulation and governance as they apply to speech regulation. Accordingly, for the purposes of this thesis, hauntology can be read as a recurrent chain of questions of repetition that "begin by coming back"[132]— i.e., questions that "interrupt" lawmaking and regulation in the post 9/11-7/7 continuum.

A crucial part of thinking with hauntology in this thesis is concerned with giving more attention to how speech in all its discontinuous iterations leads to a fundamental vulnerability of the state sovereign. I get to this place by associating first the very idea of sovereignty to speech. In fact, in chapter one, I suggest that speech is what inaugurates, legitimates, and memorializes the sovereign.[133]

I then further problematise speech (through a deconstructive reading of heterogeneity, iterability, and dissemination) to indicate that such a notion of sovereignty (especially online where speakers are multiplied) is always already untethered, polycentric and always exposed to corruption, dissimulation and collapse.[134] Thus, all inscriptions that contend with the state's monolithic or unisonant idea of speech present aesthetic problems of *différance*, capturability and calculability that haunt the state endlessly without closure. Perhaps it is for this reason that law defines terrorism and incitement in wide terms. And yet, the demarcation between what is "harmful" or "not harmful" cannot happen *stricto sensu* given the very programmable/calculable nature of law. And so, in as much as the law tries to calculate, measure, and define harm, it is still encumbered by this incalculable inadequation (*and its contradictions, interruptions, and questions*), which are embedded within its very aesthetic structure.[135] Thus, law turns upon itself in what Derrida calls "a gyratory coincidence between

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[127] Hegel, GW. *Hegel: Elements of the philosophy of right*. (Cambridge University Press, 1991) p.23
[128] Logocentric reasoning privileges a metaphysical *logos* that relies on the forced closure of structures, a closure, which produces a tendency towards positive truth-values: Harrison, M. Logocentrism: The Chicago school of media theory available at: < https://lucian.uchicago.edu/blogs/mediatheory/keywords/logocentrism/>
[129] Derrida, *Specters of Marx*, p.9
[130] Ibid p.5
[131] Ibid
[132] Ibid p.11
[133] Vismann, C. Files Law and Media Technology (Stanford University Press, 2008) p.53
[134] This is an iteration of the aporia of *singularity v. commensurability/heterogeneity* also.
[135] Derrida, *Rogues* p.141

force and law enveloping".[136] At any rate, all these conceptual phenomena –– auto-immunity, spectrality, and undeterminability declare this aporetic coincidence and its impossibility.

The concept of hauntology therefore initiates and insists on a discussion of the inadequacies, (i.e. the "real and the unreal, the actual and the inactual…to be or not to be"[137] negations, abstractions, assumptions, and dialectics as well as tensions of the calculable logics) of law making, interpretation and enforcement within modernity in the post 9/11-7//7 continuum. It probes the inoperabilities, contradictions, insecurities and tensions within law thereby testing the very philosophical concepts e.g., egalitarianism, certainty, and the harm principle that it presupposes. Thus, it shows that liberal-utilitarian law making as a sequence of modernity is scarcely self-sufficient and that geo-historical and socio-political ghosts haunt it in the living present.

There are of course structural challenges with using such a method, the most obvious one being that it can seem that scholars of deconstruction are tearing down something that they are trying to build. But for an issue as immeasurable, incompletely-complex, and elusive as speech that incites terrorism, a deconstructive reading is appropriate because it attends to the incomplete interruptions/breaks/ returns of terrorism and in doing so, allows us to reckon with the very "uncapturability" of the "structures" of "terrorism", speech and lawmaking. All this is to say that a deconstructive reading through the conceptual frame of hauntology gets at a crucial understanding of the inescapability, reverse play and heterogeneity of speech and the heterogeneity of sovereignty that makes the filtering, blocking, and regulation of content that incites terrorism especially online irrevocably difficult.

In using hauntology, I do not seek to condemn or attack lawmaking and its practices of interpretation and regulation. Rather, I seek to make an opposite claim i.e., I hope to privilege the "unmasterable"[138] ghosts or spectres that haunt law making and its enforcement and regulation in the post 9/11 -7/7 continuum.[139] Thus, I carry out a deconstructive "hovering" of the structural aesthetics of law and regulation in order to reveal contemporary underlying tensions, blind spots, and vulnerabilities that plague them. This is done to emphasise the fact that despite its liberal and modernist intentions and desires,[140] legal authority does not and

[136] Ibid p.18
[137] Ibid p.6
[138] Ibid p.7
[139] "The post 9/11-7/7 continuum" like haunting/spectrality "is not dated, it is never docilely given a date in the chain of presents, day after day, according to the instituted order of a calendar." Untimely, it does not come to, it does not happen to, it does not befall, one day": Derrida, *Specters of Marx*, p.3
[140] By exposing contradictions within modernist legal thinking, driven by certain post-enlightenment and liberal ideals-such as Kelsen's idea of "pure law" as well as other notions of, subjectivity as subjection, rationality and equality before the law, this thesis acts at once as a critique of these legal ethical epistemes.

cannot have a singular "superior transcendent existence […] which is objectively identifiable and certain".[141]

In defence of my use of hauntology as a valid conceptual tool, a number of thinkers especially in sociology, cultural theory and cultural criticism (most of them drawing from Derrida's spectral turn) have adopted haunting, spectrality, and the figure of the ghost[142] as trajectory that enables them to explore and exorcise[143] spectral guises and how they incomprehensibly "set heads spinning"[144] or unnerve societal structures, specifically in relation to immateriality, life, death, trauma, memory, obsession and power. Hence, the concept of haunting or spectrality has been used to theorise and bring to light ethical, social, political, and indeed legal problems[145] relating to oft-neglected issues concerning race, gender, ethnicity, and class both in the past and present. This thesis moves in a similar theoretical relation with such scholarship that attempts to "recover the evidence [*/traces*] of things not seen"[146] i.e., the affective-sensorial traces, grafts, and erasures that haunt, and unnerve speech, law making and regulation (*both from within and without*) in the 9/11-7/7 continuum. In this regard, my engagement with hauntology affords me with the capacity to expose and to verify certain recurring socio-political, ethical and legal failures that psychically define, constitute, and preoccupy (yet also still elude) the existence of sovereign power in the post 9/11-7/7 continuum.

iii) How hauntology relates to law

If I were to highlight, in the most abstract sense, what hauntology means for law i.e., for law making interpretation and enforcement, I would say that hauntology deconstructs the non-irreducible structures that complicate, undermine and blur law's processes of stability with regard to evaluating, perceiving, and apprehending speech rights and speech that incites terrorism in the post 9/11-7/7 continuum. This observation in fact forms the basis of my two interrelated research claims that:

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[141] Davies, *Derrida and law: legitimate fictions* p.73
[142] Gordon, A. F. *Ghostly matters: Haunting and the sociological imagination* (University of Minnesota Press, 2008)
[143] Saleh-Hanna, V. Black Feminist Hauntology: Rememory, the Ghosts of Abolition? *Champ pénal/Penal field* 12 (2015)
[144] Derrida, *Specters of Marx* p.159
[145] Oloka-Onyango, J. "Expunging the Ghost of Ex Parte Matovu: Challenges Facing the Ugandan Judiciary in the 1995 Constitution." *Makerere Journal of Law* (1996): 141-50; Oloka-Onyango, J, Ghosts and the law: An inaugural lecture Makerere University (12/11/2015) available at: < https://news.mak.ac.ug/sites/default/files/downloads/Makerere-Prof-Oloka-Onyango-Inaugural-Professorial-Lecture-12thNov2015.pdf:>
[146] Gordon, *Ghostly matters,* p.195

> 1) Laws that seek to regulate or contain speech are inescapably confusing, undecidable and mistake laden because they are compromised and made vulnerable by the inherent divergence of speech and; 2) incitement to terrorism legal provisions and practices as well as the fair balancing principles of human rights law are aporetic and autoimmune in the sense that they are configured calculably yet also indeterminably (i.e., under exceedingly opaque and undecidable frameworks) and as such, they present us with certain interminable ethical quandaries.

What drove me to making these claims (about speech offences) was the inchoate or hypothetical nature of their conceptual form. I was interested in probing the limits (or lack thereof) within speech offences and the ways in which they assumed a precautionary link between speech and presumed risk[147] or violence. I was interested in studying how imaginary or inchoate offences became credible or real. I was interested in the illusiveness of boundaries within speech offences. I then became interested in interrogating the blurry concatenations between haunting and the criminalisation of speech in a way that could articulate negative feedback loops and spectral currents such as an incalculable aporia of legal containment (*singularity vs. incommensurability/heterogeneity*) with regard to distinguishing threats from non-threats.

Additionally, I was concerned with exploring the obsessive/neurotic/psychic hyper-vigilance[148] of law enforcement procedures and technologies in the context of incitement to terrorism online and how they leave us trapped almost psychically in an undecidable interminable nightmarish reality of lack, helplessness, loss, trauma, panic, and a reactive aggressivity/violence that (at the same time) brings to light some of the unconscious processes, recurring phantasmic operations, ghostly opacities, and regulatory aporias of the post 9/11 continuum. The concept of hauntology and its multi-layered and interrelated motifs of undecidability, indeterminability and *différance* therefore seemed to be a befitting conceptual tool because in addition to providing me with an opportunity to test some of my claims, it equipped me with the tools needed to deconstruct recurrent problems of speech and

[147] Amoore, L. The Politics of Possibility: Risk and Security beyond Probability (Duke University Press, 2013); Füredi, F. Precautionary culture and the rise of possibilistic risk assessment. Erasmus L. Rev.2 (2009): 197; Füredi, F. Invitation to terror: The expanding empire of the unknown (Continuum Intl Pub Group, 2007); Beck, U. World at Risk (Polity 2009); Giddens, A. Risk and responsibility." The modern law review 62, no. 1 (1999): 1-10

[148] Virilio, P. & Bertrand, R. The administration of fear (Semiotext[e], 2012) pp.50-51;
On 'Familialism' within the context of "the War on Terror" see Cowen, D. and Gilbert, E. Fear and the familial In the US War on Terror. In: Pain, R. and Smith, S. (eds) Fear: Critical Geopolitics and Everyday Life (Aldershot: Ashgate 2008) pp.49–58; Sunstein, C.R. Why they hate us: The role of social dynamics. (2001) Harv. JL & Pub. Pol'y 25: p.429 72; Kuran, T. Ethnic norms and their transformation through reputational cascades. The Journal of Legal Studies 27, no S2 (1998): 623-659; Razack, S.H. A Site/Sight We Cannot Bear: The Racial/Spatial Politics of Banning the Muslim Woman's Niqab. Canadian Journal of Women and the Law 30, no. 1 (2018): 169-189; Gearty, C. Liberty and Security (Polity Press 2013)

proportionality concerning the blurring of criminal-legal boundaries in the post 9/11 -7/7 continuum.

More specifically, I felt that hauntology would be useful in examining how the visceral/spectral becomes logical/ rational, creating what Sunstein calls "probability neglect".[149] In this sense, hauntology is also crucial to the meaning and interpretation of incitement to terrorism and the spectral effects it produces (such as probability neglect) are inseparable from the very unidentifiable yet phantasmic phenomenon of terrorism. Indeed, when probability neglect is at work, people's attention is "affective" i.e., focused on the bad outcome itself, or the worst-case scenario, and they are inattentive to the fact that it is unlikely to occur because "the wrong things [are elevated] into sensational focus [by] *hiding and mystifying* the[ir] deeper causes".[150]Consequently, hermeneutic problems that arise when law enforcement and other regulators have to distinguish what is "illegal" from what is "objectionable" –– haunting alters. Thus, as my exploration of human rights law decisions in chapter five will show, a state of exception or "an ambiguous uncertain zone is spectrally replicated where *de facto* proceedings which are in themselves extra or anti-juridical pass over into law and juridical norms blur with mere fact hence creating a threshold where fact and law become undecidable".[151] The implication of this is that the fair balancing principles of human rights law are always already in an autoimmunary logic[152] encumbered and self-inadequated through their association with liberal-utilitarianism and its own over determination of harm, terrorism or incitement, offences which are in reality contested, shifting, and incalculable.

This not only perplexes those within and without enforcement and regulation (since it becomes hard to distinguish what incitement to terrorism constitutes) but it also functions within monolithic/homogenous logic of the self-same backed by the force of law that it requires in order to sustain its very existence. Thus, in as much as law does provide a degree of liberty, rights protection, and a measured distributive or calculated justice it is also forever marked - in a double bind - by the violence of the "force of law" that disavows the speech and alterity of the other.[153] This is an irresolvable structural-aesthetic tension, a structural ghost within (*yet also outside*) the mechanism of law that keeps returning to destabilise counter terrorism regulation, incitement to terrorism law, as well as human rights law making and interpretation in the post 9/11-7/7 continuum.

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[149] Ibid
[150] Hall, S., et.al *Policing the crisis: Mugging, the state and law and order* (Macmillan Press Ltd, 1982) introduction p.vii
[151] Agamben, *State of Exception*, p.29
[152] n.37
[153] Hartman, *Scenes of Subjection;* Kapur *Gender, Alterity and Human Rights*

Theoretical (and methodological) clarifications, scope and limitations

This thesis does not purport to offer an exhaustive empirical investigation of terrorism or incitement to terrorism under hauntology; this would be an ambitious exercise. Rather, it seeks to expose, and critically grapple with some of the conceptual problematics concerning lawmaking regulation and enforcement in the context of incitement to terrorism. As a matter of urgency, it confronts or leans critically into rather than away from the tensions of incitement to terrorism law in the hope of being more attentive to the pressing ethical demands of the speech of the other. Of course, I do appreciate that other kinds of scholarship seek to "revive" the liberal human rights project and to return to its fundamental values,[154] however, such an inclination or desire to revive, reconcile, or resolve the problems of law and human rights in the context of incitement to terrorism is not at stake in this thesis.

My reluctance at proposing a revised defining of the term "terrorism" or even distinguishing terrorist harms or "threats" from non-threats is in itself an ethical stance that is also at the same time a considered methodological resistance to a reassuring ontological reversal, which would in effect not undo our confidence in liberal-utilitarian legal rationality and thus sustain an ethico-legal autoimmunary suicide.[155] From a deconstructive perspective, I am aware of the fact that coming up with an operational distinction of say "what is harmful" from "what is not harmful" can and could be made and declared in law.[156] However, the argument this thesis seeks to highlight through a deconstructive reading is that such a normative distinction or delimited horizon cannot be enforced, pre-calculated, implemented and interpreted *stricto sensu*. Legal definitions and systems self-present as if they are definitive and clear when in fact they are not.[157] Thus, any proposed definition of "terrorism" or a distinction of "threats" from "non threats" in the context of incitement to terrorism would spectrally subtend, acellerate, and multiply the aporetic. It would incessantly defer, invert, supplant, reverse, reproduce and return [*revenante*] the very crises of undeterminability and uncertainty within law that I am attempting to problematise.[158]

The fact that contemporary laws attempt to make these distinctions and still ultimately fail to achieve a hold on clarity or definitiveness is suggestive of an inescapable auto-immunity,

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[154] See e.g., Goold, Benjamin J., and Liora Lazarus, *Introduction* Security and human rights (Bloomsbury Publishing, 2019) p.3; p.20

[155]Derrida, *Death Penalty*, p.124 See also above n.37

[156] Ibid: My reluctance to define "the other" is intentional. It is an ethical theoretical positioning that gestures towards an ethics of the unprogrammable. And so it does not seek to reduce/ delineate who exactly should protected by law or awarded justice as this would delimit/pre-programme justice using the scales of utility See also Cornell, "*Time, deconstruction, and the challenge to legal positivism"* p.285 Ramshaw, *Justice as Improvisation*

[157] Saussure notes in a relatable observation, "to speak of a 'linguistic law' in general is like trying to lay hands on a ghost": De Saussure, F. *Course in General Linguistics*, trans. Harris, R. (Open Court, 1986) pp.90-91

[158] See Derrida, *Rogues* pp.6-9 on the conceptual free wheel of reason.

spectrality, or paradoxical indeterminability within law's very aesthetic structure. This interminable inability to distingush or define - *whatever law seeks to contain* - declares an ethical impossibility that I want to tremble and tarry with, so that I do not perpetuate some of the logocentric aspects of what I am trying to undo. Which is to say that the concept of hauntology allows for some space to doubt, critique and appraise the current system of law making and enforcement (just as it is, as it functions) meticulously, — with great care.[159]

Because I am interested in critiquing current frameworks of law in this thesis, rather than lean away from these aporetic frameworks, I offer a modest critical reading of law (and its liberal-utilitarian schematics) that problematises these very frameworks based on their own predications, interpretations, necessitations, applications and assertions of what is harmful or threatening. It is for this reason that I turn to case law examples to show how the law currently functions. To be clear, I do not hold onto these distinctions i.e., of what is harmful/threatening and what is not harmful/not threatening within the law as a conceptual end or function. Rather, I situate these structural /metaphysical logic of law's dialectic tensions (*self-referentially*) in a differential economy,[160] or inhabit their discourse diacritically and deconstructively,[161] (*particularly as it has been deployed in the last 18 to19 years since 9/11*), in an attempt to discern *facere veritatem* how the law itself, based on the current statutory definitions of terrorism under the Terrorism 2000 Act[162] (where, briefly, terrorism is "the use or threat is designed to influence the government or to intimidate the public or a section of the public") calculates or distinguishes, or as I argue, inescapably self-inadequates or confuses itself internally or undecidably e.g., through its inescapable auxiliary overlaps with other statutory provisions when it attempts to calculate or distinguish, what is harmful or threatening from what is harmless or non threatening, as well as how, and when, it identifies and apprehends what "glorifies" or "encourages" terrorism as stipulated under the Terrorism Act 2006. This discussion of "terrorism" and "incitement to terrorism" and how they interact with criminal law and human rights, on their own terms, which I do in greater detail in my legal analyses in chapters two and four, is important because it provides a crucial foundational contextual prop, or standard of assessment that allows me to critique the ways in which terrorism is deployed in the post 9/11-7/7 continuum. This is methodologically crucial to my deconstructive method and its contiguous and subsequent ethical interventions.[163]

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[159] This is driven by an ethics that enacts a nonviolent poetics of relation with the other —following Cornell and Glissant. Cornell, D. "Post-structuralism, the ethical relation, and the law." Cardozo L. Rev. 9 (1987): 1587; Glissant, É. *Poetics of Relation* (University of Michigan Press, 1997)

[160] Derrida, J. *Positions* (Continuum 2004) p.xix

[161] n.77: This is a Spivakian direction that sustains comparisons and navigates deconstructively within them through an intimate register of hermeneutic critique.

[162] Whist I maintain this current operational definition in my analysis, I also probe its logocentric assumptions.

[163] n.156;n.159

My ethical ideas of the ghost dance in chapter five are tentative proposals that also take the law as it is, i.e., as a system that currently funtions within a need to determine, define or calculate harm. I envision the ghost dance as a groundless non-definable, mode of ethical interpretation that is (as I will suggest) attuned to the alterity of the other. Rather than suggest a reformulation of the law (e.g., through a definition of terrorism or a limitation of offences that incite terrorism) the ghost dance, admits and acknowledges that law and all legal definitions are inherently vague and autoimmunary. In this regard, it attempts to reroute away from the violent structure of law by attending more to interpretations and situations of justice that exceed law (*for justice is distinct from the reason, force and calculability of law, the juridical, and politics and can never be reduced to it*)[164] from within law's very pre-calculated limits.[165]

More specifically, I am concerned about the epistemic indifference and exclusionary violence to the other that such an overhaul, defining, or clarification of "the other" may signal and entail. I hold onto and work with Derrida and Ramshaw's observations that a pure ethics should be unrecognisable, improvised and unprogrammable.[166] For this reason, there is in this thesis, an ethical necessity to abstain from the liberal-utilitarian paternalising impulse to predefine and preprogramme the limits of law for the inferior/oppressed other,[167] or to even epistemically reconcile or resolve the demands of security with human rights. Whilst such scholarship is important, it does not adequately address the recurring violence of the force of law within criminal law and human rights discourse.[168]It also gestures towards a kind of legal-liberal politics that would yet again stifle the kind of radical freedom and justice for the other that I am attempting to reach for, as it would require the enforceability of, a strict determinable Kantian knowledge programme[169] (of categorical rights and "regulative ideas of reason"[170]and tolerance) that would in a circular motion efface the alterity of the other and repeat the brutal spectral effects and unfreedoms of the force of law. These are critical ethical points that this thesis seeks to mark and attend to.

The incalculable groundlessness of the ghost dance therefore enables what I think is a more adequate and urgent ethical demand as it attends to the heterogeneity of the other and also calls into question the topographical re-inscription of a western logocentric liberal-utilitarian

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[164] Derrida, *Rogues* p.149
[165] Ramshaw, *Justice as improvisation* p.115
[166] Ibid; n.156
[167]Spivak, G.C. 'Can the Subaltern Speak?' In Colonial Discourse and Post-Colonial Theory: A Reader, eds. Williams, P and Chrisman, L. (Hemel Hempstead: Harvester, 1993) p.93
[168] Derrida, spectres pp.49-53
[169] For da Silva, the Kantian knowledge programme is characterised by a post enlightenment ethical syntax of knowing and determinacy that functions through "the assignation of *value*" using a "universal scale." See: da Silva, D. F. "1 (life)÷ 0 (blackness)=∞−∞ or∞/∞: On Matter Beyond the Equation of Value." Re-visiones 7 (2017)
[170] Dister, J. E. "Kant's Regulative Ideas and the 'Objectivity 'of Reason." In Proceedings of the Third International Kant Congress, pp. 262-269. (Springer, Dordrecht, 1972)

telos that favours finding perfect pre-emptive solutions to problems rather than attending to and attuning to how and why they continue to unsettle us "perennially and recurrently".[171] It also grapples with and addresses directly the recurring problematics of the force of law. Following Derrida, I want to stress that it is this deconstructive rupture, this aporetic unsettling or questioning of freedom and rights (as they are imbricated within the prevailing liberal-utilitarian order) that exposes us to the possibility of an incalculable relation with the heterogeneous alterity and speech of the other.[172]

Again, I want to emphasise that, together with hauntology, the ghost dance is a deconstructive marking of law's undecidability and inoperability that seeks to undo, recast, interrupt, and question liberal-utilitarianism givenness and its coherent[173] self-presencing of texts. Both concepts, "hauntology" and "the ghost dance", suggest that law is disseminated, supplanted and supplemented by other regulatory orders and thus cannot be self-contained. The importance of underscoring this fact is that it draws our attention to the fact that the uncontainability of law lends itself to a corresponding closure of the horizon of the heterogeneous singularity of the other. This demands a critical-ethical intervention and is a significant reason as to why a deconstruction of law's calculability is pivotal in this thesis.

At any rate, the concepts of "hauntology" and "the ghost dance" should not be taken as an exhaustive blueprint for lawmaking or interpretation. They are merely intimations of an ethical re-imagination, an elsewhere, that attempts to reposition us beyond liberal-utilitarian constraints, of contemporary incitement to terrorism laws.

A question may arise as to why this thesis does not engage the right to privacy. Scholarship that explores privacy in the context of terrorism[174] does exist but a comprehensive deconstructive engagement with privacy would go beyond the scope of this thesis. It is for this reason that this thesis does not attend to the right to privacy.[175] Similarly, although the Article

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[171] Johns, F. *"From Planning to Prototypes: New Ways of Seeing Like a State."* The Modern Law Review (2019) 82(5) MLR 833–863

[172] Derrida, *Rogues* p.150

[173] This thesis departs from legal positivist scholarship that acknowledges the difficulty of defining terrorism yet still confusingly insists that a coherent legal international definition of terrorism can or should be achieved. See e.g., Saul, B. "Defining Terrorism: A Conceptual Minefield." (2017)

[174] Steeves, V. "Theorizing Privacy in a Liberal Democracy: Canadian Jurisprudence, Anti-Terrorism, and Social Memory After 9/11." *Theoretical Inquiries in Law* 20, no. 1 (2019): 323-341; Abbas, M.S. "Producing 'internal suspect bodies': divisive effects of UK counter-terrorism measures on Muslim communities in Leeds and Bradford." *The British journal of sociology* 70, no. 1 (2019): 261-282; Farrell, H. and Newman. A.L *Of Privacy and Power: The Transatlantic Struggle Over Freedom and Security* (Princeton University Press, 2019); Gearty, C. 'State surveillance in an age of security', in F Davis, N McGarrity, G Williams (eds), Surveillance, Counterterrorism and Comparative Constitutionalism (New York, Routledge, 2013)

[175] My critique of the liberal-utilitarianism of speech is still also at once a modest critique of the framing of privacy as a monolithic liberal-utilitarian right. Indeed, my critique of speech also unpacks some of the problematics of privacy that privilege a decontaminated or secure monolithic liberal-utilitarian imaginary that disavows relations of heterogeneity and plurivocality that as I show in Chapter one, speech and

11 right to freedom of association or assembly is also pertinent to this thesis, I do not attend to it because a comprehensive deconstructive engagement with it would go beyond the scope of this thesis.

Finally, although reference is made to other EU jurisdictions especially in my discussion of rights under the Convention, the UK remains this thesis' principal jurisdictional locus for purposes of scope.

Chapter outlines

This thesis proceeds as follows:

Chapter one is concerned with exploring speech theoretically. It draws from speech act theory and deconstruction mainly from the work of Judith Butler, *Excitable Speech: a politics of the performative* and Jacques Derrida's *Dissemination* and *Of Grammatology* in order to introduce, develop and connect many of the conceptual ideas around which this thesis is structured.

In this regard, this chapter can be read as an attempt to theorise speech and the symbolic/phantasmic potency that it wields especially in the context of lawmaking and regulation. Hence, it constructs speech as an incalculable assemblage of overlapping, divergent disseminatory and iterable speech that always already subverts containment and constatives of performance. In doing so, it suggests that the disseminatory structure of speech presents problems for law, regulation and enforcement structures that are grounded on calculable constative boundaries of interpretation.[176] Accordingly, this chapter suggests that the uncontainability and inescapable plurivocality[177] of speech is what gives speech the

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indeed technology accelerate. My modest assertion here is that "privacy territorialises a spatial collective continuity (and creates a specular other) that reifies sovereignty. A critique of speech is therefore at once also a critique of the "topographical or liberal-utilitarian aesthetics of privacy that pull individuals together universally under a common spatial frame of the sovereign state (against collective individual autonomy) creating autochthonous zones of 'presence- to-self' that are circumscribed by the rubrics of public order, assimilation and hierarchy. My critique of the monolithic singularity of speech within law therefore corresponds conceptually to and reiterates a (*would-be*) corollary critique of privacy. It is also why I do not undertake a discussion of privacy under article Article 8 of the European Convention on Human Rights in this thesis: See Joque, and Kalulé, *Law & Critique: Technology elsewhere, (yet) phantasmically present*. See also McKittrick, K. *Demonic grounds: Black women and the cartographies of struggle*. (U of Minnesota Press 2006); Browne, S. *Race and surveillance. Handbook on Surveillance Studies* (Routledge 2012); Browne, Dark matters; Weheliye, *Habeas viscus*

[176] I argue that speech is not "a transparent medium for the transportation of meaning": De Ville, J. "Derrida, the conditional, and the unconditional" Stellenbosch Law Review, Stellenbosch Regstydskrif 18, no. 2 (2007): 255-287

[177] In this thesis "plurivocality" refers to the interlinked plurality or multiplicity of speech or voices.

power and ability to confound and destabilise legal enforcement and regulation. Further, drawing from Joque's perspicacious scholarship on deconstruction and technology, a discussion of the textual nature of Internet[178] communication technologies and their ecological fecundity for dissemination and uncontainability (an issue which recurs in chapter three) is initiated. In sum, this chapter makes the theoretical claim that regulatory regimes, which claim to be able to contain speech that incites terrorism, are inherently self-compromising owing to the fact that they seem to be haunted by a trace of lack, impotence or inability in their quest to contain the heterological phantoms of speech. The main point of this deconstruction is to show that liberal-utilitarian understandings of harm have an ineluctable tendency to over determine what constitutes harm. These are important preliminary theoretical observations that later inform my criminal law and human rights analyses of speech in chapters two and five respectively.

Chapter two is a legal doctrinal chapter. The method of analysis in this chapter can be seen as being closer to a "traditional" black letter law approach in the sense that it demonstrates how existing incitement to terrorism laws are applied through a reading of case law decisions. In terms of scope, this chapter traces the genealogical links of incitement to terrorism, both as an inchoate offence and as a public order offence. In paying particular attention to the links between inchoate offences, public order offences, terrorism offences, and incitement to terrorism offences, this chapter highlights conceptually undecidable thresholds of the law in this area, and their implications. This is done through an analysis of concepts like "likelihood" and "recklessness" as well as "inchoate liability"[179]amongst others. The confusing and indistinguishable character of legal offences in this area suggests that despite its claims to certainty, there is always already an autoimmune logic inscribed and working within the text that leads to a self-inadequation in the law. This textual failure or inadequation leads to an corresponding feeling of precarity from the perspective of the sovereign that in turn makes it susceptible for incitement to terrorism laws to be applied arbitrarily, in a discriminatory manner. Moreover, this chapter suggests that because the law focuses on harm or disruption in utilitarian terms, it tends to disavow the heterogeneity of speech by failing to give credence to the iterable divergence of speech. Rather than try to analyse all manner of cases falling under the umbrella of terrorism in the post 9/11 continuum, my approach to the case law selection in this chapter was to search for terrorism related cases that demonstrated links to the protection and preservation of normative public order. I felt that analysing these cases, by looking at the ethical implications of their contradictions, was a more substantive endeavour than trying to come to a grand objective exhaustive analysis of all the cases related to incitement to terrorism.

[178] Joque, *Deconstruction Machines*
[179] Ibid

Chapter three interrogates the legal enforcement and regulation[180] of different incitement to terrorism provisions. In other words, it shows how the legal provisions in chapter two are transposed online in order to counter extremist speech. As such, it focuses on the techniques and methods of online regulation under the notice and takedown (NTD) model. It then looks at technological regulatory techniques such as filtering and blocking in order to examine their limitations. This chapter uses some of the empirical data from semi-structured interviews which were advisory and not representative to support the claim that the inadequacies and inconsistencies of the criminal law (discussed in chapter two) increasingly blur the thresholds between suspicion and actual crime hence engendering a degree of undecidability that reinforces (yet at the same time complicates and undermines) law enforcement. My decision to use interviews was driven by the need to explore some of the discrepancies between the law in practice and the law in the books especially with regard to operationalising and enforcing widely drawn incitement to terrorism statutes as no equivalent assessment of this nature has so far been conducted. Insights from interviewees are woven into my discussion in chapter three of this thesis. By carrying out a synthesised analysis that combines an evaluation of the data from these interviews, a critique of the law in chapter two, and of speech in chapter one, this chapter argues that online communication technologies and the tools that regulate them (i.e., automated filtering or algorithms and Artificial Intelligence — hereinafter AI) are self-undermining in the sense that they have the potential to subvert and resist pre-programming in their intention to detect and contain speech that incites terrorism. The discussion in this chapter reveals a crucial hauntological configuration i.e., that however much the law/regulation tries to contain these spectres, often these spectres, the "bearers of silence/*absence*"[181] return, leaking through, so as to interrupt, complicate, and impede law's hauntological logics of calculability, rationality, reason, and containability.[182]

Chapter four is a doctrinal human rights chapter. Human rights are considered here because they perform a conceptual, aesthetic and subsidiary function with respect to the lawmaking and regulatory processes of incitement to terrorism. Thus, drawing from decisions in the European Court of Human Rights (ECtHR), this chapter suggests that fair balancing principles i.e., the margin of appreciation, subsidiarity and proportionality which aim to protect the right to freedom of expression are aporetic and self-limiting and self-destabilising due to their grounding in theorems of liberal-utilitarianism. This chapter is for the most part subjunctive or hypothetical in the sense that it draws from freedom of expression decisions that are (not actually, but rather) loosely connected to the notion of incitement. My approach to the case law selection in this chapter was to search for incitement and public order related

[180]For this thesis, regulation, is defined as a "mechanism of social control or influence affecting all aspects of behaviour whether intentional or not" Black, J. Critical Reflections on Regulation London (LSE centre for Analysis of Risk and Regulation, 2002) available at: < http://eprints.lse.ac.uk/35985/1/Disspaper4-1.pdf > accessed (08/16/2018)
[181] Ibid p.6
[182] Ibid

cases that demonstrate how the interpretive principles of the Convention are applied. I was interested particularly in decisions that underscored the aporias of *singularity v. heterogeneity* and *subjectivity v. subjection* under a liberal utilitarian framing. I wanted to probe the ethical implications of such calculated restrictions. At any rate, this chapter attempts to imagine how courts would conceptually interpret incitement to terrorism decisions. This is done for two reasons: 1) because the very concept of incitement to terrorism is drifting, elusive and contestable there are – and may be – wide variances with regard to what may be considered incitement to terrorism, and 2); because there is a dearth of case law under the ECtHR with regard to cases pertaining specifically to expressions that incite terrorism. Accordingly, the first half of the chapter, is concerned with an analysis of the application of fair balancing principles of human rights such as subsidiarity, the margin of appreciation, and proportionality. This is done so as to assess the vulnerabilities and blind spots of the liberal-utilitarian framework that underpins human rights decisions. The second half of the chapter focuses on probing the liberal-utilitarian schema of rights as it applies to the balancing of the right to freedom of speech but in a much wider aesthetic way. That is, through an inter-woven double reading, this chapter navigates through cases that present two rights balancing scenarios, namely: 1) where the ECtHR declares that individual speech rights should be restricted in order to protect the overriding speech rights of the majority and 2); where the ECtHR declares that there has been an undue violation of individual and indeed minoritarian speech rights in favour of the majority. In reading these cases, I place an emphasis on the latter scenario which as I argue suggests that rights can be rerouted "otherwise", in a transgressive[183]manner that goes past and beyond constrictive liberal-utilitarian rubrics in order to achieve a kind of impossible justice that exceeds the force and violence of law and is attuned to the heterogeneity and plurivocality of the other. In addition to looking at the protection and balancing of the right to freedom of speech under Article 10, this chapter also explores: 1) Article 7 which requires that criminal laws must be foreseeable by the citizen; 2) Article 14 which protects citizens from discrimination and 3); Article 9 which protects the freedom to manifest one's religion or beliefs. My discussion of Article 14 and Article 9 follows a similar trajectory to that of Article 10 in the sense that it attempts to interrogate contrastive readings of the interpretive principles of human rights by the ECtHR. Moreover, my discussion of Articles 9 and 14 also traces how fair balancing affects the alterity of the other. The discussion of Article 7 in this chapter takes a slightly different direction in the sense that it re-examines the underlying issue of opacity and undecidability within the incitement to terrorism laws, an issue that previously runs through chapters two and three. I try wherever possible to show how these recurrent paradoxes within human rights law link back to my conceptual framework of hauntology by suffusing my case law discussions with deconstructive insights.

[183]hooks, b. *Teaching to transgress* (Routledge, 2014)

Chapter five reviews the previous chapters and pulls their arguments together. It reorients or links them back to the conceptual framework of hauntology. In doing so, it suggests that these recurring opacities within incitement to terrorism coupled with the incapacity of human rights with regard to how the fair balancing principles to extend or limit freedom of speech to the other could be a direct mark, or permeation of hauntological fear in the post 9/11-7/7 continuum. It presents this as an irreconcilable, interpretational, neither-nor tension of undecidability. In this regard, this chapter is skeptical about advocating for "new" laws or forms of regulation concerned with utility, exemplarity, deterrence, and ends-oriented justice. This, it argues, is due to the fact that the force of law and the recurring undecidable problems inherent within law engender an aporetic non-closure. These legal-ethical interpretational problems (although amplified in incitement to terrorism laws) are present within all laws, that no law is perfect. Not wanting to leave this thesis on a note of irreparable "risk" or despair,[184] this chapter proposes an ethical intervention wherein it grapples with the incalculable possibility of unanticipatable justice. It thinks about how we could attempt to signal an elsewhere (i.e., an ethical bearing that animates law's reserve for justice) in a manner that attends to the heterogeneity of the other. The "unanticipatable" directions provided here are initially formulated in chapters four and two where a discussion of cases that are receptive and responsive to the heterogeneity of the other is done. I chart and gather these directions under the notion of "the ghost dance".

[184]I take this as a pragmatic conceptual compromise in lieu of an abolitionary legal-political ethics to come. See: n.868

Chapter 1

Conceptualising speech: Of haunted terrorist speech and the limits of regulation

"Every sign, if it is to be a sign must presuppose the possibility of repetition (iterability). Because of this possibility the present presentation of meaning by expression is haunted by its repetition."[185] *— Geoffrey Bennington*

What speech represents

In *Of Grammatology* and in *Signature event context*, the philosopher Jacques Derrida looks at how speech and language form society. For Derrida, speech (and indeed language) is a form of enunciating or uttering existence and being. Speech thus forms, creates, and determines the historico-metaphysical predeterminations of modern society.

Speech, if viewed from these terms, is very instrumental for administration and governance and for inaugurating as well as preserving the idea of sovereignty. Indeed, at the beginning of the very origins of European civilisation, speech and the writing of speech were a "transmitting medium" for communication, they were an originary locutionary act that was used to transmit and convey meaning and to create hierarchisation[186] through its "living feeling" power. Such "meaning" as Derrida explains, is grounded in a presence/absence, cultural memory, imagination, morality a phantasmic materiality or (un)consciousness.[187] Speech can thus be configured as a writing pad, a sort of psychic signifying register that inscribes (and erases) signs, ideas and the circumstances that accompany them.[188] Language and speech (because speech is a component of language) are *logos* i.e., reason, coherence, logic, knowledge and the word of God. In this sense, speech provides and represents a fixed ideological grounding or corpus of knowledge.

To speak, as Fanon notes, is to "assume a culture to support the weight of a civilisation".[189] Indeed, for Vismann, the transmission of speech was a means of conveying tradition and for consolidating empire, thus, the ability of Imperial Rome to ritualise speech through signatures

[185] Bennigton, G. Jacques Derrida (University of Chicago press, 1993) p.66
[186] Derrida, J. Signature event context 1972 (Glyph I, 1977)
[187] Derrida, *Monolingualism of the other,* p.29
[188] Ibid p.6 and Freud, S. et.al "Project for a scientific psychology"(1954)
[189] Fanon, F. *Black Skin, White masks* (New York 1952) pp.17-18

scrolls and translated media, invested Rome with a voice a legitimacy and memorialisation that led to the establishment and expansion of empire.[190] Thus, much of western speech (and indeed western law as an official register of speech) sought to represent, transmit, impose (e.g. through the imposition of monolinguistic imperialistic languages and nationalistic identities or indigenousness on colonised peoples) and consolidate power, metaphysics, and a distinct imperial primacy and totality of authority.

All this is to suggest that speech inscribes, structures, and relations of power. Undeniably, the scientific and cultural expansion of Europe in the nineteenth and twentieth century would not have occurred without the intellectual sociological and scientific technologies of writing. The ways in which speech is circulated between parties predetermines roles. It becomes a vehicle for transmitting particular aims of social and political and social ordering governance and subordination. To belabour this point, one can consider the salient role that freedom of speech plays in establishing political legitimacy (or the ability to participate in a democracy) through understandings of political speech such as the vote.[191] Heinze argues that the word vote has its semantic roots in the word "voice" and is attached to the idea of citizens formally offering and pledging their mandates and views to the sovereign.[192] To this end, voting is a formalised form of speech; "*to deny a citizen a vote is to deny a citizen a voice"*. Thus construed, speech/language becomes a marker of belonging,[193] of state formation and of a unanimous people assembled and united or assimilated by an attributable symbol such as a mother tongue (i.e., an ideology of "unisonance" –– the unity/unification of voice and consciousness) joining a fraternity (a fatherland*/ Gemeinschaft*) of individuals[194] belonging to the same "bio-logic"[195] family.

To speak here of a "mother tongue" or language/speech would be to speak of a single community that as Nancy notes "loses the *in* of being-*in*-common".[196] Thus the idea of a mother tongue would draw links to an essence of birth as it relates to soil, blood, the bio-logic, as integrated under the notions of nationality citizenship and culture. This integration unification of speech/language into such an objective homogenous singularity of essence or

[190] Vismann, C. Files Law and Media Technology (Stanford University Press, 2008) p.53
[191] Rancière following Aristotle notes that, those citizens with a civic life or in a polis have a voice, *logos* that is distinct from those outside the polis. Those outside the polis only speak with a voice *phônê* that serves animals in general to indicate or show sensations of pleasure or pain: Rancière, J. *Disagreement: Politics and philosophy* (University of Minnesota Press, 1999) pp.21- 22
See also Aristotle, Politics (Cambridge, Mass: Leob Classical Library 1932)
[192] Heinze, E. Hate Speech and Democratic Citizenship (OUP, 2016) pp.46-47
[193] Derrida, *Monolingualism of the other*
[194] Bhabha, J. "Get back to where you once belonged: Identity, citizenship, and exclusion in Europe". *Hum. Rts. Q.* 20 (1998): 592
[195] "Bio-logic" is a term coined by Oyěwùmí, to show that the cultural organisation of the western world and its social categories is derived from biological determinism Oyěwùmí, O. The invention of women: Making an African sense of western gender discourses (U of Minnesota Press, 1997) preface p.ix
[196] Nancy, J.L., *The inoperative community* (University of Minnesota Press, 1991) preface p.xxxix

corpus of knowledge – usually a Pan-European knowledge – however, is not without differences, splits, divergences, subtractions, contradictions, challenges and repeated on-going translations.[197] Intellectual property law (i.e., copyright law) and indeed privacy law (e.g. discussions around the right to be forgotten)[198] suggest that speech in western liberal societies is essentially a property right (i.e., that speech invests individuals with a sense of *logos* and thus construes speech as an integrant of self-property/ownership) which means that subjects can and do exercise speech as self owning persons for the development of their agency and selfhood.[199] Speech in this regard ceases to be a monolithic/ homogenous public totality that can be present, interpretable or controllable. Rather, It starts to become a unique differentiated right. As my discussion in this chapter will later show, the very differentiation of speech then begins to correspondingly fragment, split, subtract and challenge configurations of sovereign singularity.

Such a differentiation of sovereignty is perhaps most visible online. That is to say in cyberspace, the tensions between the state and personhood take on even a bigger significance wherein individuals become somewhat devolved (or divisible) sovereigns in their own right and inhabit a power that allows them to dislodge the state's homo-hegemony of its totalising effects. As such, the public-private dialectic takes on a whole new overlay of in-between-ness wherein distinctions between the public and private become nebulous.

This cybernetic struggle for speech ownership production and regulation happens on a wide scale and within a complex system of nondeterministic/unprogrammable relations and networks. It pushes the notions of state sovereignty to the limits and in so doing allows for the putting together of differentiated/divisible speech that is bound to rupture, displace and crack the state's central/indivisible shell of speech authority and primacy by revealing the co-existence of other contesting and contested forms of sovereignty beyond state sovereignty that each infer "an infinite number of performances".[200] This then fosters a complex structure of interrelations between the speakers, akin to what Deleuze and Guattari have called the "rhizome",[201] hence complicating regulation. I return to some of these regulatory difficulties later on in this chapter.

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[197] Butler, *Excitable Speech*

[198] Mayer-Schönberger, V. Delete: The virtue of forgetting in the digital age (Princeton University Press, 2011)

[199] These Kantian style rights are also mirrored in the US first Amendment, "The First Amendment confirms the freedom to think for ourselves." *United States v. CIO, 335 U.S. 106, 144* (1948)

[200] Foucault, M. *The Archaeology of Knowledge* (Pantheon Books, New York 1972) p.27

[201] The rhizome, an interconnection of networks, is founded on heterogeneity. It is impossible to trace the rhizome back to a principal locality or root. A very similar notion to the rhizome is the assemblage, which emphasises fluidity, exchangeability, and multiple functionalities connectivity: Deleuze, G. & Guattari, F. A thousand plateaus, 1980 (Minneapolis*: University of Minnesota Press* 1987); Glissant, *Poetics of Relation* p.33

I have so far introduced the idea that speech is not singular, monolithic or univocal. In the next sections I take this idea further by looking more micrologically at the heterogeneity of speech and the tensions that are imbricated within it.

Speech and *différance*

According to Ferdinand de Saussure's, *Course of General linguistics,* language/speech consists of a closed system of words. Within this system of semiotics, the signifier is the word or sound image and the signified is the concept or mental image conjured. For Saussure, there is no intrinsic link between the word and the image. Hence, the link between signifier and signified is arbitrary, differential, insubstantial, open and relational. In other words, there is no universal essence or fixed set of concepts that signifies. What speech signifies in one language will differ (sometimes radically) from what speech signifies in another language. Each language articulates and organises the world differently. Speech is thus a network of opened-out/infinite differences with no stable programmable/calculable elements.

This emphasis of speech as a spatio-temporal-networked system of movable differences is important here. It suggests an inherent "destinerrance"[202]/ "undecidability"/ "blindness"[203] interchangeability and contingency within speech. Thus every sequence of "said speech" –– whether it be written, spoken or recorded, generates multiple sequences of meanings, cognitions/re-cognitions i.e., a multitude of alternative perspectives, identities and subjectivities, some of which will be deferred or concealed on account of their inability to be grasped. This inability to grasp (which also involves the repression, deferral or erasure of oppositional meanings "the not said")[204] is based on particular cultural and historical hermeneutic determinations particular to the western world, which strive to create a homogenous meaning out of "the said". But as we shall see, "the not said" meanings are not vanquishable. They are central to the very economy of "the said" and are in an ineluctable link or spectral tethering with(in) it.

Indeed, Derrida has demonstrated that this deferred-difference (or *différance*)[205] of speech brings otherness i.e., the representative subjectivities of the excluded outside into a

[202] *Destinerrance* combines destination and errantry to refer to a process wherein words and terms wander away from their predefined and specified destination and goal. See Miller, JH. Derrida's Destinerrance *MLN* 121, no. 4 (2006): 893-910

[203] Derrida, J. on 'Echo And Narcissus' from the film Derrida (2004) Kirby Dick and Amy Ziering Kofman available at: <https://www.youtube.com/watch?v=ya46wfeWqJk>; Bennington, G. Jacques Derrida (University of Chicago press, 1993) p.55

[204] Ibid

[205] *Différance* is a neologism/witticism by Derrida, which combines the notion of difference and deferral or postponement. For Derrida *différance* is also about the interplay of tensions and oppositions like *absence vs. presence* and the *outside vs. inside* etc. See Derrida, J. *Différance* (2002) available at: <

continuous relation with closed hierarchal structures. Thus, "othered speech" by virtue of its *différance*[206] is compelled to and indeed interacts secretly and continuously in dissent with the very hierarchical speech structures that seek to erase, exclude mute or overcome them in the first place.

If we take the example (in late-modern history) of marginalised voices, identities and relationships (e.g. the relationship between colonizers and the colonised), it becomes apparent that silenced colonised voices have always haunted the monolithic homo-hegemony i.e., the identity speech or fixity of the colonizer. That is to say, suppressed voices have always exerted an incalculable absence/presence, an (*unheimlich*) uncanniness that frustrates the familiar (or familial) present-whole that seeks to unisonantly inscribe, represent and put them in the out of memory.

And so, in a kind of ineluctable catachresis, subaltern speech inevitably inhabits a dystopic space of power (already in the inside) and spectrally reconfigures it strategically by borrowing from its own history and heritage of oppression in order to transform its "logical systematicity"[207] by "determining its conditions of existence, fixing at least its limits, establishing its correlations with other statements that may be connected with it, and showing what other forms of statement it excludes".[208] Consequently, they, i.e., the voices of absence, the voices on the outside of speech, of suspended or deferred-difference/ *différance,* re-emerge spectrally unsounded from the cracks of univocality or unisonance bringing with them disparate articulations of truth, legitimacy, subjectivity, desire, history, memory and culture that challenge established notions of centre and periphery such as monolinguistic representations, laws and sovereignties of command.

Speech in the break; turned into itself

It is fair to say (as the above section shows) that speech, from the very beginning, by ascribing or inscribing *différance,* creates a reverse-play of power or counter-power situations. In other words, all processes of communication through speech mean that individuals in socially dominated circles (i.e., the ruled) can and will inevitably re-appropriate speech using it as means of irrupting power. This very process of re-appropriation forms part of their *logos*, their existence, their being. Such reversed speech acts and utterances are

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http://projectlamar.com/media/Derrida-Differance.pdf> For Bennington *Différance* also refers the inevitable "anticipation of what is put off until later." p.71

[206] This notion of *différance* does not only refer to deferral or as that which is adjourned in an economy of the same. Indeed, as Derrida notes in *Rogues* p.38, what is also stake and marked by différance is the "*renvoi* [the sending off]", the undeniable*,* experience of "the alterity of the other, of heterogeneity, of the singular, the not-same, the different, the dissymmetric, the heteronomous." Thus this deferral refers also to marginalised and often disavowed speech voices and experiences.

[207] Spivak, G.C. Outside in the teaching machine: The politics of translation (Routledge, 1993) p.180

[208] Foucault, *The Archaeology of Knowledge,* p.28

performed in a haunt of irreducible guises that divert from pre-established and pre-determined linguistic speech norms.

Such irreducible guises indeed are always already present in the originarity of locutionary violence, as Derrida would say: "there is nothing outside the text"; in other words, the outside of such speech is *a priori* in the inside of it. Speech thus "invaginates"[209] itself in a "hermeneutic circle" structured by a double motion.[210]Accordingly, words when repeated can be appropriated by subjects to conjure up futural, historical and present meanings for which they were never intended. Embedded within speech is the possibility for it to break from prior contexts and acquire meanings and functions for which it was never intended.[211] For the "subordinated speaker", their ability to re-appropriate language can be read as a disruption, detouring and rerouting of a liberal-utilitarian/ homo-hegemonic linguistic imperial project. Hence, language (and indeed speech) becomes a tool for agency and sociality that is used to recreate subjectivities. It is this inherent illimitable power and inescapable reverse power play (combined with the heterogeneity of *différance*) within speech that perhaps makes it such an expansive, spectral, shiftable concept and makes its regulation especially online irrevocably difficult.

Derrida suggests that "context" which is always determined by the presence of a receiver, is a notion based on a hermeneutic consensus. However, a hermeneutic consensus can never be absolutely determinable, simply because the (pre)determinability of meaning within speech is received is always already at once absent. In other words, although speech carries within it a meaningful presence of intention and inscription, (i.e., a presence of a writer to "say-what-s/he-means")[212] this always happens according to a speaker's particular cultural experience. Such a condition however is not present to the reader or listener and therefore one can never be sure of the destinations of speech. In this regard, the meaning of what a speaker or reader enunciates/says or (un)consciously intends to say can lose its original form and rhythm and become lost or unreadable. For example, words that are intended to offend or cause harm can miss their intended target and in an almost camouflaged or conjuring way, produce an unexpected and unintended effect on the reader or listener[213] owing to the inescapable fact that context is always dislodged, drifting and ruptured. A "real" understanding of context would therefore be impossible to grasp.

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[209] Invagination is the inward refolding of form, "an inverted reapplication of the outer edge to the inside of a form where the outside opens a pocket… an internal pocket larger than the whole; for Derrida when/where invagination happens, the limits of the border are limitless. Derrida, J., & Ronell, A, The law of genre. *Critical inquiry* (1980) 7(1) p.59

[210] Moten, F. In the Break: The Aesthetics of the Black Radical Tradition (University of Minnesota Press, 2003) p.6

[211] Butler, J. Excitable Speech A politics of the performative (Psychology Press, 1997)

[212] Ibid

[213] Butler, *Excitable speech,* p.87

Moreover, the notion of a hermeneutic consensus, which coincides, with leading conceptualisations of the public sphere in Habermasian terms (i.e., that "language games work because they presuppose idealisations that transcend any particular language game…these idealisations give rise to the perspective of an agreement that is open to criticism based on the basis of validity claims")[214] presupposes certain universalist assumptions and homo-hegemonic fictions. In the context of law, as we shall see in the following chapter, these assumptions or legal fictions may entail standards like the "reasonableness" of "a readership" and the margin of appreciation within human rights law. But a closer reading of a standard such as reasonableness in the context of terrorist speech for example in the substantive determination of what constitutes moral and ideological aggregates such as "terrorism" "radicalisation" or even hate speech shows that such aggregates are aporetic or fraught with impermanence and contestable subjectivities of *différance (singularity v. incommensurability/ heterogeneity*) based, on interpretation, perception, memory, imagination, and understanding amongst other factors. Hence, what some reasonable readers may subjectively perceive to be dangerous terrorist speech may be perceived by other reasonable readers (within the same space or locale) as legitimate political speech. Such an opposition is inescapable, for speech is intrinsically made up of valuable contestations of difference or "locations of culture".[215]

The problem then in setting out a hermeneutic consensus or aggregate on what constitutes harm in speech regulatory situations is that it is homo-hegemonic and one-sided (i.e., it misguidedly constructs a common evil against a universal "good").[216] Hence, it forecloses relationality (or the encounter and sociality) of *différance* by reiterating practices of exclusion and abjection. A claim, for example, that certain forms of ideological speech lead to the "radicalisation" of individuals would ignore the fact that such individuals have agency or the ability to define, interpret and appropriate such forms of speech in a number of different ways that can expand on or undo their original meaning and context. It would also ignore the various contestable historical, on-going and futural translations and navigations of speech.[217]

Citational or iterant speech

Within a shared generalised social experience, speech is always citational i.e., always tracing or referring to a generally experienced and repeated signification, ritual or convention. Quotability is the very precondition of speech. Indeed, some utterances cannot be

[214] Habermas, J. On the pragmatics of communication (Polity, 2003) p.388
[215] Ibid see also Bhabha, H. *The location of culture* (Routledge, 2012)
[216] Badiou, A. Ethics: An Essay on the Understanding of Evil (Verso, 2012) p.8
[217] Butler, *Excitable Speech* p.90

apprehended without their repeated referents and signs. However, it is from this repetition of referents that an in-finitude of meaning and difference, in different context begins. Therefore, the utterance of a statement such as the "blood is red" would immediately be understood by a particular set of listeners or readers, but such an utterance would not originally originate from the speaker, it would have been reproduced recirculated and cited from a particular historically transmitted convention or representation from which it is transposable into new boundless differing/changing conventions and contexts.

The re-emergence of difference here suggests that all repetition or citation (when disseminated) involves an interplay of *différance* –"different/citation"[218]– and thus every virtual speech signature has an "other", that is, a derivative non-identical supplementary form that proliferates and disperses metonymically [*speech is* "*extra/ex/citational*"].[219] Speech thus iterates and intermingles embodying an intertextuality of finitely differing representations. It becomes "a complex system of roots"[220] enveloped in coils of "borrowed pieces"[221] crossing a multitude of singular scenes of utterance, and further scenes of utterance. With intertextuality the intelligible rules of sequence causality (and one could indeed add regulation) no longer hold, for different unforeseen, transformative temporalities always already emerge. As such, speech is a dynamic *locus* (*loci*) of changeable spiralling meanings. Kristeva, on discussing intertextuality suggests that it occurs when the "literary word", becomes "an intersection of textual surfaces rather than a point (a fixed meaning), as a dialogue among several writings".[222]

Thus, like with context, cited language and text systems are never self-contained they move unbounded blurring simplicity in a theatrical and parasitic manner, hauntologically, always hinting at the possibility of a return in a sort of graphametic drift. Even in this movement, there is always an absent "other" (i.e., an outside —, for "*iter*" connotes alter/other) to the text that is not saturable. This "other" hovers ubiquitously about, manipulating all manner of inter-medial linguistic tricks such as visuality, aurality, and temporality. With all written/recorded media, there is always an absence of the writer/speaker. The writer/speaker is not present to explain their meanings[223] and as such written and spoken signs can be reused iterably anywhere by anyone irrespective of the author's purposes. The structure of repetition (through citation) causes signs to differ, hence changing meanings. Meaning is substitutable and contaminated with *destinerrance*; it is never fully fixed and present. It never fully arrives.

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[218] Deleuze, G. Difference and repetition (Columbia University Press, 1994) pp.209-210
[219] Cixous, H. *Zero's Neighbour: Sam Beckett* (Polity Press: Cambridge 2010) p.11
[220] Derrida, J. Of grammatology (trans) Spivak, G.C. (Baltimore, John Hopkins University Press 1976) pp.101-102
[221] Ibid
[222] Kristeva, J. Word, Dialogue, and Novel *in* The Kristeva Reader (Oxford Basil Blackwell 1986) p.37 This notion of Intertextuality is also similar to the Lacanian idea of a signifying chain.
[223] Plato, G. Phaedrus & letters VII & VIII (trans) Hamilton, W. (Harmondsworth Penguin 1973)

There are always other words in a word, other texts or "grafts" of "polysemic"[224](*ad infinitum*) possibilities, in a text — "iterability alters".[225]

Consequently, if we recall our previous statement, "blood is red" a statement, which at first may appear simple, and fleeting it is highly likely that when disseminated and re-cited by various speakers online it can then infer, a different meaning (or meanings) than was originally intended by its (absent) speaker. Other speakers and audiences could then (re) cite it and through this, they could create a nondeterministic derivative re-punctuated vocabulary (with each single word, a pictograph, + ["emoji"][226] or even a Deepfake[227] image) that contests and challenges normative understandings of fiction/reality, i.e. isness,[228] "blood" and even the very colour "red".

Further, if we consider a phrase like the Islamic call to prayer: *Allahu Akbar*, such a phrase always already has an altered/ iterated/interrupted/multiplicity of meanings, significations or representations. Thus when uttered or re-cited, for non-muslim conservatives and anti-Muslim polemicists, it could read as an "Islamic battle cry" worthy of suspicion especially if read within the context of the aftermath of a terrorist attack. For others, as Harvard argues, particularly those belonging to an Arabic or Islamic cultural background it is re-cited: "at the sight of a beautiful sunset or a starry night, and roared during moments of chaos and strife. It is a reminder that no matter how invincible or vulnerable we feel, God is greater than all other powers".[229]

The rearticulating, re-citation, re-iteration, *simulacra*, and proliferation of cited speech (i.e., its *destinerrance, which extends itself far beyond what,* we colloquially understand as writing),[230] is perhaps nowhere most evident than on the Internet. Indeed, a number of Internet media communication signatures like memes, tweets (including retweets, subtweets) and videos allow for the citing (re)linking, recoding, and reworking of content nondeterministically and multipliably. As such, almost every Internet user has the ability to cite, reframe and multi-contextualise speech to invent, alter and modify presence/subjectivities. This is done using a

[224] OED; from poly- 'many' + Greek *sēma* 'sign'. It refers to the coexistence of many possible meanings for a word or phrase.
[225] Derrida, J. *Limited Inc*. (Northwestern University Press, 1988) p.62
[226] According to the OED, an Emoji (Japanese, from e 'picture' + 'letter, character') is defined as a small digital image or icon used to express an idea or emotion.
[227] Quach, K. FYI: *There's now an AI app that generates convincing fake smut vids using celebs' faces* (The Register, 25/01/2018) available at: < https://www.theregister.co.uk/2018/01/25/ai_fake_skin_flicks/ >; Cole, S. AI-Assisted Fake Porn Is Here and We're All Fucked (Motherboard, 11/12/2017) available at:< https://www.vice.com/en_us/article/gydydm/gal-gadot-fake-ai-porn >
[228] Isness here is used to refer to a state of existence elementally or factually
[229] Harvard, S.A. The Misunderstood Beauty of Allahu Akbar, Splinter Online available at: <https://splinternews.com/the-misunderstood-beauty-of-allahu-akbar-1820116428 >
[230] Such "citation"/"recitation" includes amongst other things the words of the protest sign, the call of a general and even the signature of law and so forth.

number of technological, linguistic (and rhetorical) devices like parody satire and political critique creating what Lessig has called "remix culture".[231] In attempting to clarify these rather abstract conceptual notions, it is important situate them within the textual aspects of technology. I do so in the following section.

Technological regulation as a con-textual reading

Generally, the regulation of speech can be thought of as an analytic process that cancels out or alters undesirable segments of textual information. As such, regulation involves processes of communication akin to reading, editing, analysing, identifying, interpreting and translating. Configuring technology as a text thus helps to show that perhaps technologies are not merely mathematical devices but that they are also linguistic tools that interpret and manipulate significations of language.

If technologies are not merely mathematical but also linguistic notations of e.g., protocol and code, their application for calculable regulatory purposes (i.e., to analyse, detect, identify, translate, and apprehend content that incites terrorism) then becomes fraught with undecidability. Regulation (like law, and speech) thereby becomes iterable i.e., not as rigid, secure, fixed, and straightforward as imagined. To probe this assertion further, in the next section, I look at how computer code mirrors human language/speech.

Code, programming and speech

Computer programming languages have a great deal of similarity with natural human languages and all communication, "programs function as a type of writing".[232] Indeed, code like speech carries within it linguistic elements, which is to say, that code is essentially an archive of texts in a meta-system of communication addressed to machines as well as humans.[233] Indeed, systems of code have meanings, instructions, references, citations, commands and "signifieds" that enable computer programmes to function. Code works in a recurrent manner of language inputs and outputs and seeks to communicate to multiple users. It is inherently porous and uncontainable. It is for this reason that code is susceptible to "bugs", "viruses", "glitches", "crashes", "overflows" and other unpredicted viral-contaminations, surprises and vulnerabilities of obsolescence, ephemerality and temporality.

[231] Lessig, L. *Remix: Making art and commerce thrive in the hybrid economy* (Penguin, 2008)
[232] Joque, *Deconstruction Machines,* p.17
[233] Ibid

Although scholars like Hayles and Galloway have argued that the "artificial" instantaneous/automatic language of code is distinct and not as ambiguous as (natural/human) language, their claims to this distinction of both languages (natural/human) are not so definitive.[234] Notwithstanding their distinction(s), Hayles and Galloway still fundamentally conceptualise code and computers as mediums of communication or language. And yet, regardless of whether language is thought of as human or as code/technological, in the end, it still serves the same purpose — iterable communication. Whichever way one may look at it, the bind/tether of language, as a means of relational-transmissional communication (whether its between networks of computers, or between humans using computers, or between humans simply communicating amongst themselves) is inescapable.

Moreover, code re-enacts some significant traits of human language. Code for example has elements of delay and deferral (*différance*) between the present instructive text/language and the absent/*destinerrant* action of reading or interpretation required. The same happens with human language or speech. Like with human speech it is impossible to predict what happens with code until the moment of performance. As such, the vulnerabilities of writing, speech and communication still haunt code acutely, in the same way that they haunt natural/human languages and speech. I show how these hauntings manifest themselves in a more practical way in chapter three of this thesis.

Computers and writing

Online communication technologies can be conceptualised as modern prosthetic extensions of writing —"the page remains a screen".[235]Derrida has suggested that online communication technologies in fact belong to a "digital history" of finger-operating devices and handheld devices,[236] like "pen tools" that process words or print words with voices and with words.[237] Thus, online communication technologies are essentially "textual mediums"[238] with elements of multiple addresses of code written in programming languages.[239]This is to say that they are always embedded within an iterable and disseminatory ecological process of writing and communication. They are ever in (and of) an iterable process of languaging — i.e., of reproducing and being produced as copies and duplicates of texts interminably looped in a network. Accordingly, the recurring problems and vulnerabilities of communication that plague

[234] Hayles, N, K. "Traumas of code." *Critical Inquiry* 33, no. 1 (2006): 136-157; Galloway, A,R. *Protocol: How control exists after decentralization* (MIT press, 2004).
[235] Derrida, J. *Paper machine* (Stanford University Press, 2005) p.46
[236] Ibid
[237] Ibid
[238] Galloway, *Protocol* p.165
[239] Joque, *Deconstruction Machines*, p.19

all language(s) are inherited by code and all its computational processes hence creating unknowable/undecidable gaps in interpretation/communication.[240] Arguably, these vulnerabilities are even more pervasive online because online communication involves the interplay of intensified language/speech with code and artificial intelligence in a very fast register that diverges from our human language. Further, due to the interfacing (human/machine) synchronic engagement intrinsic to online communications technologies, online communication technologies can be thought of as disseminatory organisms that produce a new kind of dual-authored writing, through a "duplicitous" double speech that "seems to originate not just with the persons who are individually identifiable in a genealogical sense, but also with a computer discourse that encircles (within itself) its own textual protocol".[241]

Because this writing occurs between *human/machine* or *human/computer* it readily re-enacts a spectral play of *différance*. Accordingly, for us "the humans", it occurs with an invisible non-presence, techno-hallucinatory-trickery or an automatic spontaneity, "an internal daemon" i.e., an other that/who can (or not) be withdrawn, in front of us; one that is faceless, from a different place, remote, behind the computer screen.[242] This auto-spectral element of spontaneity and trickery is manifested in the manifold ways in which online communication technologies come up with new or unarticulated conjunctional combinations of solutions to divergent situations (and also "autoimmune" ruptures and slippages e.g. through "glitches", "crashes" or "leaks" "DDOS attacks" etc.) that spectrally befuddle,[243] surprise, "*freeze!*" and outwit not only us their users, but also their designers, regulators and programmers.

It is also worth noting that the kind of writing produced by online communication technologies (i.e., the complex combination of networked computers with the code that operates them and the humans that sit at these computers) is more mobile, hyper-fluid and faster than the kind of writing produced by humans in the "real world".[244]Thus, the speed and force of large numbers of (real and fake) people online creates very rapid cycles of interpretation and response hence giving online communication technologies a phantasmic appearance of an almost inhuman emergence. This othered phantasmic reading/writing then accelerates all the traces of heterogeneous speech and writing that occur in "the real world" hence blurring

[240] Ibid p.29
[241] Aycock, A. Derrida/Fort-da: deconstructing play. Postmodern Culture 3, no. 2 (1993)
[242] Derrida, *Paper machine*, p.23
[243] Although different in context, the mysterious drone sightings in London Airports (in December 2018 and in early 2019) could also be thought of as a spectral intimation of ghosts re-localising/returning the automated remote-terror of western technologies. The uncertainty, unpredictability or mystery of the drone sightings is evidenced in statements made by a senior Sussex police officer who said e.g., that there hadn't "been any genuine drone activity in the first place": Spinks, R. UK police still have no proof of the drone attack that grounded 1,000 Gatwick flights (Quartz 23/30/2018) available at: < https://qz.com/1511667/the-gatwick-drone-incident-is-still-a-mystery-to-british-police/>
[244] Virilio, P. & Bertrand, R. *The administration of fear*

communicative contexts duplicitously in an immediate, otherworldly *out of time* register. Technology then becomes an open haunted door that neither the doorkeepers, nor we the end-users[245] can see through with clarity. I substantiate this relationship between opacity and regulation of online communication technologies in greater detail in chapter three. For now, we shall explore the indeterminate issues that come with having to regulate or contain iterant speech.

Irreconcilable censorship: Regulating the indeterminate

Under a liberal-utilitarian framework regulation through censorship of certain kinds of speech is important as it prevents the proliferation of hateful, offensive and criminally harmful speech. This is indeed the view taken by most European countries[246] that in contrast to the US with its almost[247] unfettered speech under the First Amendment have strict curbs on incitement to speech, racial hatred and other un-desirable motivations. These divergences in understanding speech regulation are perhaps a direct consequence of the long history of Anti-Semitism in Europe.[248] Nonetheless, despite the differences in the aforementioned cultural and jurisdictional approaches to regulating speech, it can be submitted that the mere fact that legislation proscribing such speech acts exists does not prevent such speech from being uttered and disseminated iterably (and hence indeterminably) in the first place. The very iterable/indeterminable nature of speech confounds legal and regulatory limns. More specifically, although the process of regulating harmful speech aims to cancel-out, contain, or negate such speech, it ends up engendering undecidabilities because it designates open an unsolicited, unforeseen and unprogrammable word-game of *différance* within speech. Hence, (somewhat paradoxically), the fixed or enclosed structure of regulatory law deconstructs or compromises itself by inciting open an indeterminate reproduction of subversive, reverse, or counterpoint speech within the very prescription of limits, of "the unsayable" or what can not be said.

Indeed, commentators like Levine have argued that writers or speakers can be spurred on by the impediments of censorship to innovate new styles of communication, which anticipate and bypass the limitations imposed by censorship.[249] An example of such a phenomena would be

[245] See Vismann, *Files,* pp.13-21
[246] Public Order Act, 1986, Part III (U.K.) (proscribing racially inflammatory material as well as acts intended or likely to stir up racial hatred). In Germany, the "Auschwitzlolge" offense (literally, "lie of Auschwitz" offense) under sections 130 and 194 of the Criminal Code prohibits the approval, trivialisation, or denial of Nazi crimes or the crimes of other violent regimes.
[247] "Almost" here underscores the fact that there is a discussion in US scholarship about how in practice speech is more limited than it may first appear under First Amendment jurisprudence.
[248]Boyle, K. "Hate speech--the United States versus the rest of the world." Me. L. Rev. 53 (2001): 487
[249] Levine, M.G. Writing Through Repression: Literature, Censorship, Psychoanalysis (The Johns Hopkins University Press, 1994) p.2.

the re-appropriation and re-contextualizing of ordinary and seemingly innocuous words such as “milk”[250] by online right wing and neo-Nazi extremists to iconise and connote white supremacy.[251] For the regulator(s), such a change in terminology would subvert traditional understandings of what constitutes hateful speech and would alter prevalent notions of certainty and clarity (through widening the derivative, the imitated, “the fake” and the differentiated) hence making the regulation of such speech intractable. In the context of so called terrorist speech, similar elastic word and text-image puzzles are encountered with words like *Jihad* and *Allahu Akbar* discussed above, which can and have been recoded to frame and create different representations (and indeed different “emotional effects”[252] to different listeners), which may not be easy to spot and interpret for those who decide what constitutes the legitimate and illegitimate. The same could be said of the word “radical”, a word, which is synonymous with revolutionary, progressive reformist politics, yet at the same time connotes violence and extremism.

One should also highlight here how the word “terrorism” itself has been dislodged and is still now, even in this very moment, being dislodged from its narrowly/exclusively defined cultural, religious and racial post 9/11-7/7 discursive singularities as “anti-state violence” to now embrace a whole host of shifting, heterogeneous unprogrammable meanings of “terrorism” such as state terrorism, “bio-terrorism”, “animal-rights terrorism”, “street-terrorism”, “bedroom terrorism”, “lone-wolf terrorism”, “intimate terrorism” and so forth.

Further, that the authority to delineate and translate the unspeakable from the speakable has been transmitted to a variety of players extraterritorially across legal and socio-political cultures is testament to the intrinsic uncapturability of speech. It also means that the regulatory and interpretational process is fraught with complex conflicts of power, subjectivity, representation and legitimacy. To this effect, regulation is indeterminably haunted by a “monologic terror of indeterminacy”.[253]

Derrida has suggested that “context”, which is always determined by the presence of a receiver, is a notion based on a hermeneutic consensus. However, a hermeneutic consensus can never be absolutely determinable because the predeterminability of meaning within which communication (i.e., texts or images, or speech) is received is always at once absent.[254]And

[250] Freeman, A. Milk a Symbol of neo-Nazi Hate, The conversation (31/08/ 2017) available at: < https://theconversation.com/milk-a-symbol-of-neo-nazi-hate-83292 >
[251] Iterations of this kind are also used in “draconian” jurisdictions like China where individuals use homophones to subvert censorship and regulation. For a more detailed discussion of this phenomenon see n.675 and n.676.
[252] Belavusau, U. Freedom of speech: Importing European and US constitutional models in transitional democracies (Routledge, 2013) p.110
[253] Holquist, M. Corrupt Originals: The Paradox of Censorship. *Publications of the Modern Language Association of America* 1994 p.22
[254] Derrida, *Limited Inc*

although speech carries within it a meaningful presence of intention and inscription i.e., a presence of a writer to "say-what-s/he-means"[255] according to their experience, such a condition is not present to the reader or listener especially with regard to recorded or written speech. That is to say, the meaning of what a speaker or reader says or intends to say always loses its original form and rhythm and is susceptible to becoming lost or unreadable. This means for example, that words which are intended to offend or cause harm can miss their intended target and produce unexpected, unintended and unknown effects on the readers or listeners.[256] Their context is always shifting, dislodged, drifting, always returning out again and again, churned in an uncontainable flux of rupture.

The possibilities of this occurring are incalculable especially online, given the condensed cross-cultural landscape of the Internet. Certainly, the re-citation, re-iteration, and re-contextualisation of speech/language is perhaps nowhere most evident than on the Internet where a number of Internet media signatures like memes, tweets (including retweets, screenshots, subtweets, direct messages) and videos allow for the citing re-linking, recoding and reworking of content nondeterministically, multipliably and cross-jurisdictionally. This is done using a number of online communication technological tools[257] in processes that involve the endless deferral, translation, invention, regeneration and repetition of texts — engaged with other networks of texts — in and at differing times.

In sum, the argument I am trying to advance here (an argument that I will gradually unpack throughout this thesis) is that contemporary speech regulation and indeed online regulation is complicated by the fact that it is grounded on a monolinguistic liberal-utilitarian aesthetic schema that is susceptible to disavowing the endless iterability of heterogeneous texts. This is a recurring regulatory tension and a hauntological trace that ultimately tends to privilege and preserve a univocal majoritarian viewpoint over others. This consequently complicates human rights consideration particularly the right to freedom of expression. Hence, it is important that we interrogate some of the undecidable limitations of liberal-utilitarian speech theory, which are the basis of prevailing conceptualisations of the right to freedom of expression.

On the limits of liberal-utilitarian speech theory

In this section, my approach will be to locate Millian liberal thinking within a historical–social context in order to uncover some oft-disregarded forces that in my view still significantly haunt

[255] Ibid
[256] Butler, *Excitable Speech,* p.87
[257] Lessig, L. *Remix: Making art and commerce thrive in the hybrid economy* (Penguin, 2008)

a great deal of western liberal jurisprudential and legal thought, particularly in the area of speech theory.

Generally, within the western liberal-utilitarian legal tradition the notion of harm is generally based on empiricist calibrations that help to determine whether (or not) particular acts are injurious to the safety of the state or its citizens. Such empiricism is consensus based in its construction of evil/ harm. Millian speech theory,[258]which underpins a lot of current jurisprudential ideals in the liberal-utilitarian tradition, for example functions within a fellow-feeling of normative nationalistic homogeneity: "among a people without fellow feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist".[259]

Millian speech theory thus posits a singular liberal-humanist universal speech schema that subordinates and disavows categories of being, identity and knowledge through a play of *différanc*e. In this way, it creates and maintains "a global hegemonic ethno-class world citizenship of modern "Man"[260] whose speech indispensably carries more legitimacy and validity than that of the rogue infrahuman other who remains condemned in the bottommost places of the social and communicative hierarchy of modern society.

Indeed, Jahn, Ussyk and Baxi have shown that J.S. Mill's liberal theorising is guided by colonial-cultural norms such as the belief that the world could be understood through a binarism of the civilised and the barbaric — which meant that "large masses of colonised peoples were regarded as not fully human, or in need of tutelage".[261] The Millian liberal project is thus irrecuperably underpinned with the enlightenment's mission to civilise or transform reform and initiate barbarous peoples into the echelons of higher civilisation. For Mill, backward populations had interests in assimilating with the British Empire, which was a unique privileged representative of universal causes. A demand for primacy interlaced with a colonial civilising mission of conquest that seeks utter perfectibility and exclusivity at the same time —a disregard for the alterity of the other (I develop this thought later in this section). Millian liberal-utilitarian speech is therefore haunted by colonial dialectics that reinforce signalled differences in humanhood, identity status and belonging.

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[258] Perhaps the most cited text on freedom of expression in legal jurisprudence is Mill's 1859 treatise *On Liberty* which advocates the fullest freedom of speech. However, as shown in the introduction, Mill's notion of the "harm principle" in *On Liberty* positions freedom of expression as a non-absolute right and thus as justifiably limitable by law from the outset: Mill, *On Liberty, 1859*

[259] Mill, J.S. Considerations on Representative Government (Parker, son, and Bourn, 1861) p.428

[260] Wynter, S. "Unsettling the coloniality of being/power/truth/freedom: Towards the human, after man, its overrepresentation--An argument." *CR: The new centennial review* 3, no. 3 (2003): 257-337

[261] Jahn, B. "Barbarian thoughts: imperialism in the philosophy of John Stuart Mill. *Review of International Studies* 31, no. 3 (2005): 599-618; Ussyk, P. On Liberty and its Limits: Civilisation and Barbarism (University of York, 2011); Baxi, U. *The future of human rights* (Oxford University Press 2002) p.33

Similarly, for Rawls, his overriding aim is to describe a well-ordered society that is, a society in which "all members accept, and know that the others accept, the same principles (the same conception) of justice".[262]For Rawls, people with different comprehensive conceptions of morality/depravity, justice or the good can and should reach an "overlapping consensus".[263] Rawls's thinking is thus results-driven consensus-driven and order-orientated. Arguably, his ultimate aim is to create an enlightened utopic utilitarian sphere, which rests on a reaffirmation of a distinctly universal (i.e., free and rational) *sensus communis*.

Liberal-utilitarian consensus-based reasoning as articulated by Mill, Milton, Rawls and others like Dworkin[264] and Hart[265] emerges from a distinct liberal Protestant Reformation tradition, the scientific revolution, the enlightenment and post-enlightenment, and its emergent patterns of democratic governance that reinscribed the romantic and nostalgic ideal of Eurocentric convention, authenticity and normativity.[266] It thus aimed at the realisation and preservation of a primacy of distinctive, interlocking ideals of individual character and public discourse — ideals that to a great extent emerged in the European enlightenment period as exemplified in the thought of Immanuel Kant[267] and Jean-Jacques Rousseau[268]through their constraining processes of trampling on external individual experiences (e.g., such as their aporetic tensions between individual rights and general utility) that still persist today.

Following this, it could then be argued that liberalism is fundamentally self-inadequating. Indeed, because liberalism programmes "an ascendant commonality of experience culture and political values",[269]and equal positions of power as a precondition for speech,[270] it fails to address the issue of *différance* i.e., the relational tether of othered/excluded/ differed speech. For instance, it fails to address the fact that speech does affect its listeners with differing "emotional responses". Hence, it ignores the fact that a consensus (whether it is on harm or

[262] Rawls, J. Kantian Conception of Equality (1975) pp.254-255
[263] Rawls, J. The idea of an overlapping consensus, Oxford J. Legal Stud 7 (1987): 1
[264] Although Dworkin says that rights function as trumps against utilitarian collective goals he still rather paradoxically frames them within a liberal-utilitarian (consensus based) framing. For example he argues that the state can limit the right to free speech "when there is a clear and substantial risk that speech will do great damage to the person or property of others": Dworkin, R. Taking Rights Seriously (London Duckworth 1977) p.204
[265] Hart, HLA. The Concept of Law (Clarendon 1961) pp.90-99
[266] Koppelman, A. Veil of Ignorance: Tunnel Constructivism in Free Speech Theory. Nw. UL Rev107 (2012): 647
[267] See e.g., Kant, I. "On the use of teleological principles in philosophy (1788) (Cambridge University Press 2007) and Deleuze, G. Kant's critical philosophy: The doctrine of the faculties. A&C Black, 2008 p.25
[268] Rousseau, JJ. The social contract: And, the first and second discourses (Yale University Press, 2002)
[269] Murray, A. Mapping the rule of law for the Internet (2017): 13-36
[270] Butler is critical of the liberal-utilitarian model, which "assumes that all agents occupy equal positions of power and speak with the same presuppositions of what constitutes agreement and unity": Butler, J. Gender Trouble (Routledge 1999) p.20

on morality/depravity) has varied (and equally mootable) tensions and contestations of *différance*. But in a diverse, online plurivocal world, a stable, monolithic homo-hegemonic collective identity based on the notion of consensus-based reasoning on issues like morality and justice is perilous and untenable.

Moreover, the increasing apparent blurring (and inseparable reinforcement) of borders with modern technologies in the post 9/11-7/7 continuum suggests that contemporary communication has to grapple with negotiating speech (and *différance*) in its various cultural, philosophical and national subjectivities —many of which are not necessarily reflected in the western liberal tradition. Indeed, for the most part, divergent claims always arise to challenge the very foundations of a statist, let alone a collective Euro-Atlantic normativity especially in contemporary times. And although such emerging divergent claims may (and are) easily be dismissed as irrational or against public reason, in dismissing them, the notion of justice to the other is disavowed pre-emptively. The result of this is (as is arguably happening today in public spaces both online and offline) a recalcitrant haunting of unresolved contested deferred socio-cultural in-equalities. In order to attempt to get to the roots of these irresolvable tensions, it is worth probing the relations between speech sovereignty and public order or regulation.

Speech and the ghosts of sovereignty

The arena of regulation and law traditionally lies within the remit of the state or the sovereign. Indeed, Schmittian analyses suggest that the sovereign has the ability to make laws and to determine a state of exception[271] and indeed law making which is also regulation and public order making is conveyed as a locutionary enactment of sovereign power and authority. This can be expressed in prohibitory utterances and administratory utterances by the state or sovereign that are then transmitted onto individuals by convention, ritual and enforcement. Such utterances as Derrida suggests carry with them a formative power (but also a haunting originary lack, for *"haunting belongs to the structure of every hegemony"*)[272] that structures, demarcates and forms structures of social and political ordering and being that are a reaction to real or imagined fears and anxieties. Speech is thus crucial to the administration, organisation and functioning of space, and its territory and power. It is not then surprising that such fears and anxieties would be phantasmically intensified and multiplied in situations involving national security.

In these situations, such utterances can bring about a sort of hauntological differentiation, classification, and naming by creating and inscribing what Said calls "poetic processes of

[271] Agamben, G. *State of Exception*
[272] Derrida, *Specters of Marx*, p.46

imaginative geographies and naming" that identify and distinguish e.g., citizen/barbarian.[273] Relatedly, in the interests of its own security or protection, the state can also hauntologically outline through legal prescriptions and policy declarations, which acts of speech may be unspeakable or illegitimate and which acts of speech, may be speakable or legitimate. These differentiations and demarcations of the different statuses of speech cannot happen without the foundational legal ratification and maintenance of the state and its enforcement institutions.[274] What is important to note here is that the state (in its ratification, enforcement or regulation of speech) does not act as a lone entity. Which is to say, the "locutionary violence", legitimatisation or enforcement of the sovereign with regard to speech is not singular or one-directional. It is as Bell suggests transmitted polycentrically. It "spectrally leaks" i.e., it is decentred, proliferative, transverse and transitive. Hence, its authority (and challenges to its authority) comes from multiple coexisting[275] /overlapping non-statist sources[276] of power some of which are undefined and undefinable.[277] Perhaps, it is due to this very fact that "sovereignty" (especially online) is increasingly contested.

To invoke Wendy Brown, in a somewhat Nietzschean sense, the state sovereign is dead.[278] It has left us with "spectre[s] or, like Hamlet, with a dead father-[king] in a line of dead fathers".[279] Hence, divergent spectral ghosts of sovereignty and their totems/fears/anxieties have become unravelled, disjointed, — "out of joint".

In any event, this perilous "to be, or not to be" *twilight*, absence, loss and "eternal recurrence"[280] of the sovereign's spectres through the "democratisation" of speech (and indeed other areas of socio-political administration) can be read as an intensification of late-modern phantoms of "globalisation". It thus comes with a plethora of messy anxieties (i.e., existential fears, "terrors and horrors")[281] and implacable traces of *différance* that complicate contemporary and futural speech and regulatory practices. As this thesis will show, many of

[273] Said, E. *Orientalism* (New York, 1979) pp.54-55
[274] As Benjamin has elaborated in *Zur Kritik der Gewalt*, the state or sovereign as an institution uses its "law-making" and "law-conserving" force to secure and maintain for itself an exceptional monopoly on violence: Benjamin, W. *Zur Kritik der Gewalt* (commonly translated as) "Critique of violence." *Reflections: Essays, aphorisms, autobiographical writings* (1978): 277-300. Derrida on reading Benjamin has reiterated that *Gewalt* cannot be simply translated as "violence, "It means "force" more generally, and this includes legitimate force or authority
[275] Motha, S. *Archiving Sovereignty: Law History, Violence* (University of Michigan press 2018) pp.105-106
[276] See Bell, T.W. Polycentric law (1991/92) 7(1) Humane Stud Rev1 and Casey, G. Reflections on Legal Polycentrism (2010) 22 J Libertarian Stud 22
[277] Castells, M. The Power of Identity, vol.2 of The Information Age: Economy Society and Culture (Blackwell, Oxford, 1997) p.34
[278] Brown, W. *Walled states, waning sovereignty* (Mit Press, 2017)
[279] Pollock, G. (ed) *Visual politics of psychoanalysis: Art in post-traumatic cultures* (IB Tauris, 2013) p.11
[280] Nietzsche, F. *Twilight of the Idols*, in *The Portable Nietzsche,* ed. Kaufmann, W 463-563 (Viking Press, 1954) See also: Kain, P.J. "Nietzsche, eternal recurrence, and the horror of existence." *The Journal of Nietzsche Studies* 33, no. 1 (2007): 49-63
[281] Ibid

these slippages return, through continuous Hobbesian collisions of sovereigns, to haunt lawmaking, enforcement and regulatory practices of speech in the post 9/11 -7/7 continuum.

On censorship and *différance*

Given the aforementioned rupturous and irruptive quality of speech, one may think that it is counterintuitive for governments to keep censoring content. One then wonders why it is that practices of censorship are vigilant. Following my discussion of hauntology in the introduction, I want to suggest here that censorship is a hauntological device, which provides a semblance of authority and protection. Thus, despite the fact that censorship's obsession with terror, anxiety and distress may at first glance appear to be a prohibitive structural weakness on the part of the government (in the sense that it reveals a degree of lack, powerlessness or inadequacy), it should also at the same time be viewed as an oblique productive demonstration and deployment of banoptic power insofar as it aims to proactively capture, neutralize, and pre-empt what unbearable/othered bodies (i.e., *unheimlich* /unbearable bodies that signify cultural anxiety/terror) say, speak or express in liberal-utilitarian public spaces. All this is to say that the very banoptic process of censorship i.e., of crossing out, deleting, blacklisting, annulling, taking-down or negative-writing,[282] is what validates sovereign power, endowing law with its symbolic aura of suspension, retribution, banishment and execution.[283] Thus, censorship is implicated in and conjoined to power and *logos*, inseparably. There would be no writing or speech, or *logos* without censorship.

Indeed for Vismann, law and power cannot function without the process of censorship, because censorship allows for the naming, delegitimisation and annulment of other forms of knowledge and subjectivity.[284] Similarly, Raz argues that "censorship expresses authoritative condemnation not merely of the views or opinions censored but of the whole style of life of which they are a part".[285] Robert Cover in, *Violence and the Word*, stretches this notion of condemnation even further out in describing the violence of legal interpretation as "the violence which judges deploy as prosecuting/punishing instruments of a modern nation-state" to render certain lives helpless.[286] Seen in this light, one begins to construct censorship as a significant power-producing force that mirrors fear-transmission and repression.[287] The

[282] By "negative writing", I mean that censorship is an utterance, and hence a form of writing or speech in its own right. In this sense, it is much like ordinary speech or writing as it also carries within it an inherent locutionary violence.
[283] Vismann, *Files*, p.28
[284] Ibid
[285] Raz, J. Free Expression and personal identification Oxford Journal of Legal Studies 11 no.3 (1991)
[286] Cover, R.M. Violence and the Word." *The Yale Law Journal* 95, no. 8 (1986): 1601-1629.
[287] For Foucault prohibitions allow us to repress sexual/libidinal desire and to pacify politics: Foucault, *The Archaeology of Knowledge*, p.216; Ellmann, M. Deconstruction and psychoanalysis. *Deconstruction: A User's Guide* (2000): 211-237

censorship of unlawful speech can therefore be construed as an integral hauntological instrument of psychic power in the sense that it is inseparable from the notions of fear-transmission and repression.[288]

In the context of "incitement to terrorism", this is somewhat explicitly articulated in the ways in which terrorist speech is phrased or defined as a pathogenic element or virus that has the potential to disrupt/corrupt morality or undermine the very foundations (and continuity) of liberal-utilitarian normative social orders that privilege singular homogeneity over difference. This position, (which should also be thought of as a phantasmic remnant of liberal-utilitarian thought[289]) mirrors a "pro-civility" approach in the sense that it purports to "respect the sensibilities of others and, act in a fashion which preserves a measure of decorum in society as a whole".[290] But the preservation of decorum or propriety through a censorship or erasure of undesirable and harmful viewpoints is fraught with considerable practical difficulties because in reality, cancelled-out remarks are never actually deleted. The very fluidity or unprogrammability of speech means that it interpolates and returns rupturously to haunt generic and monolithic structures (of which it is an integral part) through their very barriers and limits of regulation. Like haunting blots or scars, these cancelled out, "not-said" views, opinions and expressions are never actually excised but rather, are brought to the fore phantasmically, indefinitely and they always return in a spectral fashion to haunt and threaten the normative centralities of meaning that seek to erase them –-"*what one tries to keep outside always inhabits the inside*".[291] Consequently, this oppositional-paradoxical mode of *différance* engenders an irreconcilable tension, a power/counter-power interplay/dynamic that haunts speech regulation and undermines its very coherence and efficacy interminably.[292]

It is important to stress that such a regulatory slippage or failure does not only occur in a practical sense but it also affects the psyche, the unconscious. Which is to say, in a rather uncanny way, the authoritative regulator remains haunted by a neurotic panic of originary lack or inadequacy/helplessness (and is hence triggered into an unending paranoia and aggressivity) to censor. For our purposes, this means that the problems of containing speech that incites terrorism become especially non-reducible problems for law. Which is to say, law does not take away (but preserves) the attitudes, cultures, and hyper-visible memories of

[288] Mignolo, W. D. Introduction: Coloniality of power and de-colonial thinking. *Cultural studies* 21, no. 2-3 (2007): 155-167

[289] Losurdo, D. *Liberalism: A counter-history*. (Verso Books, 2014) pp. 273-274

[290] Geddis, A. Free Speech Martyrs or Unreasonable Threats to Social Peace? Insulting Expression and Section 5 of the Public Order Act 1986 Public law 4 (2004) p.869

[291] Bennington, G. Jacques Derrida (University of Chicago Press 1993) p.217

[292] For Derrida, "Writing*/ speech* is unthinkable without repression. The condition of writing is that there be neither a permanent contact nor an absolute break between the strata: *this explains* the vigilance and failure of censorship": Derrida, J. Freud and the Scene of Writing, in Alan Bass, ed., *Writing and Difference* (Chicago: University of Chicago Press, 1978) p.226

trauma that it seeks to contain. These remain spectrally present, escalated, always already present, (before/ after), and in the very moment of their exclusion, inscription or censorship.

On censorship as a consensus of harm

Intrinsic to the concept of justice within law is the idea that where the criminal justice system imposes a punishment, it should do so only in proportion to the crimes to which it seeks to respond. So far, my discussion has suggested that censorship may be misguided as it has the propensity to identify criminality and harm in the wrong places and with the wrong kinds of speech. In view of this predicament, a question then arises: how is proportionality construed?

And so, in a brief attempt to shed some light on this question, it is worth considering the philosophical underpinnings of censorship.

Generally, the determination of harm in western liberal states is governed by deontological and consequentialist empirical logics and ethics. Deontological ethics on the one hand are anchored in normative theories regarding which choices are morally required, forbidden, or permitted put succinctly, they are concerned with what is morally wrong or right. [293] Consequentialism on the other hand is concerned with choices or intentions and their outcomes.[294] The kind of consequentialism this thesis is concerned with is utilitarianism, a kind of consequentialism that is best expressed in assessments of moral actions and their corresponding outcomes or benefits. Of course, a thorough analysis of both consequentialism and deontological empiricist ethics is impossible here; hence, my discussion shall only focus on how they identify, predict or calculate harm.[295]

To start with, I want to suggest briefly that the differentiation of deontological reasoning from utilitarian reasoning is misleading and that fundamentally they all achieve the same aim i.e., to arrive at a consensus of harm.[296] Put differently, because assessments of terrorism are always at once *sensus communis* assessments of risk, both deontological and utilitarian ethics configure terrorism as a risk that should be contained in order to achieve security for the greater good of society. This is to say, incitement to terrorism tends to be viewed as 1) something morally reprehensible and 2); an action that infringes the liberty, rights and security of others, in a liberal-utilitarian sense, by causing them harm.

[293] Heinze, E. Hate Speech and Democratic Citizenship (Oxford University Press, 2016) pp.32-33
[294] Ibid
[295] Ibid
[296] Because they are not mutually exclusive, I conflate deontological reasoning with consequentialism for ease of argument.

Crucially, with these philosophical determinations of harm, which form the backdrop of many, if not all incitement to terrorism laws, distinctions between terrorist acts of violence and speech that incites terrorism are never clearly made. This is because empirical or evidential assumptions are generally made to the effect that certain actions can be calculated as harmful or immoral before they occur. This as I have argued in the introduction is emblematic of the harm principle within which liberal-utilitarian determinations of harm are made.[297] The key issue with this model is that unpopular kinds of speech (even those that are not substantially harmful in anyway) are susceptible to being reductively formulated in an anxiety-inducing manner i.e., with monolithic claims about harm or danger or risks or from the outset.[298] To probe this claim further, it is important for us to look at the kind of harm that deontological and utilitarian rubrics are interested in containing with regard to incitement to terrorism. For purposes of scope, in this chapter I only look briefly at a general legal and policy reasoning behind some the relevant legislation and regulatory policies. I carry out a discussion of the specifics of incitement to terrorism law in chapter two.

The kind of harm at issue

Generally, the harm caused by speech that incites terrorism is a "public harm" described in terms such as "grooming", "radicalisation" and "indoctrination". When assessing or describing the forms of speech that incite terrorism, the preponderance of opinion is that they provide "oxygen" or the mood music to ideas that lead to violent radicalisation. In this sense the speech or ideology is treated both as a trigger and an act of harm:

> We should not ignore the contributory role that radical texts and extremist pamphlets have in radicalisation. They serve to propagate and reinforce the extremist and damaging philosophies, which attempt to justify and explain motivations of terrorists. We should not undermine the role that such literature can have in radicalising vulnerable and susceptible young people particularly changing Muslims from law-abiding members of the community to potential terrorists.[299]

Implicit in the conceptual structure of incitement to terrorism offences is the presupposed notion that terrorist ideology is harmful or dangerous because it destroys the morale of a nation or class and undercuts its solidarity through the random murder of innocent people.

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[297] For Zedner, "pre-crime" marks a conceptual shift in criminology that anticipate and forestall that which has not yet occurred and may never do so: Zedner, L. "Pre-crime and post-criminology?." *Theoretical criminology* 11, no. 2 (2007) p.262

[298] Ahdash, F. "The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts." Child and Family Law Quarterly Vol 30, No 4, 2018: 389-414

[299] Hansard HL Vol.667 Col 551(17 January 2006)

This is clear in the UK's CONTEST strategy[300] (from which the "Prevent" strategy is derived), which states: "the first propriety of any government is to ensure the security and safety of the nation and all the members of the public". This general axiom of public order and safety is also reflected in criminal sanctions such as the Public Order Act 1986, the Malicious Communications Act 1988 and the Communications Act 2003 to deal with speech that stirs up racial hatred, speech that is threatening, abusive insulting and causes alarm and distress. Whilst these offences may seem convenient in their quest to prevent the harms caused by speech, questions emerge with regard to the ways in which these offences are structured. These questions can be phrased under 3 interrelated points namely:

1) That the offences disregard the iterable and indeterminable nature of speech
2) That the offences inaugurate an indemonstrable causal link between speech and harm
3) That the offences lead to broadly overreaching proscriptions of speech.

An underlying assertion in this thesis is that points two and three directly follow from point 1. I have already discussed point one to a great extent in this chapter. I discuss point 3, the notion of broad criminalisation in greater detail in the following chapter. In the subsequent sections, I focus on the point 2, which relates to the difficulties in distinguishing between harm and causation.

Speech and transferential or causal harm

Thus far, I have attempted to show in this chapter that speech is not univocal[301] i.e., that it is made up of a system of changeable and divergent referents and signifiers. It would therefore be absurd to assume that there is a uniform clarity of meaning or of cause and effect with regard to interpretation of what words mean. To this end, it is conceivably impossible in the sense that it is incalculable to measure or assess the harm, threat or risk that words carry. Indeed, what one may assess to be harmful in one situation could be read as something completely harmless in another situation. What is "harmful" lies in the eyes or ear of the beholder. But in speech situations, there is a divergent polyphony of "beholders" or "hearers", each with different attitudes, cultures, memories and histories. This ultimately makes it difficult for us to predictably draw monolithic assumptions or consensus-based assessments with regard to what constitutes harm and what does not. Hence, the very liberal-utilitarian

[300] CONTEST is the UK government's overarching counterterrorism strategy. It is a multifaceted policy comprising of four components: 1) Prevention; 2) Pursuit; 3) Protection and 4) Preparedness that has the objective of containing activities that lead to 'radicalisation' and terrorism generally. See CONTEST: The United Kingdom's strategy for Countering Terrorism: (HM Government June 2018) available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714404/060618_CCS207_CCS0218929798-1_CONTEST_3.0_PRINT.PDF>

[301] "Univocal" like monolithic or monologic means having a singular meaning or interpretation.

assertion that speech that incites terrorism is harmful or immoral becomes problematised. It becomes a point of endless iterable contestation between the regulator and the regulated, and in other cases a point of contestation of meaning morality and viewpoints between the reason of the majority and that of the minority.

Of course, there are situations where meaning is declared final but because such declarations are often carried out through a liberal-utilitarian legal-juridical calculus, they are liable to silencing the heterogeneity of marginalised perspectives such as those of women, Muslims, people of colour and queer people. And even when they claim to protect marginalised individuals from harm, such claims to protections come with calculated/ pre-determined/ paternalistic limits, demarcations and conditions such as the requirement to assimilate within normative liberal-utilitarian theorems of (un)freedom "on the grounds that the marginalised do not know what is good for them."[302] A circular irresolvable liberal programme of silencing, unhumaning and discrimination that as Butler notes creates "'subjects' who are not quite recognisable as subjects"[303] then becomes reinscribed on end. Moreover, in situations where a demarcation of what is harmful or moral occurs, where the signature of law inscribes and enforces such a definition, such an enforcement or decision does not happen *stricto sensu*. All this is to say that law remains encumbered by its inability to define or identify threats accurately or perfectibly.[304] Legal definitions abound and are always already contaminated in excess by other unanticipatable definitions.[305] This is an incalculable and irreconcilable inadequation and paradox that is embedded within law's very aesthetic structure.[306]

Contestable harm

If we maintain that there is a consensus over what incitement to terrorism constitutes in terms of morality or harm or violence, we face the risk of ignoring the fact that the very notion of incitement to terrorism such as glorification or encouragement can be contestable, which is to say, that what some audiences consider to be extremist terrorist-like or harmful may be compellingly considered by other audiences as liberating and freeing. Indeed, when all is said and done, "one man's terrorist is another man's freedom fighter". Thus, inasmuch as law seeks to identify and apprehend crime, there is an undecidable problem in apprehending speech crimes especially incitement to terrorism crimes due to their contestable nature and their heterogeneity. And even in situations where the law attempts to do this by foreclosing

[302] Kapur, *Gender, Alterity and Human Rights* p.40
[303] Butler, *Frames of War* p. 4.
[304] Derrida, J., & Ronell, A. The law of genre) p.59; Davies, M. "Derrida and law: legitimate fictions." In Derrida and Law, pp. 71-95 (Routledge, 2017)
[305] Ibid
[306] Derrida, *Rogues* p.141

other interpretations of what terrorism are through universal or liberal-utilitarian interpretations of speech, law remains haunted by its inability to occlude or foreclose the other's unsayable speech. In fact, in a paradoxical way, the person whose speech is censored may feel harmed by the fact that their speech or viewpoints are not being equally affirmed or validated within the public sphere.

Moreover, it is incredibly difficult to show that violence or harm from speech is contingent. For instance, whilst one may advance historical claims to the end that racist speech and hate speech were instrumental in periods leading up to genocide (e.g., 1940's Europe during Nazism or the Rwandan 1994 Genocide),[307] such historicist claims as Baker notes are difficult to prove empirically[308] because they tend to ignore the symptomatics of the speech at issue i.e., its deep underlying historical, socio-political and its material dimensions, conditions or forces.[309] These symptomatics of speech are disavowed spectral forces that if unresolved always return to undermine the stability of monolithic speech. Moreover, in asking us to move beyond a "general spirit" of historicist claims, Ertür observes (through a reading of the Armenian genocide) that such historical claims are susceptible to becoming "unaddressable", in the sense that they can inscribe a universalised truth about historical memory which is susceptible to cementing a "legal facticity"[310] that is self undermining on the one hand as well as instilling a particular or absolute "European universalism that is exclusionary, interventionist and often experienced by Europe's others as hypocritical"[311]on the other. At any rate, it appears that if we are to critique speech or harm that accrues from speech as this thesis attempts to do, we need one that critically goes beyond universal monoliths of pure presence and considers all of speech's inherent structural contestations, divergences and entanglements.

Speech trade-offs and human rights

The ethical challenge of regulating harmful speech or reining speech within a normative liberal-utilitarian order is that it fails to account for iterability of speech and the speech of the

[307] For Baker, countries that have experienced genocidal and racist violence have still had such speech proscriptions yet still failed to desirably contain racist attacks or genocides: Baker, C. E. Autonomy and hate speech in *Hare and Weinstein, Extreme Speech and democracy* (OUP 2009) pp.146-147
[308] The idea that we can empirically verify speech harms is conceptually misguided. It assumes that speech is a constative when indeed (as I suggest in chapter one) speech is iterable and indeterminable. Secondly it fails to give much attention to links between crime and unconscious desire/ or the psychoanalytic i.e., the fact that inasmuch as we criminalise what we regard as harmful speech the unconscious desire to make such speech manifest would still remain/return. If such a link were to be given more attention, the very idea of empirical or calculable utility as we understand it would cease to hold.
[309] Ibid; n 270
[310] Ertür, B. Law of Denial, *Law and Critique* 30, no 1(2019) p.13
[311] Ibid pp.3-4

other. Indeed, individuals from minoritarian cultural subjectivities (particularly Muslims) are susceptible to experiencing a degree of subordination or subjection when their speech does not fall within the spectrum of accepted speech in a statist sense. The reason for this (as I will show in chapter four)[312] is due to the fact that human rights are structurally formulated in a manner that allows for a degree of freedom but with trade-offs or limitations. Put another way, speech rights provided for under art 10 of the ECHR are not absolute.[313] Thus, when speech rights are at issue, the national courts and national authorities are likely to interpret human rights law in a manner commensurate with the nationalistic-whole i.e., based on their social experience, their cultural anxieties, and their civil sensitivities.

In practice, this means that limitations on the right to freedom of speech are determined and justified by contextually contingent fair balancing or interpretive principles such as the margin of appreciation, proportionality and subsidiarity, which provide states with a wide discretion when assessing what can be seen as an interference with speech that is "necessary in a democratic society". Crucially, these interpretive principles are inextricably linked to the notions of consensus-based reasoning and liberal-utilitarianism in the sense that they seek to disambiguate harm and to prevent threats, disruptions or injury to normative public orders. Because of this, non-normative forms of speech are susceptible to being seen as harmful from the outset. To this end, an inchoate pre-crime,[314] and exclusionary logic towards the speech of the other is inaugurated, and this can have a spectral "chilling effect" on speech rights that occurs by way of a kind of spectral subjection/subjugation/unfreedom that is scaffolded/authorised by the force of law and is difficult and perhaps even impossible to challenge. At any rate, this banoptic /panoptic and disciplinary logic engenders a high degree of legal indeterminability hence underscoring questions of incompatibility with regard to art 7 of the ECHR, which requires for the law to be specific or clearly defined. I analyse this point and its implications (in relation to other human rights issues, n greater detail) in chapter four.

Conclusion

The discussion in this chapter, which acts as a theoretical backdrop for much of this thesis, has attempted to map the aesthetic contours of speech and how they are negotiated in the contexts of regulation. It has suggested that speech is inherently divergent iterable, and extra/citational. Put another way, speech has an inherent ability to destabilise meaning and containment whether through regulation or enforcement. The re-circulable meanings and

[312] I highlight these human rights issues cursorily so as to draw out their theoretical connections to "haunted speech". I discuss them at greater length in chapter four.
[313] Mavronicola, N. "What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights." Human rights law review 12, no. 4 (2012): 723-758
[314] Zedner, *Pre-crime and post-criminology?* p.262

delay/relay of texts, images and spoken words with speech cannot completely arrive i.e., they cannot be mastered let alone located. They are *destinerrant*. Unsettling, phantasmically, like ghosts, these meanings elude law's immuring and arbitrary order and structure. And even after processes of translation and regulation, they forever gesture towards an infinite de-regulated presence of "heterological openings".[315] Thus, while laws and regulations strive to apprehend speech in a calculable anticipatory manner, and to rein speech within singular nationalistic moral and cultural boundaries, they flounder irreparably owing to the fact that speech is inherently unprogrammable, inexhaustibly divergent and incalculable.[316] I develop and link this claim to incitement to terrorism laws and practices as well as human rights issues in the subsequent chapter.

[315] Chow, R. Not Like a Native Speaker: On Languaging as a Postcolonial Experience (Columbia University Press 2014) pp.29-30

[316] This claim forms the very basis of my arguments in chapters two and four where I look at criminal law provisions proscribing speech inciting terrorism and human rights restrictions on such speech respectively.

Chapter 2

An evaluation of incitement to terrorism legislation in the UK

This chapter looks particularly at incitement offences as a facet of criminal law. In so doing, it critically examines the provisions under the Terrorism Acts 2000 and 2006 and their overlapping legal provisions (such as the Public Order Act 1986 and Offences against the Person Act 1861 and the Prevent strategy).

What is incitement?

The word "incitement" has no agreed legal definition. The Oxford English Dictionary defines the word incite as to: "encourage or stir up (violent or unlawful behaviour)".[317] The definition this thesis will use is the same as that of the International Criminal Tribunal for Rwanda (ICTR), which has interpreted incitement as the utterance of provocative speeches or the use of threats in public places or at public gatherings.[318] For the ICTR, incitement also involves the "sale or dissemination, or offer for sale, or display of written material, or printed matter in public places or at public gatherings or through the public display of placards or posters, or through any other methods of audio-visual communication".[319]

This definition is important because it enumerates (*a priori*) the incommensurability or indeterminability of the crime. This extensiveness is evident in the divergent terms used to refer to various forms of incitement such as the dissemination of threats through written or printed material.

What is clear from the very beginning is that in trying to proscribe certain forms of speech, incitement paradoxically opens itself up to various categories of speech crimes engendering problems of scope and definitional clarity. This in turn presents various consequential challenges particularly with regard to legal interpretation and clarity that this chapter will seek to unravel.

[317] Oxford Dictionary of English Online edn (OUP 2016) available at: <https://en.oxforddictionaries.com/definition/incite>
[318] *The Prosecutor v. Akayesu* 1998 (no. ICTR-96-4-T) at Para 557
[319] Ibid

Speech that incites: Some general criminal principles

In the majority of scenarios, criminal law has the aim of proscribing actions of persons that cause harm or carry the risk of causing harm.[320] However, there are some exceptions[321] especially with regard to certain offences where the intention is to prevent crime at an earlier stage so as to prevent accruing harms.[322]

These crimes are generally referred to as precursor crimes, pre-emptive crimes, preparatory crimes and inchoate or non-consummate crimes,[323] which implies that these offences are incomplete or underdeveloped.[324] Cahill defines inchoate crime, as "conduct that is not itself harmful or wrongful but seems somehow sufficiently close to a criminalisable harm or wrong as to be criminalisable also".[325]

For inchoate liability to occur, the defendant must have more than *mens rea*. That is to say, the defendant must be at a stage where their preparatory action or behaviour poses a risk for the safety of members of the public.[326] A defendant cannot be punished just for having the mental element of an offence. Hence, "determining" to commit an offence or merely harbouring "evil thoughts" is not punishable,[327] but intent or recklessness is punishable.

This seems bewildering in the sense that "intent" arguably reverses the very purpose of "likelihood". Which is to say, that with "intent", the chances of carrying out the crimes in question are potentially widened; anything (even the remotest of intentions) is "suspect" and thus "likely".

Further, that intent is sufficient for inchoate criminality ignores the fact that external conditions or circumstances can possibly interrupt or alter the actor's state of mind hence causing the actor to desist from engaging in the crime. Owing to this fact, there is arguably an oft-ignored element of reasonable doubt and subjectivism that haunts the very notion of inchoate crime. The implication of this is that inchoate liability seems to go against the criminal law maxim *actus non-facit reum nisi mens sit rea*, a maxim referring to the principle that criminal

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[320] Prendergast, D. "Recklessness Without the Risk." *Criminal Law and Philosophy* (2019): 1-20; Horder, J "Crimes of Ulterior Intent," in Simester A.P. and Smith A.T.H. (eds.), Harm and Culpability (Oxford: Oxford University Press, 1996), pp. 153–168

[321] See for example the Criminal Attempts Act 1981

[322] Ferzan, K. K. "Inchoate Crimes at the Prevention/Punishment Divide." *San Diego L. Rev.* 48 (2011): 1273; Alexander, L. and Ferzan, K. K. *Crime and culpability: A theory of criminal law* (Cambridge University Press, 2009)

[323] Ibid

[324] Monaghan, N. Criminal law directions (OUP, 2016) p.358

[325] Cahill, M.T. Defining Inchoate Crime: An Incomplete Attempt. *Ohio St. J. Crim. L.* 9 (2011): 751

[326] Herring, J. Criminal law: text, cases, and materials (OUP, 2014) p.343; See also Ashworth, A, and Zedner, L. Preventive justice (OUP 2014) pp3-8

[327] Ibid

culpability requires proof of a guilty mind. In the UK courts, this maxim is illustrated in *R v. Cunningham*[328] where a subjective test (which establishes that an individual should not be convicted of a serious criminal offence unless their state of mind is culpable and unless, they were foreseeably aware of the obvious risk of the prohibited consequences occurring) is applied to determine recklessness. This chapter is interested in making the argument that inchoate crimes are part of a liberal-utilitarian logic that seeks to achieve preventive justice through a calculation of deterrence and utility. It argues that this notion of "inchoate crime" affects the structure of the law and obfuscates its coherence undecidably. It also suggests that such undecidability is not necessarily a "shortcoming" of the law (*for it also decides*) but rather an enactment of utility/liberal utilitarianism i.e., an intentional deployment of the force of law that allows the sovereign to broaden its power substantially into unforeseeable contexts under the auspices of national security and public order.

Inchoate speech crime and public order

Beyond strict legality or criminality, inchoate liability plays a symbolic or public policy role i.e., in preventing future public harm and disruption. Indeed, according to Herring, inchoate liability intervenes at a stage where the crime in question is likely to threaten public order or disturb the Queen's peace.[329] This attribution of public order to inchoate liability is important because it constructs inchoate liability as a programmable legal apparatus that has the intention of identifying, designating, apprehending, and sanctioning) crimes before they materialise. Following Herring's observation, it should be noted that the inference of public order and the Queen's peace suggest that inchoate liability may not just be dealing with crimes as crimes in their technical sense but crimes as conceptualised by the sovereign and their particular social-cultural understanding of crime. In order to understand this we shall look briefly at the historical development of inchoate crime and public order in the UK. Thus, I start by looking back at them (i.e., historically) though the offences of blasphemy and seditious libel which are the *fons et origo* of inchoate speech crime in the UK.

The first recorded blasphemous case is *R v. Taylor*[330] where Taylor "a blasphemer of *unusual* thoroughness" was charged for openly proclaiming statements like:

> Christ is a whoremaster, and religion is a cheat, and profession a cloak, and all cheats, all are mine and I am a King's son and fear neither God, devil" *and* "I am Christ's younger brother and that Christ is a bastard.[331]

[328] *R v. Cunningham* [1957] 2 QB 396 See also R V.G [2004] 1 AC 1034
[329] Herring, J. *Criminal law*, p.343
[330] (1676) 3 Keb 607; 84 ER 906
[331] Cromartie, A. *Sir Mathew Hale 1609-1676:Law, Religion and Natural Philosophy* (Cambridge University Press, 1995) pp.74-5

Taylor acknowledged speaking the words (except the word "bastard") and he was found guilty of blasphemy.[332] Consequently, Chief Justice Hale provided an opinion on the case, which explained the jurisdiction of the court over blasphemy:

> And Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this court. For, to say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[333]

To understand the Court's criminalisation of blasphemy, it is important to remember that at this time in history, the state and the church were close. Indeed, during the Reformation the state and the church were unified.[334] Thus, to subvert the Church of England which then had (and still has) the sovereign, *Rex* as its head through criticism ridicule and contempt, was also to subvert the state and its sacred subjects, it was to "endanger the peace then and there to deprave public morality generally to shake the fabric of society and to be a cause of civil strife".[335] Further, by alluding God the divine, *Rex*, one also alluded to a divine universal political-religious[336] ordering of society (i.e., order/ the Queens Peace) and a deep univocal/fraternal veneration of and for scripture, the word of God, *logos* through totemic rituals (or laws) like the use of divine oaths to enforce social contracts even outside the court.[337]This suggests the presence of a mystical force and application of the law that intends to punish those who go against the collective moral/religious/ritualistic impulse i.e., those "deviant"/*unheimlich* others who transgress sameness.[338] It is thus fair to say that the criminalisation of blasphemous speech was a manifestation of a particular spectral or *unheimlichkeit* fear towards publications, speech and ideological viewpoints that had the potential to disrupt socio-political and moral political orders.

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[332] Visconsi, E. *The Invention of Criminal Blasphemy: Rex v. Taylor (1676).* Representations 103, no. 1 (2008): 30-52

[333] 1 Vent 293; 86 ER 189

[334] Hare, I. Blasphemy and incitement to religious hatred: free speech dogma and doctrine. *Extreme speech and democracy* in *Hare,* I. and Weinstein, J. (eds) *Extreme speech and democracy* (Oxford University Press, 2010) p.290

[335] *Bowman v. Secular Society Ltd* [1917] AC 406, para 466-7; *Whitehouse v Lemon* [1979] AC 617 Para 633: "…blasphemous and seditious libel were criminal offences that went hand in hand".

[336] Ibid

[337] Freud, S. *Totem And Taboo (1913): Some Points of Agreement between the Mental Lives of Savages and neurotics* (Routledge, 2013); Fitzpatrick, P. *Modernism and the Grounds of Law* (Cambridge University Press, 2001) pp.19-25

[338] Ibid

Alongside and in addition to blasphemy laws, the British state felt a need to contain other ideological forms of expression that caused moral or social-political outrage and disruption. But to understand the significance of this function and its on-going transposable effects, one needs to go before/prior the origins of these laws, to understand the socio-political conditions that necessitated the passing of these laws. A thorough examination of the genesis of blasphemy laws is beyond the scope of this thesis. Notwithstanding, it still merits a brief excavation here.

Scholars of legal history have suggested that the offence of blasphemy was created in order to deal with political, religious and moral radicalism. In this respect, the state felt that the need to criminalise such "radicalism" in a way that would enable it to maintain a hold on normative order. Consequently, sedition laws and the offence of seditious libel were established in order to put a limit on the advocacy and dissemination of radical speech, propaganda, or ideology that sought to encourage "discontent or disaffection amongst his/her Majesty's subjects, or promoted feelings of ill-will and hostility between different classes of such subjects".[339]

In *R v. Collins*[340] for example, the defendant was charged with sedition for publishing a letter in an unlawful assembly which read: "a wanton, flagrant, and unjust outrage has been made upon the people of Birmingham by a blood-thirsty and unconstitutional force from London, acting under the authority of men who…seek to keep the people in social slavery and political degradation".[341] The defendant in *Collins*[342] was liable of seditious libel because his letter was deemed to have the ability to encourage people to take power into their own hands and to excite them to tumult and disorder.[343] Related applications of sedition laws are apparent in decisions like *R v. Burns,*[344] and *R v. Aldred,*[345] which demonstrate the Courts' use of seditious laws as public order laws to prevent anticipated[346] violence or disruption to the peace of the sovereign. Whilst some may argue that seditious libel and blasphemy helped to maintain a semblance of peace and public order, it is worth emphasising that in maintaining peace and public order, such offences presented a number of operational and hermeneutic challenges that were engendered by the very breadth of the offences and the lack of definitional clarity about them.

[339] Hansard HL Deb 9 July 2009, vol 712, col 848
[340] (1839) 9 C& P 456
[341] Ibid Para 911
[342] Ibid
[343] Ibid
[344] (1886) 16 Cox C.C. 355
[345] (1909) 22 Cox C.C. 1
[346] The violence caused by such forms of expression is for the most part hypothetical/conjectural. I explore this issue in greater detail in chapter two.

Notwithstanding, at the same time, it should be stressed that this lack of definitional clarity was purposeful in the sense that it presented the government with a wide discretion to suppress a wide array of speech offences in the interests of protecting society and preserving public peace and order. The problem however with its wide discretion is that it left wide open the possibility for innocuous or inscrutable forms of speech to be suppressed arbitrarily and in discriminatory fashion.

This is evinced for instance, in the offences of blasphemy and sedition that led to the suppression of arguably harmless kinds of speech that criticised the British state's imperial and government policy. Moreover, these offences led to criminal prosecutions involving various literary works like Thomas' Paine's *The Age Of Reason* and Shelley's *Queen Mob* or even a poem, *The Love That Dares to Speak Its Name* by James Kirkup, which graphically sexualized Jesus Christ.[347] It is therefore not surprising that these offences have undergone severe criticism from a number of commenters. Indeed for Roger Douglas and Nadine El-Nany,[348] the offence of sedition, which in some jurisdictions is coupled or replaced with treason,[349] is essentially a "political crime" that was/is used to "punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually posed a threat to social order (however defined)" and to "instill fear and scuttle dissent".[350] Furthermore, as I have highlighted above the lack of definitional clarity within these offences could simultaneously be viewed as a productive demonstration and deployment of banoptic and biopolitical power in the sense that it sought to proactively capture and repress forms of expression that were perceived as unbearable, threatening, disruptive and distressing in liberal public spaces.

The construction of blasphemy and seditious libel as public order offences therefore suggests that they are primarily intended to contain "outrageous" speech however so defined. Which is to say, it can be argued that these offences were never intended to protect the interests of "persecuted believers" but to suppress speech that expressed non-majoritarian viewpoints or (more specifically put) speech that reflected legacies of protest, resistance, opposition and dissent.[351] Eventually, based on their conceptual vagueness and their susceptibility to

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[347] Green, J. & Karolides, N.J. *The Encyclopedia of Censorship* (Facts On File Inc, 2005) pp. 56-57

[348] El-Enany, N. "Innocence Charged with Guilt: The Criminalisation of Protest from Peterloo to Millbank". In *Riot, Unrest and Protest on the Global Stage*, pp. 72-97 (Palgrave Macmillan, London, 2014)

[349] In the UK the law of sedition which cited treason was abolished by the Treason Act 1945

[350] In many British colonies, sedition charges were used to deal with individuals, including prominent lawyers and newspaper editors, who criticised various institutions of government. In more contemporary post-colonial states, "hangover" sedition laws are still being used for political censorship See: Alam, A. *'Sedition' is a colonial punishment in free India,* The Tribune (08/24/16) available at: < http://www.tribuneindia.com/news/comment/-sedition-is-a-colonial-punishment-in-free-india/285005.html>

[351] El-Enany, N. *Innocence Charged with Guilt*

suppress unorthodox speech for no justifiable reason, the offences of blasphemy and sedition fell out of fashion and they were abolished by the Criminal Justice and Immigration Act 2008.

Nevertheless, as things currently stand, it can be said that contemporary inchoate speech offences from which incitement to terrorism offences spring still repeat the conceptual errors of blasphemous libel and sedition. That is to say, inchoate speech crimes (or ideologically motivated crimes) still follow a particular univocal[352] logic that already assumes/ presumes/ predicts a transferential effect of meaning or interpretation with regard to speech offences even when these offences (e.g., "racial hatred") are spectrally oblique or obfuscated in the sense that they are mootable, subjective and "not amenable to precise empirical observation"[353]and analysis.

The danger then of inchoate speech offences is that individuals could be punished simply, *tout court*, for what they say or think even when it has the remotest link to actual violent acts owing to the fact that the contours of liability become incalculable.[354] In so doing, inchoate speech offences capitalise on a hypothetical notion of criminal intent. In other words, they place an emphasis on hypothetical/ conjectural causation in their configuration of speech crimes. Whilst such an inchoate speech framework is thought to be convenient in protecting national security especially in times of terror, its tendency to anticipate[355] or apprehend crimes before they are completed still presents two key problems, namely: 1) scope, i.e., it is not formulated with sufficient precision to enable a citizen to foresee the consequences which a given course of conduct might entail and 2); its pre-calculations of utility and deterrence under a liberal-utilitarian schema are susceptible to foreclosing the alterity of the other.

These two claims warrant further analysis. I touch on some of them in this chapter but they also form the basis of my analysis of human rights in this chapter four.

Mapping the contours of incitement: The example of incitement to racial hatred

To illustrate these aforementioned concerns, it is first worth exploring the contours of incitement generally through the lens of incitement to racial hatred. A discussion of incitement to racial hatred will then develop the links between incitement and inchoate crime and thus inform our wider discussion on "inchoate liability" and "incitement" in the context of terrorism.

[352] Univocal here means having a singular meaning or interpretation.
[353] Heinze, E. Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity. *Extreme speech and democracy* (2009): 265-285
[354] Duffy, H, and Pitcher, K. "Inciting Terrorism? Crimes of Expression and the Limits of the Law." In eds B. Goold and L. Lazarus Security and Human Rights (Hart Bloomsbury Publishing, 2018)
[355] Derrida, J. Archive Fever: A Freudian Impression (The University of Chicago Press, 1996) p.7

The offence of incitement to racial hatred is a speech-related offence laid out under Part III of the Public Order Act 1986. Racial hatred is defined under section 17 of the Act as: "hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins". It is worth noting that the incitement to racial hatred offence has several elements beyond the scope of this chapter and so, I cannot claim to offer an exhaustive treatment of all its elements. Hence, here, I only focus on section 18 which proscribes the use of "threatening, abusive, or insulting words or behaviour or displaying written material intending to, or which is likely to, stir up racial hatred".[356]

For an offence to materialise under section 18, it has to be: 1) "threatening, abusive or insulting", and; 2) it has to be intended to or likely in all the circumstances to stir up racial hatred.

A significant interpretational test accruing to incitement to racial hatred and indeed to all inchoate crime is the subjective recklessness test (as discussed in *R v. Cunningham* above). The rationale for punishing defendants for planning activity, which generally is not sufficient to constitute a completed crime, is its increased possibility or likelihood of success. Thus, the prosecution must prove that hatred was intended or likely –perchance/ perhaps– to be stirred up. "Likelihood" does not connote that racial hatred was simply possible. Likelihood or probability is a test of "reasonable probability" and not of near certainty or clear and present danger.

Although "likely" means that the context of any publication or behaviour has to be considered very carefully (factors like the prevailing public mood, the characteristics of the target audience are taken into consideration)[357] it is entangled with the requirement for the perpetrators *mens rea* i.e., the perpetrators' intent or state of mind, which may in this case include features like a deliberate dissemination to a wide audience.[358] This inextricable entanglement with *mens rea* problematises "inchoate liability" as it presents unforeseeable ambiguities with regard to determining and identifying the crime. At the same time, the subjectivism of the offence and the perpetrators' *mens rea* then become engulfed in an incommensurable economy of *différance* haunted by an unforeseeable iterability of speech which the thresholds of the law/offence cannot contain. The concept of "likelihood" then becomes undecidable or indeterminable hence potentially problematising law enforcement and interpretation.

[356] The Public Order Act 1986
[357] Ibid
[358] The defendant can also use the lack of deliberate dissemination as a defence.

Underlying the logic of incitement offences is a rationalised logocentric assumption that incitement crimes carry with them a transferential or direct link to crime. Indeed, as Horder notes, the purpose of inchoate speech crimes like incitement to racial hatred is that it helps with futural crime prevention: "the concern [in criminal liability] is not merely with the occurrence of harm but also with its prevention" in the future.[359] Although this ability to prevent harm in the future stands out as convenient, it can also be counterproductive and self-undermining of the law itself in the sense that it spectrally saturates speech offences with pre-calculated conjectural criminal logics i.e., the logics of suspicion and pre-crime. These logics in turn sustain, and extend the banoptic and disciplinary power of the state i.e., the force of law, and its propensity to punish innocent individuals.

The vagueness of incitement to terrorism offences is further complicated by the fact that they mark and inaugurate speech (*an iterable disseminatory medium*) as crime. This, I maintain, is an interminable conceptual blind spot because it ignores the fact that the singular fixed structure of law has to contend with the very disseminatory, heterological and iterable form of speech. In this way, legal-juridico decisions that aim to determine and distinguish legitimate speech from harmful speech become fraught with a textual-hermeneutic haunting.

Relatedly, it becomes difficult to clearly identify terrorist speech or speech that incites terrorism in divergent contexts. This is as I have argued partly due to the fact that it is not easy to demonstrate empirically and with calculable consistent evidence that incitement to terrorist speech causes terrorist violence. This dilemma occurs because we cannot clearly predict or determine the outcomes of speech transparently, as they are.[360] In this sense, the law displays within its structure an irretrievable aporia o*f singularity v. incommensurability,* an aporia that in an auto-immunary logic self-inadequates and undermines the stability and determinability of speech offences hence rendering them interminably undecidable.[361]

And even if it were argued as proponents of regulation suggest that speech offences are not undecidable that they are intended to capture "obvious dangers"[362] e.g., offences that drum up enthusiastic support or create the "mood music" for terror and hatred one could still equally

[359] Horder, J. Ashworth's Principles of Criminal Law (Oxford University Press, 2016) p.470
[360] As demonstrated in Chapter one, we cannot predict such outcomes of speech with clarity because our states of mind (and indeed our re-actions to "threats insults or abuse" based on what he hear or read) in a plurivocal cross-cultural society are divergent, iterant and difficult to assess foreseeably. See also Alexander, L. & Kessler, K.D. "*Mens rea* and inchoate crimes". The Journal of Criminal Law and Criminology (1973-) 87, no. 4 (1997): 1138-1193
[361] The effect of this is that some speech offences become hard to prosecute and enforce. Perhaps it is for this very reason that there is a dearth of case law pertaining to the offences of glorification and encouragement.
[362] We could question the assumptions that give centrality to the notion of "obvious danger" which yet again conceals a plethora of nonunifiable incongruities. We might ask who considers certain speech dangerous and why such speech is perceived to be dangerous via the authority/ force of law.

argue following Heinze that such an argument is not empirically provable. Such an argument is also circular because it returns us to a position where we would still have to determine what such terrorist speech and hate speech would entail despite their conceptual and definitional uncertainty. And so, even if such an argument (i.e., that hate speech presents obvious dangers) became a reason for regulating hate speech, it would still be reductive of speech in the sense that would ignore the inherent iterability of speech that I have underscored in Chapter one. Furthermore it would, as Heinze and Barendt have highlighted, privilege the conceptual misapprehension of speech as a distinguishable ideological act when it is indeed performative and distinguishable from constative acts.[363]

Moreover, as scholars like Nusbaum have demonstrated, the criminalisation of speech in jurisdictions like France and Germany, which have strong legal-regulatory structures that criminalise and seek to deter neo-nazi hate speech can have the adverse effect of not only causing hate speech such as racist speech to go underground, but also of morphing it into an unanticipated insidious or re-coded form of speech that iterably escapes readers, regulators, or listeners. Nusbaum makes this observation as if to suggest that, all forms of speech criminalisation are still encumbered by the very circulation and iterability of speech, which is in essence non-transparent and resistant to capture.[364] A singular homo-hegemonic enforcement of counter speech laws (and their corresponding authority and field-force of power normalization)[365] therefore remains unable to reduce and preempt some, "*if not all"* harmful forms of speech.[366] Perhaps, the reason for such a structural ethico-regulatory undecidability or failure as I have shown in chapter one, is down to the very fact that speech is inherently disseminatory/iterable and as such ruptures all singular structures of determinability, interpretation and containment.

R v. Mizanur Rahman,[367] a decision concerned with incitement to racial hatred demonstrates how this undecidability bears out in more practical terms. In *Rahman*, the appellant was tried at the Central Criminal Court before the Common Sergeant on offences alleged to have been committed during a demonstration in London in February 2006 against cartoons of the Prophet Mohammed that been published some months earlier in a Danish paper. During this protest, Rahman held a placard demanding the deaths of British troops in Iraq and

[363] Baker, Autonomy and hate speech pp.146-147 Barendt, E. "What Is the Harm of Hate Speech?" Ethical Theory and Moral Practice (2019): 1-15; Heinze, E. "Viewpoint absolutism and hate speech." The Modern Law Review 69, no. 4 (2006): 543-582; Butler, *Excitable Speech*

[364] See: n 176; n.202. n:209-n.211. See also, Nusbaum, H.C. The Breakdown of Civic Virtues and the Problem of Hate Speech: Is There Wisdom in Freedom of Speech? In: Sternberg R., Nusbaum H., Glück J. (eds) Applying Wisdom to Contemporary World Problems. (Palgrave Macmillan, 2019)

[365] Hall, S. On Postmodernism and Articulation: An Interview with Stuart Hall. Journal of Communication Inquiry, 10 (1986) 45-60

[366]See Chapter one; See also Joque, J and Kalule, P *Law & Critique: Technology elsewhere;* Kalulé, *On the Undecidability of Legal and Technological Regulation*

[367] [2008] EWCA Crim 2290

"beheading of those who insult Islam".[368] After the protest, Rahman made a speech that referred to western military forces in Iraq and Afghanistan where he said, among other things:

> We want to see them coming home in body bags. We want to see their blood running in the streets of Baghdad. We want to see their blood running in Fallujah. We want to see the Mujahedeen shoot down their planes the way we shoot down the birds. He then prayed to Allah, Don't leave any of them alive in Iraq. Don't leave any of them alive in Afghanistan.[369]

The prosecution's case was that what he did in marching with the banners and what he said in his speech amounted not merely to behaviour, which contravened the Incitement to racial hatred under section 18, the Public Order Act but amounted to incitement to murder. Consequently, Rahman was convicted for using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred or in circumstances where racial hatred was likely to be stirred up contrary to section 18 of the Public Order Act 1986 and also for inciting murder. For his defence, Rahman argued that he was carried away in the moment and that he did not intend his words to be taken literally and not as inflammatory provocations. Nonetheless, the judges felt that there was a need to pre-emptively subdue Rahman's speech, as there was a likelihood that his would lead, others to commit acts of racial violence. This view was based on the words that were uttered (i.e., "running blood" and "body bags") and the apparent symbolic power of those words.

I am not necessarily concerned about whether *Rahman* was wrongly decided or not. Rather, I am more concerned about probing the conceptual framing of the offence with regard to its scope i.e., how the offence is determined or distinguished from other offences and its subsequent implications. This decision suggests that from the outset the prosecution and the jury are not so certain of how to identify or categorise Rahman's overdetermined speech. It is not clear whether it should fall under (or leak into) the category of incitement to racial hatred or incitement to murder. This determination is even made more confusing if we consider the fact that incitement to racial hatred and incitement to murder are two broad separable criminal categories. At any rate, because the speech offences are so widely and incrementally drawn, the entire legal structure that supports them collapses within and upon itself. It then becomes difficult for the prosecution or even the jury to draw or identify distinctions of "harm" and to apply the very text of the law.

[368] Ibid
[369] Ibid

The decision in *Abdul v. Director of Public Prosecutions* [370] underscores some of these issues and is worth probing. Here five appellants in a small group of thirteen Muslim protesters were protesting the UK's involvement in the Afghanistan and Iraq war were convicted of using threatening, abusive or insulting words (within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby) contrary to s 5 of the Public order Act 1986.

Section 5 provides:

> (1) A person is guilty of an offence if he—
>
> (a) uses threatening **[**or abusive**]** words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening [or abusive],within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
>
> (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, a person inside a dwelling displays sign or other visible representation, and the other person is also inside that or another dwelling.
>
> (3) It is a defence for the accused to prove—
>
> (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
>
> (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
>
> (c) that his conduct was reasonable.

During the protest, the appellants shouted slogans such as: "British soldiers murderers; Baby killers, Rapists all of you; British soldiers go to hell; Shame on you; Go to hell; Murderers; Baby killers".[371]From the evidence presented to the court, the appellants were compliant throughout the protest to directions from the police; there was no evidence (of any warnings given to the appellants to desist from their behaviour), or of any efforts made to confiscate their placards or PA system. In fact, a letter was received on behalf of the Regiment saying (commendably) that they had not been bothered "one jot" by the demonstration. This letter describing the reasonably peaceful atmosphere of the protest suggests that there was no imminent link to harm that legitimized this prosecution. Based on the combination of these facts, one could argue that the actions of the protestors did not have a causal link to violence

[370] *Abdul v. Director of Public Prosecutions* [2011] EWHC 247 (Admin)
[371] Ibid Para 16

or an (impending) inclination towards violence. Indeed, owing to the configuration of the crime at issue as an inchoate or precursory crime, it could be argued that the threat caused by the appellants' speech in the demonstration was merely conjectural and presupposed.

To illustrate this claim, the statements or speech made by *Abdul* also warrant a discussion here. To suggest that soldiers are murderers may be outrageous for some but it is not for others. Such an inference then creates a tenuous link between speech and harm or violence. Nonetheless, it should be noted that many of the statements in *Abdul* e.g., "soldiers are murderers" are similar to the kinds of statements that could made by pacifist protestors to suggest that war and militarism are destructive, violent and unnecessary. The statement "soldiers are rapists, murderers and baby killers" although arguably incendiary could also be read as a fair statement of fact in light of sexual assaults[372] and war crimes committed by the United States Army such as the gruesome Mahmudiyah rape killings in 2006.[373]

Accordingly, one could argue that Abdul's speech is a form of perfectly legitimate political speech that does not cause violence or threats of violence. It is simply a statement of political protest and resistance by Muslims against the war on terror and its brutal unhumaning effects such as the indiscriminate killing of civilians as well as the deployment of technologies and weapons of war like unmanned aerial vehicles.[374] Hence, the court's proscription of the protestor's speech in *Abdul* conceptually oversimplifies (and yet doubly blurs) hermeneutic interpretations of speech in the sense that it substantially essentialises perceptions and determinations of what is "safe" or "harmful" according to the audience or a hypothetical public to whom speech is addressed. As I have demonstrated in chapter one, the implication of this is that it instills a monopoly or recursive cultural self-referentiality with regard to what "truth", "terror","harm" and "ideology" are, hence sustaining a *différantial* exclusion of minoritarian speech and viewpoints. But in doing so, the very monolithic structures of containment and self-referentiality remain compromised by their inability to grasp the iterable, performative, and incalculable nature of concepts like truth, harm, and terror.[375] This is an inescapable tension.

To illustrate this tension further, it is worth turning to the case of *Chambers v. DPP.*[376]Although not an "incitement to violence" case *per se*, *Chambers* is significant because

[372] Rosen, D. "Rape as an Instrument of Total War." (Los Angeles Times 2006) available at: <https://www.sfwar.org/pdf/StateViol/MIL_Altnet_04_08.pdf >
[373] Trabucchi, E. "Rape Warfare and International Humanitarian Law." Human Architecture: Journal of the Sociology of Self-Knowledge 6, no. 4 (2008): 5; Crook, J. R. "US Criminal Charges Against Luis Posada Carriles." The American Journal of International Law 101, no. 2 (2007): 493
[374] Crook, J. R. "Multiple UCMJ Proceedings Involving Offenses Against Civilians in Iraq." The American Journal of International Law 101, no. 2 (2007): 494
[375] Butler, *Excitable Speech*
[376] [2013] 1 W.L.R. 1833

it illustrates how innocuous speech could be wrongly criminalised. In *Chambers*, the defendant was convicted for posting a series of tweets commenting on the closure of an airport from which he was due to travel. He posted several "tweets" including: "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!" None of the defendant's "followers" who read the tweets were frightened or shocked by them. A few days later however, the duty manager responsible for security at the airport found the tweets during an Internet search for tweets relating to the airport. Consequently, even though not constitutive of a credible threat, the matter was reported to the police. The defendant was charged with sending by a public electronic communications network a message of a menacing character, contrary to section 127(1) a of the communications Act 2003.[377] He was convicted in a magistrates' court. The Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the defendant was, at the very least, aware that his message was of a menacing character. The Court later allowed the appeal, on the grounds that the defendant did not have the intention to send a message of menacing character:

> [T]he mental element of the offence is directed exclusively to the state of mind of the offender, and that if he may have intended the message as a joke, even if a poor joke in bad taste, it is unlikely that the *mens rea* required before conviction for the offence of sending a message of a menacing character will be established…. this 'tweet' did not constitute or include a message of a menacing character.[*378*]

Crucially, for our purposes, the mere fact that such a decision concerning commentary written in jest (or bad taste) had initially been interpreted as menacing and had led to a prosecution goes to show the difficulties that those who enforce or interpret the law in speech situations may encounter. *Chambers* suggests that what a speaker or reader says or (un)consciously intends to say can lose its original form and rhythm and become lost, unreadable. Chambers' harmless "joke tweet" was clearly lost uncannily, in context. *Chambers* thus suggests that context with regard to speech is always plural, in rupture, dislodged, suspended, drifting, — *destinerrant*. A "real" understanding of context and the different nuances of context is therefore intolerably difficult to grasp. Hence, it becomes difficult from the outset to enforce laws that regulate speech, as these laws have to grapple with the contextual heterogeneity, incommensurability, and indeterminacy of speech, or even possibly whatever they construct as "ideology".

What these decisions (especially *Abdul)* suggest is that laws that seek to contain speech have a recurring conceptual difficulty of thresholds. In other words in their quest to regulate

[377] See section 127 of the 2003 Act
[*378*] [2012] EWHC 2157 Para 38

indeterminate speech laws such laws are susceptible to being undecidably self-defeating in the sense that they may not be able to delineate precise and clear definitional thresholds with respect to different criminal categories of speech. They may for instance be incapable of differentiating between speech that merely threatens and speech that incites racism or even speech that incites murder. Furthermore, these decisions underscore another conceptual difficulty of inchoate speech crimes i.e., their incalculable inability to accurately establish a perpetrator's *mens rea* with regard to inchoate speech offences.

Another point that merits a brief discussion here is the susceptibility of inchoate speech offences to foreclose the alterity and speech of the other. In its justification of suppressing the speech of the protestors in *Abdul,* the court held that "when determining whether speech is "threatening, abusive or insulting, the focus on minority rights should not result in overlooking the rights of the majority".[379] The notion that the rights of the majority should not be overlooked if speech is threatening is concerning, because it ignores the fact that minoritarian individuals speak from a different/iterable structural position in western liberal societies and are thus always already likely to be subject to a censorial regime of delegitimation from the outset. This reenacts the aporia of *subjectivity v. subjection* that is present within all liberal-utilitarian legal calculations of deterrence, prevention and utility as means-oriented justice. The criminalisation of the offence under a liberal-utilitarian calculus that privileges the rights of the majority should not be overlooked. It is significant because it legitimises, and inscribes a homo-hegemonic "pro-civility" of speech norms that renders certain viewpoints more conventionally acceptable than others. In this sense, it infers that the minoritarian speech of the other always already has a premeditated or pre-determined phantasmic potential to disrupt the normative liberal idea of a univocal or unanimous white, secular, or Christian, liberal-British people.

It is therefore not surprising that in *Abdul*, British white people (who are a structurally/materially privileged racial majority) are psychically centred as the victims of racial hatred. Considering that racial hatred is for the most part concerned with the protection of racialised and racial minorities like Muslims in the post 9/11 continuum, this particular juridico-legal interpretation of what racism entails paradoxically replicates the structural /institutionalised production and effects of racism[380] in the sense that it disavows the alterity of the other through its negation or delegitimisation of the speech/*logos* of the most marginalised in society.

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[379] Ibid

[380] Anti-racism laws can also be marginalizing and reiterative of *subjectivity v. subjection*. Crenshaw demonstrates how the marginalization of Black women occurs within antidiscrimination law and even within liberal antiracist theory and politics. Crenshaw, K. "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics." *U. Chi. Legal F.* (1989): 139

Crucially, my reading of "racial hatred" in *Abdul* touches a very sensitive nerve in the collective cultural memory of the majority of citizens in the UK who are white, non-religious and liberal British. Which is to say, that Abdul's speech taps into western society's general unconscious (i.e., its cultural anxiety of Islam specially in the content of its involvement in Iraq and Afghanistan) revealing the unsayable psycho-existential wound or trauma of what Derrida might call "the unconscious scar of the to come".[381] This uncanny or *Unheimlichkeit* investment or need to safeguard liberal orders against the terrible unknown in *Abdul* can be read as being suggestive of a calculated sovereign psychoanalytic desire to suppress or censor the "unsayable" or difficult to bear.[382]And so, by creating Abdul's speech as a potential cause and "transmitter" of racial hatred, such criminalisation can be read as a kind of repression that fails to reckon with the "ghosts" (i.e., the materially disavowed and underrepresented contours of Abdul's speech).

The effect of all this is as Choudhury and Fenwick [383] have observed is the execution of a structural and epistemic limit that can contribute to a wider sense of injustice and aggravation among minority groups especially Muslims who may feel that they are a scape-goated "suspect community"[384]targeted for their speech. This in turn engenders (and sustains) a highly racialised hauntological climate or system of collectively repressed fear,[385]anxiety and racialised suspicion that haunts not only Muslims but also non-Muslim communities through irreconcilable tensions or polarisations of *différance* (such as the idea of the *West v. Islam*) that also accelerate, multiply, and sustain the additional aporetic problematics of *subjectivity v. subjection* and *singularity v. incommensurability/heterogeneity*. To this end, the law's intentions to create a more secure and ordered society through extensive criminal measures are undermined for the reason that a phantasmic impression of a society under siege is created without closure.

Of course, it is fair to say that the inherent flexibility is convenient because it is instrumental in quashing racial hatred before it occurs, especially in unforeseeable speech situations. Flexibility can be seen as convenient due to its ability to prevent, identify and anticipate futural crimes especially in the context of speech. I am somewhat sympathetic to this line of reasoning because law is always left wanting especially if it is "strictly applied" or narrowly interpreted.[386] However, as I have already suggested, in the context of inchoate speech

[381] Derrida, *Philosophy in a time of terror* p.97
[382] Razack, *A Site/Sight We Cannot Bear*
[383] Choudhury, T. & Fenwick, H. The impact of counter-terrorism measures on Muslim communities *International Review of Law, Computers & Technology* 25, no. 3 (2011): 151-181
[384] Like Fanon, (n.128), Ralph Ellison in the invisible man articulates blackness as a non-being as a spectral invisibility. Ellison, R. "Invisible Man. 1952 (New *York: Vintage,* 1995)
[385] de la Roche, R. S. Collective violence as social control." In *Sociological Forum*, vol. 11, no. 1, (Kluwer Academic Publishers-Plenum Publishers, 1996) pp. 97-128
[386] Ramshaw, *Justice as Improvisation* pp.6-7

crimes, flexibility tends to be so widely inscribed and construed conceptually within the very text of the law that it ends up producing and inaugurating conjectural notions like “likelihood” and “reasonableness” that complicate speech regulatory situations. Put another way, such flexibility conflates understandings of harm and paradoxically inaugurates a slippery slope within the very structure and text of the law that makes practices of regulation and containment intractable.

The implication of such overcompensatory/overdetermined flexibility, especially in the context of inchoate speech crimes, is that it can be used as a justification to extend the singular application of the law and its thresholds into unknown contexts. Whilst this may be necessary for law enforcement, it presents three irreconcilable mooring problems related to the thresholds (i.e., the textual boundaries, gaps, disavowals, and limits) of the law namely:

1) In its desire to enduringly predict or calculate, flexibility’s lack of precision and wide scope complicates and stretches the very text of the law (intertextually) into unforeseeable contexts or situations (flexibility engenders the aporia of *singularity v. heterogeneity*) making laws’ very enforcement and interpretation intractable. Hence, the inscribed speech harms (or ideologically motivated crimes) that the law seeks to contain in the first place become unidentifiable, blurry and indistinguishable making the law self-undermining and self-inadequating.
2) This aporia of *singularity v. heterogeneity* (which also operates concomitantly within an aporetic episteme of *subjectivity v. subjugation*), leads to a prioritization of the needs of the singular over the heterogeneous and in turn makes the law more susceptible to being applied in discriminatory and arbitrary ways.
3) This consequently conflicts with the right of freedom to expression provided for under art 10 ECHR and related rights such as the right from discrimination. As will become evident in this thesis, these violations occur partly because of the “vagueness”[387] of the law, which “impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application”.[388]

[387]Endicott, T. "Law is necessarily vague." *Legal theory* 7, no. 4 (2001): 379-385 and Endicott, T. "Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law." Jerusalem Review of Legal Studies 10, no. 1 (2014): 46-56. Following yet departing from Endicott, I suggest in this thesis that law’s vagueness is a double-bind in the sense that it carries with it limitations to rights due to imprecision but also simultaneously carries with it possibilities for reading rights transgressively through the notion of the ghost dance.

[388] As per Judge LJ in *R v Misra and Srivastava* [2004] EWCA Crim 2375, Para 31, citing *Grayned v. City of Rockford 408 US 104 (1972)*

In this chapter I focus on the first two gaps. I pay more attention to the third conflict with human rights particularly art 10 of the ECHR in chapter four.

Incitement to terrorism in the UK

Because incitement to terrorism is conceptualised as a convergence of incitement on the one hand and terrorism on the other hand, it is important, for the purposes of this thesis, to briefly consider the definitions of incitement and of terrorism in their particularities as this can aid our understanding of the notion of incitement to terrorism better.

Incitement

I have already outlined the contours of incitement as a crime that instigates, prompts or "goads (someone) to take some action or course of action"[389]to some degree in the previous sections. For the purposes of this thesis, incitement will be conceptualised as a generic concept that gathers together various inchoate speech offences such as glorification and encouragement as brought about by the 2006 Terrorism Act in relation to extremist speech.[390] What this chapter will be interested in is tracing the overall structure of incitement and probing how it brings two key trends into play 1) precursor/inchoate crimes and 2) crimes that seek to regulate and pre-empt the dissemination of speech or ideologically motivated crimes. I return to this discussion later in this chapter. But first, for now, I turn my attention to the component of terrorism within incitement to terrorism.

Defining terrorism

The definition of terrorism is found under s.1 of the Terrorism Act 2000, which provides:

> (1) In this Act "terrorism" means the use or threat of action where –
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

[389] *R v. Zafar and others* [2008] EWCA Crim 184, Para 31
[390] Scholars like Walker and Barendt use the word Incitement to terrorism broadly to define offences under the 2006 Terrorism Act. See for example, Walker, C. *Terrorism and the Law* (Oxford University Press, 2011) p.365; Barendt, E. Incitement to, and glorification of, terrorism in *Extreme speech and democracy* (OUP 2009): 445-462

(c) the use or threat is made for the purpose of advancing a political, religious[, racial] or ideological cause.[391]

Right away, in looking at the definition of terrorism, a reader faces many definitional and interpretational difficulties that demonstrate the broad range of activities covered. These are aesthetic and conceptual difficulties of scope (e.g., from "serious property damage", to endangerment of another person's life to creating a serious public health or safety risk to serious interferences or disruptions of electronic systems) that extend even to activities carried outside the UK.[392]

Indeed, if this definition under the 2000 Act is contrasted with the previous definition of terrorism provided under section 20 of the Prevention of Terrorism Act 1974 ("the use of violence for political ends including any use of violence for the purposes of putting the public, or any section of the public in fear"),[393] drastic extensions definition-wise and scope-wise arise.

Section 1(c) for example lumps together different criminal offences and concepts (such as "political, religious, racial or ideological") and conflates them. Significantly, by obfuscating the boundaries between racial, ideological and political motivations (or put differently, by merging all these divergent concepts under the singular notion of terrorism definition) section 1 engenders a further interplay of indistinguishable offences. Moreover, contestable terms like "religious" and "ideological" are then inscribed within the very undecidable opacity of "terrorism", enkindling opacities within opacities. Hence, from the outset, an inevitable and undecidable entanglement of differences that play upon each other is inhabited and initiated from within section 1's text. This spectral play of *différance/*differences is perhaps most evident in the inclusion of the notion of "racial ideology" –– an amendment to the 2000 Act that was made in 2008. The introduction of "racial" ideology into section 1's text inscribes or marks the speech of the racialised other (in particular the Muslim other), as a potentially transferential cause and referent of terror. In doing so, the provision psychically asserts an expansive homo-hegemonic episteme, that widens the scope of terrorism potentially creating, consolidating and enforcing a racialised interpretation of terrorism (*the West vs. Islam)* that at the same time, inherently defers and disavows the alterity of the other.[394] Yet, inasmuch as this widening of the Act increases the sovereign's power to police terrorism, it also paradoxically opens the definition of terrorism further out, into other phantasmic dimensions and extremities by elevating "the wrong things into sensational focus [and] *hiding and*

[391] Section 1 Terrorism Act 2000
[392] Ibid section 1(4)(a)
[393] Section 20 of the Prevention of Terrorism Act 1974
[394] This Orientalized concept of terrorism is always already haunted by what it excludes. It opens itself to continuous unanticipated hauntings, transgressions, recontestations and renegotiations.

mystifying the[ir] deeper causes".[395] This inexorably blurs and compromises the intended stability, coherence and enforceability of section 1.

The Supreme Court's decision in *R v. Gul*[396] underscores some of the interpretational difficulties and challenges brought about by the broad definition of terrorism as provided for under section 1. In *Gul*, the defendant had uploaded and disseminated videos which showed attacks by insurgents on coalition forces in Iraq and Afghanistan and excerpts from martyrdom videos accompanied by commentaries praising the attackers' bravery and encouraging others to emulate them. He was tried and charged and convicted under s 2 of the Terrorism Act 2006. Similar to the decisions discussed earlier in *Abdul* and *Rahman*, one of the key issues of concern in *Gul* was the potential for the definition of terrorism under s1 of the 2000 Act to be used arbitrarily owing to its imprecise wording. In fact, this was the basis of Gul's appeal.

Gul believed that his actions did not amount to terrorism because the "concept of terrorism"[397] in international law (unlike the UK's definition of terrorism) excluded those engaged in an armed struggle against a government who attacked its armed forces in the context of a non-international conflict. Although his appeal was dismissed, the court acknowledged the potential over-reaching nature with regard to the way in which terrorism was defined. The Court's *obiter dictum* observed that

> the fact that the powers are so unrestricted and *the definition of 'terrorism' is so wide* means that such powers are probably of even more concern than the prosecutorial powers to which the Acts give rise …[emphasis added].[398]

Like with the offence of incitement to racial hatred (discussed above), the justification given for preserving the incitement to terrorism offences in their current state is the same given for other inchoate crimes i.e., they are instrumental in quashing terrorism before it occurs. In this way, they also serve a public order purpose, a banoptic pre-control or "governmentality" function[399](rather than a strict criminalising purpose), which is the preservation of the sovereign's peace, order or security.

Although this thesis focuses solely on the United Kingdom, it is worth noting that the European Union has taken a related stance with regard to offences that incite terrorism or

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[395] Hall, S. et al. *Policing the crisis: Mugging, the state and law and order* (Hong Kong: Macmillan Press Ltd, 1982) preface
[396] [2014] 1 All ER 463
[397] Ibid at Para 25
[398] Ibid Para 63
[399] Choudhury, T. "The Terrorism Act 2006: Discouraging terrorism" in *Extreme Speech and Democracy* (OUP 2009) p.465

(according to its terms) offences that provoke terrorism. Looking briefly at the EU's 2017 Directive on combating terrorism is important because it provides some comparative insight into the essence of the offence and its aims.

The EU Directive 2017/541 provides that:

> The offence of public provocation to commit a terrorist offence act comprises, *inter alia*, the glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population. Such conduct should be punishable when it causes a danger that terrorist acts may be committed. In each concrete case, when considering whether such a danger is caused, the specific circumstances of the case should be taken into account, such as the author and the addressee of the message, as well as the context in which the act is committed. The significance and the credible nature of the danger should be also considered [...].[400]

At the time of writing, it is evident that the Directive, like the incitement to terrorism offences, is broadly constructed so as to stop the dissemination of harmful speech transnationally.[401] The danger however in this Directive is that:

> 1) It creates a reductive pre-programmed and calculable understanding of speech harms or ideologically motivated crimes that eschews the fact that speech is iterable, divergent, and multi-contextual and
> 2); It drafts incitement to terrorism laws as firm inchoate offences that seek to pre-determine the outcomes of speech/ ideologically motivated crimes in differentiated contexts paradoxically undermines (yet also exaggerates) the limits and definitions of such laws by widening their reach indeterminably. This I argue fundamentally and inexorably blurs and compromises the intended clarity and coherence of inchoate speech crimes.

Having discussed the nature of incitement, and pointed out its vulnerability to indefiniteness or opacity, it is now important that we trace its configuration in contemporary UK legal

[400] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

[401] See de Londras, F, and Doody, J. eds. The impact, legitimacy and effectiveness of EU counter-Terrorism (Routledge, 2015); de Londras, F. "Politicisation, Law and Rights in the Transnational Counter-Terrorism Space: Indications from the Regulation of Foreign Terrorist Fighters." European Review of International Studies 5, no. 3 (2018): 115-138

provisions in order to understand how it is defined and interpreted. My starting point for discussion is the 2006 Terrorism Act.

The 2006 Terrorism Act: A background

Legislation targeting incitement or speech of a terrorist nature in the UK was first proscribed under Schedule 1 of the Prevention of Terrorism Temporary Provisions Act 1989. However, over time, this Act was deemed to be necessarily ineffective because it could not counter the threat from extremist international terrorism in the post-9/11-7/7 era, as practiced by global terrorist organisations such as Al Qaeda, Boko Haram and ISIS, amongst others.

Accordingly, in an attempt to supplement this inadequacy within law, an interrelated smorgasbord of legislation has replaced the 1989 Act, namely: the Terrorism Act 2000, the Prevention of Terrorism Act 2005, and the Counter-Terrorism and Security Act 2015. This chapter limits its focus on the Terrorism act 2006 and section 57 and section 58 of the Terrorism Act 2000 for the reason that these provisions best exemplify the notion of incitement to terrorism.

The Terrorism Act 2006[402] was brought into effect as a direct result of the London bombings of July 2005. During parliamentary debates before the Act was passed into law, the then Home Secretary Charles Clarke MP stated:

> The July events indicate that there are people in this country who are susceptible to the preaching […] of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that…. What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken.[403]

The foundations of this law suggest that it was formulated for prophylactic purposes. The Preamble of the 2006 Act describes it as: "an Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism".[404] Thus, in the process of passing the 2006 Act a great deal of attention was paid towards the concept of ideological speech as a cause of violent radicalisation and terrorism.

[402] This legislation exists alongside "incitement" as expressed under section 18 of the Public Order Act.
[403] *Commons Draft Terrorism Bill, Written and Oral Evidence:* HC Vol 515-I, (October 11, 2005)
[404] Preamble Terrorism Act 2006

This, from the point of view of the government, was a justifiable stance because ideology can have great implications for the process of radicalisation:[405]

> We should not ignore the contributory role that radical texts and extremist pamphlets have in radicalisation. They serve to propagate and reinforce the extremist and damaging philosophies, which attempt to justify and explain the motivations of terrorists. We should not underestimate the role that such literature can have in radicalising vulnerable and susceptible young people particularly changing Muslims from law abiding members of the community to potential terrorists.[406]

Consequently, the 2006 Act purposively sought to contain speech in the form of religious ideology (particularly Islamic related speech)[407] as it was conceptualised a key contributor of terrorism. Thus, the 2006 Act constructed religious, political and ideological forms of speech as inchoate offences, with the intention of curbing the proliferation and publishing of such forms of speech that would glorify, encourage, induce and provoke acts of terrorism. These offences in principle were to cut back on the capabilities of those who contribute to a climate in which "impressionable people" might believe that terrorism is acceptable. It was thought that limiting access to ideological speech would prevent terrorism.

I want to position this discussion differently. I want to suggest, following my discussion of inchoate speech crimes, that the passing of the Act should be read as a configuration of sovereign power to control speech or discourse/ideology by preserving normative liberal orders. To understand this, one must briefly retrace the genealogical roots of inchoate crime. In addition to situations (involving unlawful assembly, blasphemy and particularly sedition as discussed above) inchoate speech offences were instrumental in the British empire's attempts to police tendencies that sought "to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government"[408] in the colonies especially in places like Ireland, Palestine, Kenya and Cyprus where it routinely experienced anticolonial dissent.[409] Many of these uprisings e.g., the Mau-Mau independence movement in Kenya employed covert unpredictable and subversive tactics that left the British colonialists with hardly any choice but to employ proactive as well as pre-emptive military/policing strategies and tactics.[410] Many of these tactics, were driven by

[405] Steger, M.B. The rise of the global imaginary: Political ideologies from the French revolution to the global war on terror (OUP 2008) pp.10-15
[406] Hansard HL Vol. 677 Col. 551(17 January 2006)
[407] Barendt, E. Threats to Freedom of Speech in the United Kingdom UNSWLJ 28 (2005): 895; Duffy and Pitcher, *Indirectly Inciting Terrorism? Crimes of Expression and the Limits of Law*
[408] See Stephen, J.F. Digest of the Criminal Law, 9th ed., Art. 114
[409] Similar structures of speech regulation have also been used to suppress communist speech.
[410] Elkins, C. "Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice." The Journal of Imperial and Commonwealth History 39, no. 5 (2011): 731-748; Anderson, D. Histories of the hanged: The dirty war in Kenya and the end of empire (WW Norton & Company, 2005); wa Thiong'o,

an uncanny fear of colonial self-preservation, a "fear felt by the white community and the need to preserve its privileges".[411]

Owing to this phantasmic fear, they followed a spectral extralegal logic akin to Agamben's critical postulation of "the state of exception". That is to say, the tactics blurred legal norms and went beyond conventional legal means and employed brutal proactive and pre-emptive methods of torture and degradation such as unlawful imprisonment, hanging, castration and screened interrogations, all in the name of preempting unpopular speech ideas.[412] Years later, some of these strategies were transposed and implemented into UK national law and counter terrorism policy especially during the Irish troubles in Northern Ireland.[413]

No doubt, the situations encountered by the British government on foreign soil are different from the situations of terrorism encountered on British soil today. But it is still within this broader historical context that the Terrorism Act 2000 should be read, for the UK's legislative past still haunts the present. Which is to say, its terminologies of anxiety and panic belong to this same psychic/mystic colonial-liberal-utilitarian register. Indeed, the 2000 Act performs a similar "reincarnative" colonial-liberal-utilitarian function of proactive and pre-emptive policing and risk management. In fact, what stands out initially from the language used in these terrorism provisions is that they are conceptually drafted as inchoate speech offences so as enable the authorities to police and arrest the indeterminate and unpredictable elements of post-9/11-7/7 terrorism[414] through notions like pre-crime. As such, they infer a systematic operation of a kind of governmentality or calculability that attempts to determine and calculate the outcomes of speech as behaviour beforehand, (even) in differentiated contexts.

Whilst this can be convenient from the point of view of national security, it yet again, in an ironic vein, it re-inscribes the two aforementioned challenges highlighted in my discussion of inchoate speech crimes, namely:

Ngugi. A grain of wheat. Vol.2 (Penguin, 2012); Elkins, Caroline. Britain's gulag: the brutal end of empire in Kenya (Random House, 2005)

[411] Bowcott, O. Mau Mau rebellion victims claim parliament was misled over torture (The Guardian 23/05/2016) available at: < https://www.theguardian.com/world/2016/may/23/mau-mau-rebellion-kenyan-victims-compensation-claim> See also *Mutua and others v. The Foreign And Commonwealth Office [2012] EWHC 2678 (QB*);
Kimathi and Others v. Foreign & Commonwealth Office [2018] EWHC 2066

[412] Ibid

[413] The Compton inquiry of 1971 found that techniques of physical brutality similar to those used in the Mau Mau rebellion were also applied in Northern Ireland. See: Home Office, Report of the enquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971 Cmnd. 4823, XXXII.1011, Vol 32

[414] Parliament Select Committee on Home Affairs Police briefing note (5/10/05) available at: < https://publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91010.htm > accessed 28/07/2016

1) A pre-programmed or pre-calculated understanding of speech and indeed speech harms that do not consider the fact that speech and speech harms (or "ideologically motivated crimes") are iterable, divergent and contextual. This ultimately fosters a homo-hegemonic consensus on speech and harm based on western liberal-utilitarian viewpoints that deters, delegitimizes and forecloses the speech of the other; and

2) A paradoxical widening of the law and its definitions in an attempt to contain the indeterminate. This stretching out into the indeterminate fundamentally blurs and compromises the intended stability, coherence and enforceability of inchoate speech offences.

In the next sections, I explore these claims further by looking at the notions of encouragement and glorification as forms of incitement to terrorism legislation in the UK. Throughout my discussion, I probe the inchoate nature of the offences and the particular ethical predicaments this may have in regard to legal opacity, interpretation and accessibility of law.

Encouragement and glorification of terrorism under the 2006 Act

Encouragement

The offence of Encouragement to commit a terrorist act is laid out under section 1 of the Terrorism Act 2006. Section 1(2) A of the 2006 Act states that a person commits an offence if:

(a) he publishes a statement to which this section applies or causes another to publish such a statement; and

(b) at the time he publishes it or causes it to be published, he;

(i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or

(ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

Like with many of the other generic concepts of incitement to terrorism, "encouragement" is broad in scope. For example, it includes the notions of publication of statements causing to publish statements and preparing or instigating the publication of such statements.

The statement in question can be visual or auditory or could even be done electronically through a service like the Internet.[415] The publication of the statement would thus constitute the *actus reus* of the offence. The statute also requires the prosecution to show that the instigator intended members of the public to be directly or indirectly encouraged or induced by the statement, this would constitute the *mens rea*.

It is worth noting that the consideration of the composition of the readership of a publication is different from, and should not be confused with, the consideration of evidence of people who have read a publication in the past and have been encouraged to commit terrorist offences. This is demonstrated in *R v. Faraz*[416] where the appellant, a manager of an Islamic bookshop appealed a conviction for selling publications of books, articles, videos and DVDs that allegedly encouraged militant Islam.[417] In *Faraz*, the prosecution had submitted that the publications were terrorist publications by virtue of the fact that they were found in the possession of terrorists. At first instance, the judge accepted that the evidence provided by the prosecution was important explanatory evidence of the case as a whole, particularly in determining whether or not the publication concerned was a "terrorist publication".[418] However, on appeal, the court was of the view that the judge at first instance had erred in his reasoning and it quashed the convictions. The court held that inferences of encouragement to terrorism drawn from mere possession of publications were not admissible for the reason that they would be "speculative, unfair and prejudicial".[419]

Although this distinction of substantial probability as established in *Faraz*, in the context of terrorist crimes is important, it is not the only determinant of *mens rea.* In reality, the requirement for such a probability also pays attention to contextual factors. Indeed, the court attempts to make distinctions based on the facts of each case to determine whether or not the context in which speech is disseminated impacts on the defendant's ability to encourage terrorism. This approach is expressed in *R v. Ali (Humza).*[420] Here, the defendant, who was a supporter of the proscribed organisation Islamic State, sent three Islamic State propaganda videos to two other men with whom he was in contact via a chat group. The first two videos showed prisoners confessing "sins" against the organisation and being executed, while the third was a recruitment video. The defendant was charged with three counts of disseminating a terrorist publication, contrary to section 2 of the Terrorism Act.

[415] Section 3, Terrorism Act 2006
[416] [2012] EWCA Crim 2820
[417] Ibid
[418] Ibid
[419] Ibid at para 42
[420] [2018] 1 W.L.R. 6105

In *Humza*, the court was of the view that the case should be distinguished from Faraz because "the context was different and the dissemination was different and it involved different dissemination, different material and a different potential readership".[421] *Humza* unlike Faraz had clear connections with terrorism activities in the sense that he had taken positive steps such as the dissemination of videos that encouraged and supported IS's activities and thus suggested a deep commitment to terrorism activities.[422] *Humza* like *Faraz* can thus be read as a properly considered decision in the sense that it provides an important setting of interpretational thresholds that appreciate the "difference" or heterogeneity and iterability of speech.

To determine the *mens rea* of encouragement, further guidance is provided for under section 1(4) of the 2006 Act, which requires consideration to be taken for the publications as a whole. Accordingly, the context of the document or publication in question is crucial. Thus, how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard to both: (a) the contents of the statement as a whole; and (b) the circumstances and manner of its publication.

Notwithstanding, in day-to-day enforcement situations, using contextual interpretations to determine *mens rea* can be difficult, owing to the inchoate and intertextual/iterable nature of the offence. Furthermore, the fact that the offence relies on reasonableness and likelihood complicates things. Reasonableness is a very subjective term (that in a play of difference/*différance* articulated in the previous chapter) somewhat presupposes an other's unreasonableness. Thus, how "some readers" understand and interpret text and speech is subjective and problematic from the outset. The possibility of a publication being unfairly misread or misinterpreted by a given readership (especially where the addressee/addressees are not physically present) is thus infinitely high. Determining the circumstances and manner of a publication and the publisher's intent thus becomes intractable.

A demonstration of this instance occurs in *R v. Brown (Terence Roy)*[423] where Brown was convicted of seven counts of collecting or making a record of information including a publication of the "Anarchist Cookbook" a 1971 pamphlet that and a limited CD edition, which comprised thousands of files already available on the internet. The court was of the view that such information was likely to be useful to a person committing or preparing an act of terrorism. No doubt, the context played a role here in the courts determination. It appears that the court was fixated on the fact that these publications were disseminated in the aftermath of

[421] Ibid Para 13
[422] Ibid Para 7-8
[423] [2012] 2 Cr. App. R. (S.) 10

the London bombings. Perhaps for this reason, the courts were palpably haunted by the spectre of terrorism. Perhaps also, the court's interpretation of harm or risk in *Brown* emerges from this spectral socio-political reality.

I raise this as a point of contention because unlike *Humza*, one could argue (as in *Brown*) that he had no intent to cause or encourage terrorist acts through his dissemination of the publications. He had no deep commitments to IS or any other proscribed terrorist group and did not want to cause serious violence to public. Moreover, the publications were publicly available online and could have been accessed by anyone. *Brown* thus contrastingly goes in a very different direction from *Faraz*. It reads as a decision that seeks to establish an element of far reaching risk/harm prevention. But in doing so it undermines consistency within the law. Furthermore, the decision in Brown ignores the fact that speech can affect different readers differently and that speech dynamics are incalculably diverse, iterable, heterological.

1) The Encouragement Defence

To establish a defence to the offence of encouragement to terrorism, the defendant will have to show that:

> (a) The statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and (b) that it was *clear, in all the circumstances* [emphasis added] of the statement's publication, that it did not express his views.[424]

Yet again, the requirement to show that it was "clear in all circumstances" i.e., that a statement did not endorse terrorism is not so easy to identify because speech is inherently elusive, unprogrammable and obscure. Indeed, as I have suggested in chapter one, whatever one says or endorses, is iterable, not constative. Words do not correspond to certain fixed mono-subjective system of signs (or in a straightforward cause-effect-trajectory/"criminal interaction order")[425] and for this reason, they can never be "clear in all circumstances". Put another way, for a statement to be clear or for it to be interpreted as such means that it would have to undergo a publicly biased/subjective/presumptuous liberal consensus-based determination. This in turn makes it almost impossible from the outset for anyone to argue that a statement they have published or uttered is not connected to terrorism if the majority of the public to whom such a statement is communicated directly or indirectly believe and generally agree that it is.

[424] Section 6 Terrorism Act 2006
[425] Goldsmith, A. & Brewer, R. Digital drift and the criminal interaction order, *Theoretical Criminology* 19, no. 1 (2015): 112-130

Glorification

The offence of glorification to terrorism is proscribed under section 3 of the 2006 Act.

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which:

> (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
>
> (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

Although similar to "encouragement", glorification appears to stretch the definition(s) of incitement, at least conceptually. As per section 20 (2) of the 2006 Act, glorification brings to mind the notions of "praise", "eulogising", and "celebration". Or as Home Office Minister Baroness Scotland has put it, "to glorify is to describe or represent as admirable, especially unjustifiably or undeservedly".[426] The offence covers statements published which glorify terrorism "in the past, in the future or generally"[427] and hence arguably goes further than encouragement.

The purpose for the indication if "glorification" in law is tied to an official response of palpable panic after the 7/7 attacks in the UK as reflected in the statements of then Prime Minister Tony Blair who said: "Let no one be in any doubt, the rules of the game are changing".[428] Such panic led to a restructuring of the UK's legal anti-terrorism measures through the introduction of new anti-terror legislation such as the offence of glorifying terrorism. Amidst all the post-7/7 socio-political legal upheavals and uncertainty, it was felt that the offence could pre-emptively control ideologically motivated crimes. When the Act was still a Bill, the then home office secretary stated that the purpose of the law was to make it more difficult for people to transition from encouraging, glorifying to then committing acts of terrorism.[429] Further, in later comments about the law the home office secretary also seemed to emphasise that there was a link between speech or "ideas"[430] that glorify terrorism and acts of terrorism themselves:

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[426] Hansard HL Vol. 677 Col. 583
[427] Ibid
[428] Full text: The prime minister's statement on anti-terror measures The Guardian 05/08/2005 available at: < https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1 >
[429] Hansard HC Vol. 438 Col. 325
[430] Ibid: The government in its desire to prevent terrorism seems to have placed a lot on emphasis on the fact that speech is a direct cause and driver of terrorism. The problem in such a reading is that yet

> It is perfectly clear that people who seek to recruit terrorists do so not just by directly encouraging terrorism or by provoking people to commit violent acts but by *glorifying* terrorism and terrorists. They may emphasise that terrorists are heroes whose actions should be copied; that terrorists go straight to paradise when they die; that terrorist undertake glorious acts that deserve to be emulated; or that terrorists are simply better humans than those of us who are not terrorists. The single word that best captures that is 'glorification'. […] It does not as I have explained cover all forms of indirect encouragement, but it does cover those forms. It is that clarity of meaning that makes the word glorification so important […] those who seek to recruit terrorists know what it means [emphasis mine].[431]

The law would thus act as a kind of security/protective cushion. Indeed as Eric Barendt[432] has observed, the purpose of the legislation from the point of view of the government was to "signal" that speech glorifying terrorism was unacceptable. It is of course understandable to a degree that the government needed a wider legal strategy to deal with the then threatening characteristics of post-9/11-7/7 terrorism. For the government, the communication of ideology from both the perspectives of the publishers and the readership/listeners (or members of the public) were an urgent and important factor in the equation.

Under section 4(b), the offence of glorification requires that those who hear a statement praising or celebrating terrorism must reasonably be able to infer that what is praised is being praised as something that should be emulated by them in existing circumstances. This requirement for a readership to reasonably infer meaning from what is praised in the existing circumstances however presents difficulties it would be necessary for us to interrogate. For example, there can be an enormous scope for disagreement between its readership (the fictional members of the public as to whom it is published)[433] as to whether a particular comment is merely an explanation or an expression (such as humour, satire, a double-edged pun, or irony or a word placed within a tendentious cluster of words goes further) and amounts to encouragement, praise or glorification".[434] In this regard, the offence relies on the

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again it glosses over the divergence and iterability of speech and it disavows other symptomatic/deep underlying causes of terrorism. Furthermore, the legal proscription of terrorist speech offences does not necessarily bring an end to the dissemination of terrorist content, which is subversive by its very nature.

[431] Hansard HC Vol. 442 Col. 1437

[432] Barendt, E. Incitement to, and glorification of, terrorism in *Extreme speech and democracy* (OUP 2009) p.469

[433] According to s 2 of the 2006 Act, the impact of the publication is measured by it's understanding by all or some of the members to whom it is or may become available.

[434] Hunt, A. Criminal prohibitions on direct and indirect encouragement of terrorism Criminal Law Review (2007)

drawing of inferences (or hauntological projection)[435] therefore generating a degree of uncertainty and unpredictability or inaccessibility of the law.

Moreover, one could argue, as I have done in the previous chapter, that the offence of glorification especially in a liberal-utilitarian society like the UK doubly functions as a tool of censorship in the sense that it inscribes and pre-determines how certain socio-political references, vocabularies and histories are to be invoked, enunciated or expressed. In doing so, it in an *a priori* fashion subjugates minoritarian viewpoints that cannot yield or assimilate to the norm. It condemns them to "silence or to shocking non-civil outspokenness"[436] in order to preserve a normative univocal/fraternal British *logos* or way of life.[437] This is a monopolisation of violence through law, a kind of monopolization that dispossesses non-minoritarian people of their ability to speak in certain ways by its inscription of a banoptic and disciplinary logic that disavows the alterity of the other.

Part of the difficulty in determining glorification stems from its grounding in terrorism which (as discussed earlier) is in itself nebulous and has an expansive interpretation within UK legislation. This is problematic considering the fact that the ECtHR has held in *Sunday Times v. United Kingdom,*[438] that "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case".[439] In interpreting glorification, it is conceivable that an enormous scope of disagreement can arise between reasonable people as to whether a particular comment is merely an explanation or an expression of a previous terror incident or whether it amounts to praise or glorification. This is further complicated by the representational dynamics of speech as a form of locutionary power and sovereign exclusivity.[440] One who defines the world controls it and circumscribes a particular division and consensus of it.[441] A dominant universal meta-narrative can lead to misrepresentations of less popular speech, even by a reasonable composition of a readership, and this could incalculably label speech as "glorification" even when it is not.

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[435] For Freud, projection is a self-preservative mechanism in which the ego defends itself against unconscious impulses or qualities by repressing or disavowing their existence and attributing them to others. See: Freud, S. *Case Histories II* (Penguin Freud Library Vol. 9, 1988) p.132

[436] Bourdieu, P. Language and symbolic power (Polity Press, 2016) p.139

[437] Schmitt, *The Concept of the Political*, p.26

[438] *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245

[439] Ibid at Para 49: a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.

[440] Dawes, J.R, Language, Violence, and Human Rights Law, *Yale Journal of Law & the Humanities*: Vol. 11: Iss. 2, Article 1(1999)

[441] Foucault M, Power/Knowledge: Selected Interviews and Other Writings 1972–1977 (Colin Gordon, 1980) p.93

Furthermore, the requirement of "reckless" rather than "intentional encouragement" is also problematic. Traditionally, the test of recklessness is based upon the subjective recklessness test in *R v. Cunningham,*[442] which establishes that recklessness occurs when: a person acts recklessly with respect to a circumstance when he is (a) aware of a risk that exists or will exist; and (b) being aware of that risk, it is, in the circumstances known to him, unreasonable to take the risk.[443] Glorification however, under the 2006 Act, creates a drastic shift in the reading of recklessness that postulates foresight of consequence. That is to say, "recklessness" under the 2006 Act does not depend on the publisher, rather, it is an "objective recklessness", determined by the readership of the publication i.e., members of the public "who could reasonably be expected to infer that what is being glorified as conduct that should be emulated by them in existing circumstances".[444]

This supposition of "objective" within recklessness also needs some closer examination. Being "objective" infers being impartial, equitable and unbiased and is a matter of unacknowledged truth making. It is defined by the inclinations of how certain social agents (in this case the readership) view and experience the world. Thus, no matter how carefully framed and expressed "objectivity" is, as a mode of inquiry, it inevitably "harbours preconceptions and pre-understandings that direct and regulate it".[445]All this is to say; it is quite likely that in trying to be objective, the readership would be exclusive, essentialist and reductionist. Put differently, because the make up of the readership would coincide generally with a particular regional/geographical cultural position, they would be inclined to recognise and identify what "glorification" is basing it on a particular regional, historical and cultural narrative and its complex set of assumptions and presuppositions. Naturally speaking, their regional historico-cultural narrative would be the norm; it would be the proper or "rational" way of doing things and all other ways of doing things would be constitutively non-objective, irrational. In this sense, it would carry with it dominant univocal and homogenous mono-subjective discourses that dictate day-to-day cultural attitudes and experiences.[446] Thus, given this fact, it is improbable that such a univocal readership would identify positively with non-normative speech that challenges or re-interprets the readership's very historical-cultural position (i.e., their moral, ontological and epistemological attitudes, sensibilities and experiences).

Objective recklessness then becomes delimiting (paradoxically) because it conserves and gives a greater role to the readership's collective sensibilities and presuppositions. Indeed, as chapter one of this thesis has suggested, drawing clear, objective and unbiased meanings or

[442] [1957] 2 QB 396 see also *R v. G* [2003] UKHL 50
[443] Ibid Para 41
[444] Section 3(b) Terrorism Act 2006
[445] Gunkel, D.J. Hacking Cyberspace (Westview Press, 2001) p.1
[446] Heinze, E. Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity. *Extreme speech and democracy* (2009) p.267

a hermeneutic consensus from speech in highly charged socio-political contexts is impossibly difficult. The contexts themselves are always drifting and the speech itself is always iterable. Indeed as the decision in *Abdul* above has shown, reasonable beliefs (like with "objectivity" discussed above) ignore the hierarchisation of positions of utterance, they infer a commonality of experience with regard to culture, memory, re-cognition and interpretation and are susceptible to excluding minoritarian opinions and viewpoints as well as the different nuances within the significations and gradients of speech such as the ability to read or distinguish between statements and gestures of irony, socio-political critique, or even a joke made out of mere frustration as was the case in *DPP v. Chambers*.

That glorification also turns back the clock, by its proscription of statements that occurred in the past is confusing. It is not clear, for example, whether or not the now (*ex post* justifiable) actions and statements of people like Nelson Mandela fighting against repression such as the ANC of 80's South Africa or even if say Dedan Kimathi of the Mau Mau independence movement would encompass "glorification".[447] Arguably, such meanings remain elusive since they can only be ascertained after the event, and not by psychically "scrying" into the future.

Reasonableness, with regard to interpretation or meaning, is further problematised when we think of speech dynamics within the medium of cyberspace —a medium of metadata, which continuously transmogrifies[448] digital speech[449] and obscurely multiplies words, contexts, and subjectivities. This ecological and informational ambiguity engenders an interpretational void, which can be confusing when trying to establish the publisher's *mens rea* and ultimately in trying to establish when an individual is "glorifying" terrorism or not. Such a determination is hard to make because speech is inherently divergent. It iterates into different modes and functions that evade translation, calculation, and apprehension.

Awan for instance suggests that such speech through debates or poems online can in certain instances have a cathartic function that enables users to express their despair or concerns of

[447] Stone, R. Civil Liberties and Human Rights (OUP 2008) p.244; Macdonald, S. "Prosecuting suspected terrorists: precursor crimes, intercept evidence and the priority of security." In Critical Perspectives on Counter-terrorism (Routledge, 2014) pp.146-165

[448] My use of the word transmogrify here refers to the inherent ability of digital speech to transform or alter meaning in a surprising manner.

[449] Murray, D. Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights. Neth. Q. Hum. Rts 27 (2009): p. 331. See also: Pickerill, J. Radical Politics on the Net, Parliamentary Affairs, Vol. 59, No. 2 (2006): p. 273; Miró-Llinares, F. Moneva, A, and Miriam, E. "Hate is in the air! But where? Introducing an algorithm to detect hate speech in digital microenvironments." *Crime Science* 7, no. 1 (2018):15 Pontzer, L. "If words could kill: can the government regulate any online speech." *Pitt. J. Envtl. Pub. Health L.* 5 (2011): 153; Marwick, AE. and boyd, d. "I tweet honestly, I tweet passionately: Twitter users, context collapse, and the imagined audience." New media & society 13, no. 1 (2011): 114-133; Kalulé, *On the Undecidability of Legal and Technological Regulation*

frustration or empathy with others without necessarily resorting to violence.[450] Awan cites a poem written buy one blogger, which in some situations could be, misread as inciting or glorifying terrorism.[451] A section of it reads thus: "I can no longer see my family being slaughtered and do nothing/ What would I tell Allah on the Day of Judgment /That I couldn't help them or that I couldn't save them/ I will not have their blood on their hands".[452]

While this poem does not necessarily draw explicit links between its speaker and a terrorist organisation, it could still be read as some as making this connection. At the same time, it could be read as others as not making this connection. Such connections are contestable and not easy to draw. Audiences can (and do) misunderstand a speaker's intentions. Furthermore, there is also always the possibility that an audience could disengage, or read/listen passively (i.e., without responding or being affected transferentially) to the speaker or publisher. Speech circulates in various uncontainable ways. This is an inescapable outcome and effect of all speech and communication. Given this fact, we are then presented with a quandary: how is a readership reasonably expected to infer, or discern, that what is being glorified is being glorified as conduct that should be emulated considering that speech that glorifies may be infinitely and inherently divergent, and perhaps more importantly not necessarily of a violent nature?

But who is "a readership" or and how are they to "reasonably" be determined? Is "a readership" monolithic or is a "readership" a particular section of the public?

The provisions under the 2006 Act do not provide much guidance concerning these questions. They also do not provide much guidance on interpretation and foreseeability. And even if they did, hypothetically, they would still struggle to rein in, grasp or fathom speech's inherent heterological fugitivity, given speech's ability to shift meanings in different, applied contexts as shown in my discussion of *Chambers* above.

At any rate, there always remains an interminable absence of clarity or undecidability concerning how glorification is to be understood. This undecidability seems to go against the requirement of the law as expressed in *R v. Secretary of State for the Home Department, Ex parte Simms*[453] that restrictions must be the clearly expressed intention of the legislature, using specific and unambiguous words. This however in the context of terrorism and national security is impossible. The concern then in using an ambiguous word like "glorification" is that it self-compromises by stretching the criminalisation and prosecution of speech into areas that

[450] Awan, A.N. Virtual jihadist media: Function, legitimacy and radicalizing efficacy." *European Journal of Cultural Studies* 10, no. 3 (2007): 389-408
[451] Ibid p. 397
[452] Ibid
[453] [2000] 2 AC 115

Parliament had never intended. This of course is understandable considering the fact that terrorism always comes unexpectedly, as a surprise, but it creates an irresolvable incongruity with regard to the clarity and predictability of the law.

Although not a glorification case, but an offence dealing with proscribed organisations, *R v. Choudary (Anjem)* and *R v. Rahman (Mohammed Mizanur)*[454]gives us some insight into how the interpretational undecidability of glorification could be handled by the courts. In this case, the appellants were charged with offences of inviting support for a proscribed organisation. They were said to have given talks and made an oath of allegiance to the organisation and its leader and posted them on the Internet. The appellants denied that the talks were invitations to support the organisation or that they intended them to be so. This case is significant here because it was concerned with clarifying the notion of inviting support. Thus, the judge decided that the words "inviting support" were to be given their normal and ordinary meaning, and that the "support" required for the purposes of the *actus reus* of the offence was not restricted to practical or tangible support. Giving the word "support" its ordinary meaning, the court held that "the *actus reus* of the offence could encompass support going beyond that which could be characterised as practical or tangible; however, that did not mean that the section was ambiguous or impermissibly vague".[455]

What is striking about this case is not the conviction but the conceptual significance of the court's extensive interpretation of "inviting support". The courts phrasing of "beyond that which could be characterised as practical or tangible" is problematic because it suggests that the courts could also possibly interpret glorification as a broad offence without material causation or indeed as an offence pivoted on "likelihood" and "recklessness". Whilst this conceptually allows the state's prosecutorial apparatus a broad discretion with regard to whom it goes after, it also equally risks undermining the coherence of the law. This intrinsic potentiality for incoherence *différance* then challenges the implicit assumption that speech that glorifies terrorism is identifiable. It is perhaps because of this reason that there is a dearth of case law under the specific notion of glorification of terrorism.

That being said, the rarity of cases under "glorification" does not take away its symbolic prominence. Which is to say, despite its grey areas, and despite the fact that statements that glorify terrorism can be successfully prosecuted under other, more narrowly drafted statutes, the offence of glorification still remains on the statute books and it plays a fundamental-functional role in the day to day enforcement and regulation of speech both offline and online. In fact, if looked at from a more international perspective, it appears that the criminalisation of glorification as a mode of counter-terrorism is here to stay. The current legal-political structure

[454] [2018] 1 W.L.R. 695
[455] Ibid Para 52

demands it. For example, it is explicitly proscribed by the Directive 2017/541 on combating terrorism of the European Union.

And whilst it could be argued on the one hand that laws of a symbolic function are convenient because they prohibit (perceived) harm or violence, we should also attend to the fact that offences like glorification overdetermine, that they are susceptible to prohibiting speech and harms that are conjectural and not demonstrable.[456] This in my view is a conceptual step too far (in terms of calculation/determination), for the reason that it takes away from the reality that speech is iterable and divergent and that its causes or effects cannot be rationally presumed, pre-calculated, delimited or pre-determined with clarity.[457] Glorification thus becomes phantasmic or hauntological in the sense that it remains haunted by its inadequacy to accurately identify, contain, and distinguish speech that "glorifies" terrorism from speech that does not. The inability to distinguish clearly what harm constitutes engenders a spectral extensiveness that widens the discretion of law enforcement which can in turn lead to a discriminatory and arbitrary application of the law in a manner that elevates the "wrong things into sensational focus [by] *hiding and mystifying* the[ir] deeper causes".[458]

In any event, an analysis of the offence of glorification does not take us very far given the lack of case law. We therefore have to look at other/ ancillary incitement to terrorism provisions or statutes that "cross–refer" to encouragement and glorification as proscribed under the 2006 Act. Perhaps the most important ones are the possession offences under section 57 and section 58 of the Terrorism Act 2000, which are pre-cursors to encouragement and glorification.

The Possession Offences

Section 57 provides:

> (1) A person commits an offence if he possesses an article in circumstances, which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

[456] As demonstrated in Chapter one, historicist arguments to the end that (e.g., Nazi speech) is harmful are reductive in the sense that they place a lot of emphasis on speech as a direct cause or effect of violence but fail to account for the underlying, unresolved symptomatic or material/structural causes and factors that cause and accompany such harmful speech in the first place.
[457] See my discussion of iterable speech in chapter one. Any such claims to empirical coherence, stability or calculability would be indeterminate and thus conceptually contradictory.
[458] Hall, S., et.al *Policing the crisis: Mugging, the state and law and order* (Macmillan Press Ltd, 1982) introduction p.vii

(2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

And section 58:

(1) A person commits an offence if —

(a) s/he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or

(b) s/he possesses a document or record containing information of that kind.

(2) In this section 'record' includes a photographic or electronic record.

(3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession".

The central purpose of section 57 was to criminalise the possession of ordinary items,[459] which could be used in the commission, preparation and instigation of terrorism. An "article" is defined in section 121 of the 2000 Act to include a "substance and any other thing", and has been used to charge those found in possession of everyday items like fertilizer[460] and petrol.[461] More relevantly, an "article" can also include a publication or documents and has been used to prosecute individuals with computer hard drives containing instructions on the manufacture of bomb-making equipment.[462]

Under section 57, the phrase "connected with…an act of terrorism" is somewhat contentious. It is not clear and can cause interpretational problems. Consider again, the notion of "terrorism"(which I defined earlier in this chapter). Is "terrorism" here to be interpreted in the same manner as "an act of terrorism"? Perhaps, but perhaps not. This is not clearly articulated within the statute.

Additionally, the words "activities connected with" broaden the scope of activities that may be caught under this provision —I discuss this issue later. It is also worth pointing out that under section 57 (2) the defendant has some room to rebut this presumption of guilt by proving that an article was not in the defendant's possession for a terrorist related purpose. This however is a reverse onus of proof broadened by the notion of "reasonable suspicion".

Unlike section 57, there is no requirement in section 58 (1) for the prosecution to prove that the defendant possessed the information for a terrorist purpose. All that the prosecution has

[459] It is not clear whether this statute was always intended to apply to speech offences but it does so in the sense that it pertains to publications and documents.
[460] *R v. Khyam* (Omar) [2008] EWCA Crim 1612
[461] *R v. Lusha (Krenar)* [2010] EWCA Crim 1761
[462] See *R v. Sultan Mohammed and R v. G; R v. J below*

to show under section 58 is that the material in question is of practical use to a terrorist. In other words, the material must go beyond encouraging terrorism. It must be material of a practical kind that gives rise to a reasonable suspicion in the commission or preparation of terrorism. Thus, section 58 makes it an offence to collect, make or have in one's possession, without a reasonable excuse, any record of information (written, photographic, or electronic) "likely to be of use" to a person committing or preparing an act of terrorism or to have possession of any document or record containing such information. Section 58 has been applied cases like in *R v. G; R v. J,*[463] where the court has held that possession of a document or record is a crime only if it is of "practical use" and was possessed by a person without a reasonable excuse.

R v. Sultan Mohammed [464] demonstrates that an article of practical use should "speak for itself" and not be of the sort in general circulation. In this case, the appellant had written a document outlining ideas on how to conceal information and avoid being arrested on suspicion of involvement in terrorist offences. The information in this document called "draft ideas" included a wide array of practical instructions and suggestions such as avoiding using code words in emails, and avoiding using words like *jihad* over the telephone amongst others.[465] The document also contained a list of suggested readings.

The question for the courts in this case was whether or not the information in this document fell under the meaning of "information" as provided for under section 58. The court was of the view that a document entitled *Draft Ideas* spoke for itself and could not reasonably be viewed as information for every day use by ordinary members of the public. Put differently, *Draft Ideas* were very peculiar to this case and were so different from other everyday items like published timetables and maps.

The document "speaking for itself" also connotes that a reasonable jury should be able to conclude that the document contains information of a kind likely to be useful to a person committing or preparing an act of terrorism. This is to be assessed objectively in the light of all the circumstances. My point however, is that in times of palpable fear, such as the post-9/11-7/7 continuum, the determination of what such a document is can become inflected broadening its reaches into unforeseen contexts. Which is to say, the document could then

[463][2009] UKHL 13

[464] [2010] EWCA Crim 227

[465] More of the notes in draft ideas included suggestions such as:

> "Try avoiding using Islamic words on the phone e.g. *jihad*, *insha'allaah*, *irhabi* etc one of the reasons is the phone systems have or are going to have tunnel systems were certain words go back to the operator… more details follow.
> E-mail*:* […] Utilize non-home i.e. private flat connection or secure proxy in the least)[…].The email account used should be changed every so often and promptly in emergency and specific words and plans avoided."

most likely become anything because, hypothetically, any document of ordinary or everyday use to ordinary members of a population (such as the yellow pages) could be of use to terrorists.

This inescapable blurring and irresolvable lack of reasonable thresholds within section 57 reveals the fact that the nature of law in this area is always already indeterminably construed (beyond pragmatic usefulness) hence problematising its day-to-day enforcement. Moreover, it remains unclear as to how far law enforcement would have to go to ascertain crimes caught under section 57 this presents a question of ethical fraught pertaining to the indistinguishability of risk that arguably affect minoritarian viewpoints, in the sense that the state could have a carte blanche to construct othered heterogeneous forms of speech as legally relevant grounds for justifying extensive discrimination. Ultimately, this occurs because the vagueness of the law allows for it to be manipulated by the sovereign in a suppressive fashion[466]for its own preservation, safety and liberal-utilitarian ends.

On the convergence of section 57 with section 58

Despite the differences in categorisations between section 57 and section 58, it should be noted that these two different sections are conceptually similar and that they overlap in reality. The court has admitted and demonstrated this in *R v Rowe.*[467] In *Rowe*, the appellant was charged with two counts of possessing articles for terrorist purposes, contrary to section 57 and section 58. Rowe had been arrested at Coquelles in France in October 2003 as he tried to enter the UK on a coach bound for Victoria Station, London. The articles in question were: a) notebook which contained mortar instructions and b) a substitution code which listed components of explosives and places of a type susceptible to terrorist bombing e.g., “airport” and “military bases” in his handwriting. It was the prosecution case that the appellant was shortly to embark on a terrorist venture and that both the notebook and the substitution code were held for terrorist purposes. Rowe’s reason for possessing these items (only advanced at trial) was that the notebook contained information to help Muslims defend themselves against the Serbs in 1995, and the substitution code was part of a humanitarian plan to courier items needed by Muslims attacked or persecuted in Chechnya. The prosecution response to this was that, while he might have been engaged on expeditions abroad, these were not for the humanitarian purpose described.

The point of relevance here, which also formed the substance of Rowe’s first ground of appeal, was whether or not documents could be an article under section 57, or if the appellant

[466] Vismann, *Jurisprudence: a transfer science*, p.281
[467] [2007] EWCA Crim 635

should instead have been charged under section 58, which specifically refers to documents. Concerning this point, the court was of the view that the documents could be articles:

> There are a number of other instances of prosecutions being brought under section 57 in relation to documents or records…. There is *undoubtedly an overlap between section 57 and 58*, but it is not correct to suggest that if documents and records constitute articles for the purpose of section 57, section 58 is almost superfluous [emphasis mine].[468]

This statement in *Rowe* is significant because it confirms that section 57 and section 58 converge. But whilst this convergence of section 57 and section 58 is useful from the vantage point of the state and the prosecution, it can lead to undue enforcement overreaches and a high degree of interpretational inconsistency and uncertainty.

In the following sections, I look at some case law decisions in order to explore the possession offences in more detail. The issues of particular interest here are: 1) the opacity and stickiness of the law in this area brought about by the broad drafting of the legislation, and 2); the overlaps the possession offences under the 2000 Act have with the encouragement and glorification offences under the 2006 Act.

In *R v. Samina Hussain Malik,*[469] Samina Malik, (who also dubbed herself 'the lyrical terrorist')[470] was prosecuted under section 57 and section 58. *Malik* argued that the documents in question (various publications relating to violent *Jihad* and terrorism found on her computer, and poems written by her) were not for a purpose connected with terrorism. Rather, she claimed that they were for writing poetry and were in her possession only for curiosity. The Court of Appeal found that only some of the documents fell under section 58 and quashed the conviction because the jury had not been properly instructed on the practical assistance requirement it held that there was scope for confusion on the part of the Jury as they had been misdirected on the ingredients of the offence of possession of terrorist information under section 58 and the defence of "reasonable excuse".

That some of *Malik*'s poems would potentially fall under section 57 rather than section 58 is quite telling; it affirms that these offences overlap and that they can be used in a catchall manner. It also shows that section 57 and section 58 have the potential to chill speech by causing individuals with minoritarian views to hold back from publishing downloading and

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[468] Ibid Paras 32-34
[469] [2008] EWCA Crim
[470] Gardham, D. 'Lyrical Terrorist' Samina Malik cleared on appeal (The Telegraph, 17/06/2008) available at < https://www.telegraph.co.uk/news/uknews/2145506/Lyrical-Terrorist-Samina-Malik-cleared-on-appeal.html > accessed (24/07/16)

sharing information online. More importantly perhaps, *Malik* highlights the irresolvable hermeneutic opacity of section 57 and section 58 i.e., the definitional, differentiating and contextual issues it is likely to engender when the Courts and law enforcement are dealing with material that causes and incites terrorism. A question thus remains, how are the courts to determine what is likely to be useful in the dissemination of harm or indeed terrorist related crime?

It appears to me that such an assessment would yet again be determined under a liberal-utilitarian calculus that aims toward deterrence and utility. The problem however, is that such a mode which is subtended by an exclusive moral/socio-cultural consensus or reason of the majority), is likely to disavow minoritarian views or even frame them as the very cause of harm, disruption or risk. To illustrate this problematic, we turn to the decision in *R v. K*.[471] Here, the defendant was charged under section 58 (1) of the Terrorism Act for being in possession of material of a kind likely to be useful to a person committing or preparing an act of terrorism. With regard to the material in question, the counts related to a copy of the Al Qaeda training manual, and texts concerned with the organisation of *Jihad* movements. Another count concerned a text advocating for Muslims to work for the establishment of an Islamic state. The defendant submitted that the documents in question were merely theological or propagandist. The defendant argued that because section 58 was insufficiently certain; it lacked clarity to comply with the common law doctrine of legality or Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The judge rejected that submission and dismissed his appeal.

Concerning the nature of the material, the judge was of the view that it was up to a jury to determine whether or not the material in question was material likely to be useful to a terrorist and was possessed by the defendant without reasonable excuse. He further rejected the defendant's submission stating that depending on the context and circumstances of the case, theological and propagandist material may indeed fall within the scope of section 58.[472] Consequently, *R v. K* reveals some unresolved tensions and undecidabilities within the law. It shows that section 58 catches not only documents falling within the practical assistance remit but also materials hitherto excluded such as propaganda and theological documents hence potentially going contrary to the decision in *Samina Malik.*

In *R v. Zafar and others,*[473] the defendants, four university students and a schoolboy, were charged with possessing articles for a purpose connected with the commission, preparation or instigation of an act of terrorism, contrary to section 57 of the 2000 Act. The articles in question were documents, computer disks and hard drive with political and religious material

[471] [2008] EWCA Crim 185
[472] Ibid Para 7
[473] [2008] EWCA Crim 184

of an extreme nature.[474] Communications between the defendants and others showed a settled plan under which they would travel to Pakistan to receive training and thereafter commit terrorist acts in Afghanistan. The point of contention in *Zafar* was the notion of certainty under section 57 of the Act. Despite the fact that there was evidence that supported the existence of a plan to travel as alleged, it was held that there was nothing expressly showing the use, or intention to use, extremist literature to incite terrorism. The material in question was merely akin "to literature stored in a book on a bookshelf, or on a computer drive, without any intention on the part of the possessor to make any future use of it at all".[475]

Based on the very nature of the information and its inchoateness i.e., its remoteness from actual terrorist violence, it was also doubtful to show if section 57 was infringed. This was a matter for the Jury to decide. But in coming up with their decision, the jury had to be satisfied that the planners intended to use the extremist material to sustain their enthusiasm and resolve—to "hype each other up" in order to carry out the act(s) of terrorism. The court held allowing the appeal that the phrase "for a purpose connected with" was so imprecise as to give rise to uncertainty unless it was construed to require a direct connection between the article possessed and the act of terrorism. Indeed, the words "connected with" enlarged the ambit of section 57 by rolling up three distinct stages of the plan:[476] 1) travelling; 2) training and; 3) fighting against the government as constituting incremental acts of terrorism.

Crucially, *Zafar* highlights a situation where the court has interpreted speech crimes connected to terrorism more sensibly. That is to say, that although *Zafar* still demonstrates the incredibly broad scope and opacity of section 57 (owing to its conceptual grounding in the tenuous and opaque notion of terrorism) the court in *Zafar* is able to distinguish mere possession from acts that instigate terrorism. Indeed, by emphasising that there should be a "direct connection" between the materials in question and terrorism, *Zafar* limits the potential overreaches of section 57. In this way the court shows that a degree of certainty can be ascertained in the face of legal undecidability by placing a restricted meaning on section 7. In this sense, *Zafar* holds out for an achievable potential or promise that suggests that section 57 can be interpreted beyond preventive means-oriented frames of deterrence and utility so as to make it more responsive to the heterogeneity and speech of the other.

A decision worth considering together with *Zafar* is *Siddique (Mohammed Atif) v. HM Advocate*.[477] Here, the appellant was charged with various offences under the Terrorism Act

[474] Ibid: Para 18 The extremist material in question included MSN communications, significant amounts of radical religious and political Islamic material and other material such as a USA military manual downloaded from the Internet. Further, as per Para 6-7, the crown the alleged that these articles were somehow connected to overthrowing the government in Afghanistan.
[475] Ibid Para 21
[476] Ibid Para 40
[477] [2010] HCJAC 7

2000 and a breach of the peace in terms of material found on his various computers and other electronic equipment and magazines found upon a search of his home. The key question here was whether or not the appellant who possessed documents and information had articles likely to aid terrorism purposes. The appellant himself did not deny possession of the relevant material; he however sought to argue that the trial judge had misdirected the jury. For his defence, it was submitted, *inter alia*, that the judge had misdirected the jury in assessing whether *Siddique's* possession of the articles was for a purpose connected with the commission, preparation or instigation of an act of terrorism. The appellant argued that some of the material (which enjoined the slaying of the "infidels") should not be given undue weight and scrutiny as it included material from the Koran, which was merely a personal historiography of Islamic culture, it offered no practical utility to anyone It therefore did not give rise to a reasonable suspicion under section 57, for a purpose connected with the commission, preparation or instigation of an act of terrorism. This recognition that the material in *Siddique* was merely of an iteration of difference and not "anticipatorily harmful" is crucial. Through its anticipation of the promise of justice to the heterogeneous other, it breaches normative frames of preventive justice that are grounded in deterrence and utility.[478]

Although the appeal in *Siddique*[479] was allowed, the decision highlights the difficulty in scope i.e., the opacity remoteness and unpredictable nature of the offence in question in relation. It shows that the statutory defence provided for in section 57 (2) could only properly operate on the strict application of the statutory language used in section 57 (1). Thus, there remains a serious likelihood of confusion; section 57 could be interpreted widely in situations where accurate directions are not given to the jury.

Put differently, given the broad scope of the section 57 offence, and indeed the section 58 offence, there always remains the inescapable possibility for section 57 to be applied exceedingly, in a manner disproportionate to the (perceived) recognition of the threat at hand. Thence, there remains an incalculable and unpredictable element of interpretational and contextual doubt and confusion that would still impact on day-to-day enforcement of the possession offences. That "at least 80%"[480] of the material that can be of use for terrorist purposes can be accessed from everyday sources like internet searches, books magazines and television broadcasts, maps, public data on state capabilities etc., without resorting to illegal methods,[481] underlines the incalculable and indeterminate scope that section 57 and section 58 have to grapple with. At the same time, it emphasises the extensive potentiality of incalculable public anxiety or the spectral nature of the terrorist threat at hand.

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[478] Ibid
[479] Ibid
[480] Donohue, L.K. Terrorist speech and the future of free expression *Cardozo L. Rev.* 27 (2005): 235
[481] Ibid

No doubt, from the perspective of law enforcement and the sovereign, there is a practical incentive for the possession offences to remain opaque and flexible so as to deal with these wide speech and terrorism outcomes especially in times of palpable insecurity. But nevertheless, in their desire to achieve flexibility in order to contain and overcome the indeterminate outcomes of speech and terrorism, section 57 and section 58 still remain undecidably and inescapably compromised or haunted by their very own inability to identify and distinguish legitimate possession from criminal possession. This is an irreconcilable tension.

Although section 57 and section 58 claim to hold a promise of containability and thus certainty, the mere fact that they are inextricably linked to other provisions outside the possession offences gives rise to uncertainty. This works in two ways. Firstly, it can lead to arbitrary and discriminatory applications of the law as it extends the powers of prevention available to law enforcement. Secondly, it can lead to a penumbra of legal uncertainty in the sense that individuals are unlikely to foreseeably know with sufficient precision how, or even whether or not their actions are proscribed by law.

Auxiliary legal provisions

The problem of opacity (with regard to incitement to terrorism offences) is further compounded by the auxiliary nature of the law in this area. This problem arises due to the fact that terrorism offences are conceptually tied to a number of pre-existing legal provisions ranging from: religiously aggravated abuse, to soliciting murder, to Malicious Communications to incitement to crime, incitement to racial hatred.[482]

Arguably, the auxiliary configuration of the law in this area (i.e., its susceptibility to accumulate offences that overlap, leak into, or bleed into each other) is in part driven by the fact that the threat presented by terrorism in the post-9/11 continuum is far too great (especially considering the high threat post-9/11-7/7 continuum and the scale and frequency of contemporary terrorist attacks, in the western world and in the UK).[483]

Although these auxiliary laws may be convenient from a securitisation and enforcement point of view, their very overcompensatory discretion and "intertextual" framework betrays them in the sense that it aesthetically extends them to an inaccessible play of opacities within

[482] Ibid

[483] Europol provides statistics, which show that there were 211 attacks in 2015, the highest since records began in 2006. Most arrests occurred in: France (424), Spain (187) and the UK (134). See: TeSat, Europol. EU terrorism situation and trend report (2016) Available at <https://www.europol.europa.eu/latest_publications/37> accessed 25/07/16

opacities, which incrementally makes processes of interpretation slippery, muddled, inconsistent and undecidable. In this sense, the very inter-textual structure of the law in this area begins to deconstruct itself in an autoimmune logic.[484] Which is to say, the very structure and letter of the law starts to hide within it what Derrida calls a "nonunifiable multiplicity of concepts".[485] As such, it becomes indeterminably extensive rendering it otiose, undecidable, and thus difficult to enforce consistently in practice.

To illustrate this conceptual and textual problematic, in the following section I trace how the offences of glorification and encouragement always already overlap with the offence of soliciting to murder.[486]

Incitement to terrorism and its overlaps with soliciting to murder

In *R v. El Faisal*,[487]a Jamaican national known as "Sheik Faisal" who had become an Islamic theologian and was living in the United Kingdom was convicted for creating a number of audiocassette recordings of an inflammatory nature that urged Muslims to wage war against and kill Jews, Christians, Americans, Hindus and other "non-believers". His recordings also condoned suicide bombings and the use of chemical weapons. El Faisal was thereby convicted under two pre-2006 statutory provisions i.e., of using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred contrary to section 18(1) of the 1986 Act and soliciting to murder, contrary to section 4 of the Offences Against the Person Act 1861.

In *R v. Abu Hamza,*[488] the appellant, who was previously an Imam at a mosque, had been convicted and charged for possessing threatening, abusive or insulting sound recordings with intent to stir up racial hatred, and possessing a document or record containing information of a kind likely to be useful to a person committing or preparing to commit an act of terrorism under section 58 of the Terrorism Act. In addition to this, he had also been convicted for soliciting to murder contrary to section 4 of the Offences against the Person Act 1861.

The facts in both *El Fasial* and *Abu Hamza* are similar, indeed, in both cases the offences arose out of speeches made by the appellants inciting their audiences to engage in *Jihad* and to kill those not of the Islamic faith. The following is an excerpt from one of El Faisal's statements:

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[484] The laws thus display an autoimmune logic (n.37) similar to the concept of the *pharmakon.* This means that when laws are instrumentalised for safeguarding, they present within them both a problem and a cure. They thus always already have the potential to worsen situations of securitisation.
[485] Derrida, *The Death Penalty*, p.40
[486] For purposes of scope, I focus on the offence of soliciting to murder.
[487] [2004] EWCA Crim 456
[488] [2006] EWCA Crim 2918

> The way forward can never be the ballot. The way forward is the bullet; we spread Islam by the Sword and so what, and today we are going to spread by the Kalashnikov and there is nothing you can do about it. Is there any peace treaty between us and Hindus and Indians? No, so you can go to India and if you see a Hindu walking down the road you are allowed to kill him and take his money.[489]

Arguably, the statements in *El Faisal* and *Abu Hamza* show that the appellants' offences could have conveniently fallen within the ambit of "glorification" or "encouragement" to terrorism under the 2006 Act or the possession offences under the 2000 Act. However, because the law on both glorification and encouragement wasn't clear, they were prosecuted under yet another auxiliary provision: soliciting to murder.

Even more strikingly, if we recall the decision in *R v. Umran Javed* and others[490], discussed above, it becomes evident that the offence of soliciting to murder and another public offence i.e., in this case, stirring racial hatred can be prosecuted concurrently. This yet again widens the potential ambit of the law and reintroduces gradients of inconsistency with respect to incitement to terrorism speech offences.

To emphasise the patchwork nature and the excessive, gratuitous, supplementary/ complementary of the offences in this area, it is important to briefly probe the offence of soliciting to murder under section 4 of the Offences Against the Person Act 1861. Section 4 of the 1861 Act provides:

> Whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable ... to imprisonment for life.[491]

A leading case in interpreting section 4 is the 1861 case of *R v. Most*[492] where Most who had published and circulated a publication of an article, written in German in a newspaper published in London, exulted the murder of the Emperor of Russia and commended it as an example to revolutionists throughout the world. The Court held that the publication and circulation of a newspaper article might be encouragement, or might endeavour to persuade

[489] [2004] EWCA Crim 456 Para 15
[490] [2007] EWCA Crim 2692
[491] Section 4, Offences Against the Person Act 1861
[492] (1881) 7 Q.B.D. 244

murder, within section 4 although it was not addressed to any person in particular. Huddleston B laid out the scope of the offence as follows:

> The largest words possible have been used—'solicit'—that is defined to be, to importune, to entreat, to implore, to ask, to attempt to try to obtain; *'encourage',* which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; 'persuade', which is to bring to any *particular opinion*, to influence by argument or expostulation, to inculcate by argument; 'endeavour', and then, as if there might be some class of cases that would not come within those words, the remarkable words are used, 'or shall propose to', that is to say, make merely a bare proposition, an offer for consideration It is to be a misdemeanour of a highly criminal character to solicit, to encourage, to persuade, or even to propose to any person to kill any other person, whether one of her Majesty's subjects or not….What was the intention of this Act? The intention was to declare the law and to protect people abroad from the attempts of regicides of this description, and therefore the largest possible words are used.[493]

The definition of the offence of "soliciting" in *Most* is thus suggestive of the fact that the offence of soliciting to murder overlaps with all other incitement to terrorism offences. Indeed, as Huddleston's words above show, soliciting to murder carries with it the criminal concepts of inchoate crime and the notions of ideological encouragement or glorification soliciting to murder. In other words, these offences all involve the urging or persuasion with words of one's audience to attack an individual or individuals before such an attack is done.
Yet again, rather than clarifying the meanings of incitement to terrorism, these offences use words that are inscrutable hence making incitement to terrorism fuzzy and self-inadequating and hence difficult to enforce consistently in practice.[494] To this end, "glorification" and "encouragement" exhibit an overarching monologic desire to contain the incalculable, which is also an aporetic formulation of the tension between singularity and incommensurability/ heterogeneity. However, this very "overdetermined" desire to contain the incalculable, which is also a desire of "self-presencing" that enacts the sovereign violence and monopoly of the force of law, is what stretches the text of these offences making them paradoxically incapable of effectively identifying, distinguishing, and apprehending the very crimes that they seek to contain.

In any event, ancillary incitement to terrorism provisions such as "glorification" and "encouragement" under the 2006 Act are arguably unnecessary. They only seem to exist to

[493] Ibid Para 258
[494] In such instances, the meaning of the law becomes enigmatic, neither present nor absent. See Goodrich, P. Legal Enigmas—Antonio de Nebrija, The Da Vinci Code and the Emendation of Law. *Oxford Journal of Legal Studies* 30, no. 1 (2010): 71-99

serve the sovereign with a mystical and symbolic reassurance of incalculable force against unanticipatable threats in our precarious historical present.[495] In fact, far from offering any functional use, the provisions under the 2006 Act are mirrored under an older body of criminal provisions ranging from public order offences, to the Offences against the Person Act 1861. And so, the offences of glorification and encouragement only compound the problem of legal interpretation by further confusing an already existing legal muddle or exception of inchoate crimes. Practically, this means that, in the moment of having to make a decision, those who interpret the law, or who enforce it would be confused as to which laws or which combinations of laws to apply and how they are supposed to interpret them.[496] In addition to the problematics of legal interpretation and enforcement, the undecidability of incitement to terrorism provisions also gives rise to underlying human rights concerns such as legal clarity and accessibility under article 7 of the Convention, concerns that I address more substantially in chapter four.

The section 58 defence under the 2000 Terrorism Act

Although the extensiveness of the offences under the 2000 Terrorism Act seem to be tipped largely in favour of the prosecution and law enforcement, it is worth noting that the Act has a defence that seeks to allow for a degree of individual rights protections and is worth touching on briefly. Section 58 provides a defence of reasonable excuse, which states that: "It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession".

This defence would suffice where a person felt that they had a valid reason for possessing such content. Such a defence would presumably be invoked when an individual is being investigated or questioned on matters surrounding terrorism.[497] Although the burden on the defence is evidential and has to be proven beyond reasonable doubt as was the case in *R v. G and R v J*,[498] (where it was held that it was necessary for the Crown to prove beyond reasonable doubt that the possession of information was for a terrorist purpose a defendant claimed that he had a reasonable excuse for possessing the relevant). Accordingly, one could argue that this defence is inherently fragile, owing to the fact that the prosecution needs to do no more than prove that the reasonable excuse put forward is untrue. Therefore, there is no need to go further and prove that the defendant's possession of the article was for a purpose

[495] Derrida, *Force of law*
[496] I show how this plays out in the context of Internet regulation in the next chapter.
[497] Sabir, R. UK's misguided terror laws: Criminalising the innocent: Increasing jail sentences for viewing terror content does not counter terrorism; it terrorises the innocent (Aljazeera.com 08/10/2017) available at: <https://www.aljazeera.com/indepth/opinion/uk-misguided-terror-laws-criminalising-innocent-171007103005102.html>
[498] [2009] UKHL 13

connected with terrorism.[499] If a defendant suggests that his reasonable excuse for possession of say, an article on the internet as per academic research, the prosecution must only show that the defendants defence is untrue although in actual sense such articles in possession could serve more than one purpose.[500]

To illustrate this point, I turn to the decision in *R v. Amjad.*[501] Here, the defendant was found in possession of a number of anti-western publications and a notebook containing a handwritten list of fitness exercises for a *Mujahidin* fighter. Police internet searches revealed a similar list in a document on two websites attributed to a person believed to be a terrorist engaged in *Jihad*. The defendant was charged with possession of a record containing information likely to be useful to a person committing or preparing an act of terrorism. At issue was whether documents were part of a normal fitness regime or if they were part of a fitness regime to further acts of terrorism, either by the defendant himself or someone else. The Crown, in this case did not have to furnish evidence to establish the origins of authorship of this document in order to show whether or not they were of a "terrorist" use. The court was of the view that the possession was identical to that attributed to terrorists. The defendant was convicted without proof and even without a statement from an expert witness. He consequently appealed on the basis that the internet material was "anonymous hearsay" without a statutory basis.

I am not concerned in this particular instance about whether or not the documents in *Amjad* were likely to cause terrorism or not. Rather, I am more concerned about the lowering of the burden of proof under section 58. The burden of proof here is low and it seems to go against the stricter requirement of proof beyond reasonable doubt under conventional criminal law standards. In such a case, it can simply be achieved by calling evidence to show that the article in question was not reasonably for academic purposes. Thence, section 58 potentially leaves room for pre-conceptions and presuppositions meaning that there would be no need to prove beyond reasonable doubt that the real reason for possessing the article in question was for a purpose connected with an act of terrorism.

Conclusion

This chapter started by looking at the wide scope of offences that proscribe incitement to terrorism. It suggested that the notion of "incitement" and indeed "incitement to terrorism" and

[499] Ibid Para 55
[500] See e.g. *R v. Omar Altimini* [2008] EWCA Crim 2829 where the Court of Appeal held that materials held on a hard drive by a terrorist "sleeper" (i.e. a suspected individual not actively engaged in terrorist activities) contravened s.57, notwithstanding that his immediate purpose was storing them.
[501] [2017] 1 Cr. App. R. 22

is grounded in inchoate crimes that seek to prevent crimes before they occur. It then looked more closely at the notions of glorification and encouragement under the 2006 Act and found that these offences were also widely conceptually drawn. It further showed that these offences overlapped with other auxiliary offences e.g., the pre-existing public order offences of soliciting to murder and stirring racial hatred. Understandably, from the point of view of the sovereign, this flexibility is convenient because it provides the state a wide scope to proactively and preemptively combat terrorist crimes. In other words, this substantially broad formulation of speech crimes is important for the state because it acts as a necessary security cushion especially in the face of incalculable terrorism in the post-9/11-7/7 continuum. The issue with this however, is that the incitement to terrorism offences themselves self-deconstruct. They function on "*a scale without scales"*[502] through ambiguous and vague terms, hiding a "nonunifiable multiplicity of concepts"[503] contradictions and questions. Through interminable aporetic formulations their singular structure of containment fails to limit speech crime pertaining to terrorism and instead in a paradoxical movement becomes supplanted by the very unidentifiable, incalculable and indistinguishable logics of the speech and harms it seeks to contain. Inasmuch as this problem of the undecidability of incitement to terrorism offences is a structural/ aporetic problem of interpretation, it is also, as my discussion in this chapter unravelled, an exposition of important ethical concerns with regard to how the undecidable criminal provisions engender an element of unforeseeability within incitement to terrorism laws. Put differently, the undecidability of the law in this area does not only lead to a self-inadequation of law but it also simultaneously[504] consolidates the force of law by broadening the scope of terrorist related crimes spectrally, "further up the field"[505] into unforeseeable contexts. As cases like *Siddique*, *Zafar, Samina Hussain Malik,* and *Chambers* have demonstrated, such an over-determined calculated, preventive notion of harm that prioritizes utility and deterrence under preventive justice and draws us into "pre-inchoate territory"[506] that sets dangerous precedents wherein individuals are punished for what they think even when it is not tangential to violence or harm. This in turn is likely to criminalise reasonably remote iterations of speech such as jokes in bad taste[507] or critical political commentary on social media that is far removed from any measure of harm.

At any rate, what the overall legal-regulatory overcompensation of incitement to terrorism offences suggests in this chapter is that the iterability and heterogeneity of speech haunts the monologic text and conceptual structure of incitement to terrorism laws, inescapably. This draws us to the fact that perhaps, the only way that law can deal with such heterogeneous

[502] Derrida, *The Death Penalty*, p.119
[503] n.485
[504] All these textual and conceptual tensions happen in different directions and at the same time.
[505] Anderson, D. "Shielding the Compass: How to Fight Terrorism Without Defeating the Law '(2013)." EHRLR 3: 233-246
[506] Ashworth, A, and Zedner, L "Prevention and criminalization: justifications and limits." New Criminal Law Review: In International and Interdisciplinary Journal 15, no. 4 (2012): 542-571
[507] Duffy, and Pitcher, *Inciting Terrorism? p.343*

speech is only through over-determined liberal utilitarian calculations (expressed through ethically fraught and conjectural terms like “glorification”, “encouragement” and “likelihood”) of what such speech constitutes. The observations in this chapter are not a *tout court* rejection of law. Rather, they highlight the fact that an irresolvable ethical impossibility operates within the very structure of law. A way out then may be a kind of statutory interpretation that betrays current frames of “preventive justice” within criminal law that are geared towards deterrence and utility and instead works towards a kind of incalculable/unanticipatable justice that embraces the alterity and heterogeneity of the other. I show how such a kind of justice could be achieved using the notion of the ghost dance in chapter five.

Chapter 3

Of enforcement and regulation: some inescapable conundrums

Introduction

In talking about technology, this chapter focuses on what I call online communication technologies, in particular the Internet and its different private and public gatekeepers or Internet Service Providers (ISPs) such as social networking platforms and law enforcement bodies. More specifically in this chapter, I probe how the domestic and international legal framework of incitement to terrorism are transposed onto contemporary enforcement and regulatory practices (such as filtering and blocking) in order to address hauntological tensions like undecidability therein.

Technological regulatory frameworks

Internet gatekeepers

I use the term gatekeepers drawing from Barzilai-Nahon's Network Gatekeeper Theory (NGT).[508] Under NGT, gatekeeping is a binary process involving the gatekeeper and gated, it is concerned with the movement of information through gates, and the use of a gatekeeping process and mechanisms. Generally gatekeepers do one or more of the following: selecting, channelling, shaping, manipulating and deleting information.[509]

Kraakman defines gatekeepers as: 1) those who control access to information by limiting access to or restricting the scope of information; and 2) opinion leaders, those who facilitate "innovate, change communication channels, carry out or broker intermediary functions".[510] Internet gatekeepers therefore include as Laidlaw[511] has suggested, search engines, ISP's, high traffic social networking sites user-generated uploading-content sites and portal providers,[512] —all these "gatekeepers"/ "doorkeepers" protect the endpoints of the network

[508] Barzilai-Nahon, K. Gatekeeping: A critical review. *Annual Review of Information Science and Technology* 43, no. 1 (2009): 1-79
[509] Ibid
[510] Kraakman, R.H. Gatekeepers: the anatomy of a third-party enforcement strategy." *Journal of Law, Economics, & Organization* 2, no. 1 (1986): 53-104
[511] Laidlaw, E. A Framework for Identifying Internet Information Gatekeepers, *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010
[512] Ibid

and constitute what Zittrain calls “points of control” of content in cyberspace.[513] For the purposes of this discussion the notions of “gatekeeping”, or “regulatory duties and roles” will involve the managing and taking down of terrorist related content and its filtering/moderation in cyberspace.

Self-regulation

Self-regulation can be defined as the process by which private gatekeepers collectively administer solutions to address citizens, consumer issues, or other regulatory objectives, without formal oversight from government or regulator.[514] It involves the decentering of regulation from the public sphere to the private sphere.[515] Generally, the UK has run on a self-regulatory system of the Internet, but state regulation is increasingly encroaching on this system of self-regulation hence forming a system of co-regulation.[516] This in simplified terms means that the economic /market liberalism of gatekeepers makes them reluctant to cooperate with state or public regulators especially in scenarios where the gatekeepers have objectives and concerns that differ from those of the state. Many of these objectives /concerns are business orientated (such as protecting the data privacy of Internet end-users) others are jurisdictional and practical.[517] These self-regulatory interests are to a great extent facilitated by the European Union Directive 2000/31 on electronic commerce, which exempts gatekeepers from certain monitoring liabilities and obligations, discussed later. Nonetheless, some commentators are of the view that on the great scale of things, a pure self-regulation” does not exist anymore (and has perhaps never truly existed), self-regulation only exists when viewed from the prism of internal self-regulation which includes management of platforms and the taking down of viruses and spam. Thus private gatekeepers always already manage/self regulate their own platforms in a strictly “devolved”[518]/ “unilateral” manner.

That being said, it is should be emphasised that gatekeepers still receive a high level of external influence from the government and public authorities and at least cooperate with them to a certain degree. For instance, art 16 of Directive 2000/31 and the EU action plan for

[513] Zittrain, J. Internet points of control *BCL Rev.* 44 (2002): 653
[514] Ofcom, Statement: Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation (10/12/2008) pg. 2 available at: <https://www.ofcom.org.uk/__data/assets/pdf_file/0019/46144/statement.pdf>
[515] Black, J. Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory World. *Current legal problems* 54, no. 1 (2001): 103
[516] Marsden, C, T. "Internet co-regulation and constitutionalism: Towards European judicial review." *International Review of Law, Computers & Technology* 26, no. 2-3 (2012): 211-228
[517] Because “terrorism” is culturally and contextually fluid gatekeepers face a regulatory and in some cases a diplomatic conundrum when regulating it.
[518] European Digital Rights Initiative The Slide from ‘Self-Regulation’ to ‘Corporate Censorship’ (2011) p.4 available at: < https://edri.org/wp-content/uploads/2010/01/selfregualation_paper_20110925_web.pdf >

safer Internet use emphasise the need for co-ordination and co-operation across Member States between public law enforcement agencies and the private internet industry[519] and the need for some form of "cooperation" between Internet intermediaries and governments for public policy objectives and interests. As Kreimer puts it, "the Internet is not dyadic it is linked by a complex chain of connections".[520] We are therefore at the tipping point of self-regulation, waiting at that blurry converging aperture where self-regulation and co- regulation are inseparable and indistinguishable.[521]

The invisible handshake: Self-regulation as co-regulation

It is incorrect to think that private gatekeepers do not have securitisation monitoring and regulation obligations. As the 2013 Snowden Revelations show, there is indeed an extra-legal[522] "shadow of control"[523] from the government and law enforcement (who can be thought of as public gatekeepers) that looms, compelling private Internet gatekeepers to monitor activity and to take down/filter illegal content/ disclose information about their users /subscribers. This shadow of control involves the government and law enforcement providing ISPs with a blacklist of illegal content. Thus, a governmental/public gatekeeper like the Counter Terrorism Internet Referral Unit[524] provides private gatekeepers and intermediaries with a blacklist of extremist content to be filtered or blocked from the Internet. At the same time, gatekeepers, who may in certain situations not qualify as intermediaries, can (under their own self-regulatory remit)[525] proscribe content that they deem to be extremist. Thus, regulatory roles from both a self-regulatory and co-regulatory point of view are not clearly defined but are freely shifting. What is clear nonetheless, is that both forms of regulation and gatekeeping have a unified intention of censoring and blocking content that incites terrorism however undecidable this may be. This in turn creates a considerable variance of filtering and blocking procedures practices and processes across gatekeeping in general. This fragmented heterogeneity in regulation standards across different private/public gatekeepers[526] and

[519] European Parliament, Multiannual Community Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, Official Journal of the European Communities, L336 (1999) 1
[520] Kreimer, S.F. Censorship by proxy: the first amendment, Internet intermediaries, and the problem of the weakest link *U. Pa. L. Rev.* 155 (2006): 11
[521] Ibid
[522] i.e., obligations not in accordance with promulgated laws.
[523] Edwards, A. The moderator as an emerging democratic intermediary: The role of the moderator in Internet discussions about public issues, Information (Polity 2002) 7:1, 3–20
[524] I discuss the Counter Terrorism Internet Referral Unit in greater detail later in this chapter
[525] This is done usually by way of platform based community standards or terms of use.
[526] There is no one single gatekeeper but a complex architecture of gatekeepers from online intermediaries and social networking platforms such as Facebook and Twitter to law enforcement to intelligence agencies.

indeed jurisdictions[527] (engenders regulatory variances, divergences or opacities) and has implications for human rights safeguards such as accountability, accessibility, transparency and proportionality.[528]

What is more, the lack of clarity in how to classify ISPs (i.e., in regard to whether they play a private or pubic gatekeeping role) means that there is a potential limit with respect to their responsibility insofar as human rights are concerned.[529] In the UK, the HRA restricts liability of Human rights violations on the actions of "public authorities".

Section 6 of the Human Rights Acts states that: "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". According to section 6(3)(b) a "public authority" is any person whose functions are of a public nature, and section (6)(5) notes that, "in relation to a particular act, a person is not a public authority by virtue of only section 3(b) if the nature of the act is private".

Taken together, these two subsections provide that any person (or body) whose functions are of a public nature will be a public authority, other than in relation to those particular acts, which are of a private nature. These provisions allow for the requirements of the HRA to be enforced against private bodies in cases where they are performing "functions of a public nature". The activities of ISPs to filter or block content in order to protect national security could be read as actions of a public nature. Indeed, one could argue that the convergence of take down requirements with intelligence gathering and surveillance cements the status of ISPs as bodies serving a public function.

This concurrent private-public fusion of personality, what Birnhack and Elkin-Koren call the "invisible handshake"[530] between public and private gatekeepers complicates the classification of ISPs and has further repercussions for human rights compliance and accountability. Thus, an Internet intermediary could flexibly engage its private status to exempt itself from onerous human rights obligations. This private status is useful in a co-regulatory context because it can be used as a loophole or by public authorities such as governments to bypass human rights compliance and accountability such as adequate judicial oversight and the justification of censorship according to human rights standards in a court of law. At any rate, by giving private companies an accompanying public role in the normal business operations the statute obfuscates the private status of such companies and creates barriers with regard to administrative law, human rights compliance and liability.

[527] See Appendix, *Interview transcript A: with a former Facebook Content moderator,* p.266
[528] I explore these human rights safeguards in chapter four.
[529] A discussion on the status and classification and role of ISPs as private bodies or public bodies is beyond the scope of this thesis.
[530] Birnhack, M.D. & Elkin-Koren, N. The invisible handshake: The re-emergence of the state in the digital environment." *Va. JL & Tech.* 8 (2003): 1

The rationale of such co-regulatory arrangements is understandable. Indeed, given the transnational character of the Internet and the divergence in different regulatory models globally it would be irrational to grant sole responsibility for internet governance to the public bodies or governments as they would not be competent enough to solve internet related crime in real time. Outsourcing and sharing this responsibility through co-regulation with private ISPs is therefore considered to be reasonably pragmatic. Co-regulation nevertheless has several drawbacks in so far as legal accountability and human rights compliance are concerned — the most clearest one being that it tends to privilege efficiency over due process. Some of these drawbacks are unavoidable due to the manifestation of divergences in legal-jurisdictional and criminal standards online.

Furthermore, inescapable divergences in cross-jurisdictional definitional interpretations in the context of terrorism and extremism recur making legal accountability and human rights and legal compliance intractable. Yet again, the blame or liability is usually placed on private bodies but their standing as private bodies absolves them from human rights culpability.[531] This leaves us at a crossroads. Either way, human rights obligations are likely to be violated. Accountability and redress are also likely to be less than ideal. At any rate, "private power can jeopardise the exercise and the very core of individuals' prerogatives as much as public power".[532]

Of course, in relation to investigatory powers, one must note that it is still the state which is responsible for human rights obligations. But, when the state outsources intelligence gathering and moderation to private companies, things become more problematic in that there are no oversight or accountability safeguards as these are only based on the (usually ambigious) standards of the outsourced private ISP's in question.

As things stand, whether ISPs are classified as public or private entities doesn't seem to change the fact that they play a central gatekeeping role in the execution of Notice and Take down procedures. The more pressing issue here is not the nature or meta-structure of regulation but how regulation amongst the different gatekeepers is achieved. Accordingly, it is essential for us to further probe the ways in which NTD procedures are carried out. In the subsequent sections I examine filtering and blocking in particular to illustrate how even more perplexing, indeterminable and hauntological the regulation and enforcement of incitement to terrorism online is.

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[531] Weissbrodt, D, and Kruger, M. *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*. American journal of international law 97, no. 4 (2003): 901-922

[532] Stalla-Bourdillon, S. The flip side of ISP's liability regimes: The ambiguous protection of fundamental rights and liberties in private digital spaces. *Computer Law & Security Review* 26, no. 5 (2010): 492-501

How online regulation works: Filtering and blocking

The terms “filtering” and “blocking” are interchangeable. The major difference between filtering and blocking is their “scale and perspective”.[533]Filtering on the one hand is commonly associated with the use of technology that block pages by reference to certain characteristics, such as traffic patterns, protocols or keywords, images on the basis of their perceived connection to illegal content, it is micro.[534] Blocking on the other hand can be thought of in macro terms as it refers to preventing access to specific websites, domains, IP addresses, protocols or services included on a blacklist. There are a number of different techniques that ISPs adopt to block a target website or online location.[535] The more commonly used blocking techniques have been highlighted in *Cartier International AG v. British Sky Broadcasting Ltd,* a decision which was concerned with the appeals by five UK ISPs (Sky, BT, EE, TalkTalk and Virgin) collectively against orders which required them to block or attempt to block access by their customers to certain websites which were advertising and selling counterfeit goods.[536] I call them macro-blocking techniques. Generally, they include the following:[537] DNS name blocking; IP address blocking using routers; DPI-based URL blocking; and Two-stage systems.[538]

Although all the aforementioned macro systems of blocking are relevant, for purposes of scope, this chapter shall focus on micro-filtering technologies. The two micro-filtering technologies I explore are: 1) keyword filtering through natural language processing techniques and 2) the blacklisting of an exploration of how these algorithmic tools and technologies work. In looking at these tools, I emphasise that they are used for textual analytic functions i.e., they reroute, edit and censor or cancel out harmful speech. Thus, my discussion of them always points back to the uncanny complications of speech i.e., dissemination, *iterability,* and *destinerrance* that I have discussed in chapter one of this thesis.

1) Textual filtering: Natural Language Processing (NLP) technologies

[533] Barnes, R. et al. "Technical Considerations for Internet Service Blocking and Filtering." (Internet Architecture Board, 2016) p.3-5 available at: < https://tools.ietf.org/id/draft-iab-filtering-considerations-03.html >
[534] Ibid
[535] Ibid
[536] [2014] EWHC 3354
[537] Ibid
[538] Ibid

Natural language Processing (NLP) techniques work by scrutinising the meanings of words online. They scrutinise euphemisms, references, code words and colloquialisms online to predict their proximity to crime and its commission. NLP techniques associate and identify extracted words and sentiments to specific topics using statistical extraction and retrieval algorithms. By looking at documents as a bag of words, each word in each document is assigned a score reflecting the word's importance in this document.[539] The document is then represented by a vector whose coordinates correspond to the words it contains with each coordinate having the word's score as its value. A similarity of vectors denotes a similarity of documents. After the data are identified, a method of elimination known as hashing is applied. Hashing is a mathematical operation that takes chains of data of arbitrary length, like a video clip or string of DNA, and assigns it a specific value of a fixed length, known as a hash. The same files or DNA strings will be given the same hash, allowing computers to sequentially search, segment and classify duplicates.[540] In this process of sequential searching and classification, if blacklisted keywords are detected, RST injection packets[541] are used to disrupt or disconnect on-going communications and sometimes also temporarily block the IP address from connecting. [542] At this point, access to the documents in question is prevented.

An example of where NLP techniques have been used is Impero Education Pro.[543] Impero is in an internet monitoring software used in over 40% of secondary schools in the UK and developed in response to the Prevent strategy and the duty of care placed on schools under s 26 of the 2015 Counterterrorism and Security Act which requires "specified authorities" to ensure that children are "safe from terrorist and extremist material when accessing the Internet in school, including by establishing appropriate levels of *filtering*".

Working within an analytic and calculative logic that aims to detect, identify and apprehend extremists and potentially extremist students before they are drawn into terrorism, Impero comes with a radicalisation library analogous to a search index of keyword maps that sifts through documents, sentences or phrases that contain those keywords. This library or glossary contains a list of over 1000 phrases words or wordings that filter the Internet to indicate whether a student is proactively seeking extremist content.[544]

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[539] Jain, A., et al. Data clustering: a review. *ACM computing surveys (CSUR)* 31, no. 3 (1999): 264-323
[540] Ibid
[541] Packet injection, generally, refers to an interference technique that spoofs or disrupts an established traffic stream. Packets are normally used to let one side of Transmission Control Protocol (or network connection) know that the other side has stopped sending information, and thus the receiver should close the connection.
[542] Ibid
[543] Impero's anti-terrorism, extremism and radicalisation keyword library, as part of Impero Education Pro see <https://www.imperosoftware.com/zh-tw/resources/videos/imperos-anti-terrorism-extremism-and-radicalisation-keyword-libraries-explained/> accessed (05/06/19)
[544] Ibid

The list includes acronyms and neologisms such as: YODO i.e. (You only Die Once) words which also feature noticeably in different contexts such as Dying Awareness Week. Thus, there are credible fears that Impero can unwittingly catch some students out and proscribe innocuous content.[545] And although Impero has emphasised that: 1) its software is not about catching students out but about safeguarding, not criminalising or punishing and 2); and that its software enables school staff to make a human judgement call — by capturing the content in question as a time stamped screenshot or video recording logged against the students identity —[546] there are some seemingly undecidable tensions concerning the proportionality of the software.

Firstly, perhaps most importantly, there is a lack of clarity on the meanings of words, word combinations and terms in Impero's radicalisation library or glossary. This inescapable lack of clarity creates ambiguity that ultimately prevents Internet users from knowing what content is illegal or not so that they can regulate their conduct appropriately. The guidance policy of the Prevent strategy provides some hints (but no clarifications) on the type of words or word combinations that the software may entail:

> The authorities specified …are subject to the duty to have due regard to the need to prevent people from being drawn into terrorism. Being drawn into terrorism includes *not just violent extremism but also non-violent extremism*,[547] which can create an atmosphere conducive to terrorism and can popularise *views which terrorists exploit*.[548]

However, the Prevent Duty guidance comes with definitional difficulties, which are then transposed into Impero, creating problems with regard to scope and certainty. The term "non-violent extremism" for example presents blind spots that deserve closer inspection. "Non-violent extremism" is an amalgam of two notions: nonviolence and extremism (with extremism being defined as: "vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs)".[549] Non-violence, which refers to ideological beliefs that are conducive to

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[545] Ibid See also Richardson, H. Software to spot extremism among pupils BBC (04/06/2015) available at: <http://www.bbc.co.uk/news/education-32996327 > and Impero, countering radicalisation in schools (22/06/2015) available at: < https://www.imperosoftware.co.uk/countering-radicalisation-in-schools/>

[546] Ibid

[547] Prevent duty guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism. Available at: < http://www.legislation.gov.uk/ukdsi/2015/9780111133309/pdfs/ukdsiod_9780111133309_en.pdf > The initial Prevent strategy dealt with violent extremism but it was explicitly changed in 2011 to encompass 'non-violent extremism',

[548] Section 26 of the Counter-Terrorism and Security Act 2015

[549] Prevent duty guidance, p.107

terrorism yet without terrorism, is a very vague concept not only by virtue of it simply being a legal-juridical concept susceptible to iterable non-closure, but also vague but because it is also aligned to the already indeterminable concepts of terrorism and violence. The marriage of both terms into the notion of "non-violent extremism" therefore creates an expansive definitional scope that is not only conceptually contestable but also open to an iterable interaction with heterogeneous speech that cannot be contained.

This question becomes predictably more complicated if we consider the fact that the software just like the humans who design it is bound to have subjective and alternating viewpoints about notions like "British values", "extremism", "terrorism", and "radicalisation". And even if we trusted software and algorithms to be objective or even more objective than humans, the reality is that humans craft these algorithms and software and they "embed in them all sorts of biases and perspectives"[550] that are read usually "from the perspective of those [i.e., the monolithic whole] who stand to lose the most."[551]

2) Blacklisting of audio-visual images: Digital fingerprinting techniques

In addition to language processing techniques, it is important to examine the workings of digital fingerprinting in regulating speech. In practice, digital fingerprinting works in a manner similar to NLP techniques. It enables Internet platforms, search engines and networking sites to scan online content, classify it in categories and compile it in a database of unique files i.e., a hash that allows for sequential searches and matches. And although the practice of digital fingerprinting within the context of terrorism is known to be prevalent (e.g., it has been reported that Facebook, Microsoft, Twitter and YouTube have collaborative digital fingerprinting databases for identifying the most extreme and egregious terrorist images),[552] precise details concerning how digital fingerprinting is done in the context of terrorism still remain unclear. What is known is to us is that the government works with the filtering industry in an on-going process that involves a bio-diverse spectrum of private gatekeepers (e.g., social networking platforms who then communicate with the Home Office and law enforcement) so as to identify unlawful material that incites terrorism under the Terrorism Act 2006 and also under Prevent.[553]

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[550] Dormehl, L. From Algorithms Are Great and All, But They Can Also Ruin Lives, Wired (19/11/2014) available at: <https://www.wired.com/2014/11/algorithms-great-can-also-ruin-lives/> accessed 20/02/2017

[551] Beatty, D. The Ultimate Rule of Law (New York: Oxford University Press, 2004) p.160

[552] Perez, S. Facebook, Microsoft, Twitter and YouTube collaborate to remove terrorist content from their services (12/05/2016) Available at: < https://techcrunch.com/2016/12/05/facebook-microsoft-twitter-and-youtube-collaborate-to-remove-terrorist-content-from-their-services/?guccounter=1>

[553] The Prevent strategy is used to combat content that causes radicalisation and extremism

For a more "forensic" analysis of digital fingerprinting, it is worth exploring digital fingerprinting in the context of illegal child sexual imagery. Briefly, in my discussion of digital fingerprinting in the next few paragraphs I should reiterate (following my theoretical discussion of speech in chapter one) that digital images online are signifiers of text and speech and of language on the whole. Thus, filtering deals not only with written or spoken texts as "speech" but also with images as "speech".

In the UK, the "Internet Watch Foundation", an independent non-for profit organisation, principally regulates sexual imagery. The IWF (and online social platform Twitter),[554] which uses Microsoft's PhotoDNA technology to regulate illegal "child abuse" images. PhotoDNA scans content, uploads it onto the cloud then tags it with a "hash" that is then connected to other digital databases held by Interpol, and other law enforcement agencies around the world,[555] so that the system flags duplicate copies of the images found elsewhere in cyberspace to make proactive monitoring of content possible.[556] The monitoring is then let to the IWF in conjunction with other Internet intermediaries and law enforcement that then work towards the blacklisting and blocking of the content in question.[557] There are of course concerns with regard to the IWF blacklisting model. That said, with the IWF, these concerns are mitigated to a degree because the IWF uses specially trained moderators who follow UK criminal court sentencing guidelines on "child sexual abuse", —an arguably more clearly definable category of speech. Moreover, the IWF has other processes for intervention like monitoring and transparency reports that are reviewed by the police, the public and other stake holders on their website.

Contrastingly, the situation is evidently less transparent and clear in the context of terrorist blacklisting because the guidelines on blacklisting terrorism are secretive. Questions arise thus: 1) who makes the decision on the types of material that should be blacklisted, is it the police, an intelligence agency, a judge, the content moderators, or the Internet intermediaries? 2) On what criteria or guidelines are such blacklists made considering the very definitional and cross jurisdictional instabilities of terms like "terrorism", "violence", "nonviolence", "radicalisation" and "extremism"? and 3); What happens with terrorist content that is blacklisted, is it just taken-down or are there prosecutions?

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[554] Arthur, C. Twitter to introduce Photo DNA system to block child abuse images, The Guardian (22/07/2013) available at: < https://www.theguardian.com/technology/2013/jul/22/twitter-photodna-child-abuse>

[555] Although beyond the scope of this thesis, it would be interesting to explore what it means for the police to reproduce and store hashes of traumatic content on the cloud. Arguably, the very process of storing these hashes replicates a haunted archive wherein regulators reproduce and disseminate the very thing they attempt to exclude.

[556] See: IWF, image Hash List available at: <https://www.iwf.org.uk/our-services/hash-list> accessed 05/06/18

[557] One should distinguish the censorship process of the IWF from that of the CTIRU. For the IWF, the process is monitored and transparent and not just carried out by law enforcement in secret.

Furthermore, the most significant concern about digital fingerprinting is its inherent fallibility. Although many cryptographic hash functions tend to guarantee that two distinct inputs (i.e., files) will not produce the same hash value, they also have many functional shortcomings.[558] As discussed earlier, altering the original file, for example through shortening or excerpting it, re-encoding it, and so forth, invariably alters the hash value. This means that modified i.e. re-encoded, retitled shortened files may avoid being recognised for the reason that they contain a different hash value from the original hash value, in the database of hashes, which identifies them. A search for the hash will not always match with them, hence problematising their detection. Additionally, it is worth pointing out that with fingerprinting, the bits inside the media file (which can also change with alteration and editing) are never properly scrutinised. DNA technology only looks at the components of the media in question itself rather than the bits encoded in the entire file itself.[559] Therefore, a lot of content can go undetected undermining the very process of identification and detection.[560] Ultimately, because Microsoft's Photo DNA technology (like all filtering technologies) relies on prior examining, analysing and identifying aspects of matched target files against hash values its efficiency and accuracy can be compromised through subsequent manipulation of files and their duplicates to alter hashes through a series of steps like re-encoding, shortening, re-editing and re-titling.[561]

It is also worth noting that technological tools like encryption stymie sophisticated fingerprinting technology. When a file is encrypted, the entire content of the message is concealed making it impossible for the regulators to gain access to information stored electronically in order to analyse the content of the file for specific patterns. And although it is possible to encrypt a file's content without encrypting the metadata, such a method would be subject to the limitations of metadata such as incorrect matches.

This scenario has been played out more markedly in the aftermath of the 2015 ISIS-inspired terror attack in San Bernardino, California. Following this attack, the U.S. Federal Bureau of Investigation (FBI) attempted to retrieve some information from a smartphone used by one of the alleged terrorists.[562] The phone, an iPhone, was cryptographically protected by encryption security measures pre-installed by Apple. The problem here from a point of view of

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[558] Engstrom, E. & Feamster, N. The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools, Engine (March 2017) available at: < https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf >

[559] Ibid

[560] Ibid

[561] Ibid

[562] Order Compelling Apple Inc to assist agents in search: In *re* The matter of the search of an Apple iPhone seized during the execution of a search warrant on a black Lexus IS300, California license plate 35KGD203 No. ED 15-0451M (C.D. Cal.16, 02, 2016) available at: <https://assets.documentcloud.org/documents/2714005/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf accessed 19/05/2018

regulation/enforcement was that the FBI was unable to break through Apple's security barriers, as these consisted of a two-step verification/public-key encryption system. The iPhone needed to be unlocked with a personal code only known by the user, and if the FBI attempted a "brute force" attack (i.e., where software is used to randomly enter numbers until a right combination of digits is found) Apple's inbuilt security software would self-destruct deleting all the contents of the phone after 10 failed attempts.[563]Apple declined to aid the FBI in breaking the encryption code. Consequently, the FBI issued Apple with a court order in order to force Apple to comply.[564] By associating code with expression and speech in an American jurisprudential sense, Apple argued that it was unconstitutional for the FBI to compel them to unlock the phone as the First Amendment protects speech. Further, Apple claimed that they could not themselves break into iPhones without changing their entire approach to encryption and that doing so would potentially compromise the personal data of their customers.[565]

Although eventually the FBI found a third-party provider that was able to hack into the iPhone in question, the trajectory of this case suggests that encryption generally complicates and encumbers enforcement and regulation processes of speech. The problem of encryption or "the going dark problem"[566] is a huge issue for law enforcement, or is claimed by them to be a huge issue anyway. It is not just limited to the well-publicised Apple FBI iPhone case but it something that they probably encounter on a day-to-day basis. Indeed, today, platforms that use end-to-end encryption are the legion and they provide terrorist groups with a wealth of communication options that are usually free and accessible to use and download.[567] Hence, the options to disseminate extremist content cryptographically without it being intercepted become divergent, incalculable, and uncontainable especially if we start to consider smaller less popular social networking platforms beyond the major ones like Facebook, Twitter, WhatsApp, Google and YouTube. All this auto-proliferation of content arguably makes the regulation of online communication technologies undecidable.

In fact, in order for the predictive algorithms to be more accurate (although I doubt that this is possible) they need masses of data of alternating variables to be fed/input into their main database systems. In determining what terrorist or extremist imagery looks like (a very complex hyper-subjective determination that needs an intricate situational reading of socio-

[563] Zetter, K. Magistrate orders Apple to help FBI hack San Bernardino shooter's phone
[564] Ibid
[565] Cook, T.A. Message to Our Customers, APPLE (16/ 02/2016) available at: <http://www.apple.com/customer-letter/ > (accessed 18/05/18)
[566] Traylor, J. M. Shedding Light on the Going Dark Problem and the Encryption Debate. U. Mich. JL Reform 50 (2016): p.489
[567] Consider the example of Telegram, a free encrypted messaging social networking application, which was popular with Daesh. Smith, L. Messaging app Telegram Centrepiece of IS Social Media Strategy (BBC News, 05/06/17) available at: < https://www.bbc.co.uk/news/technology-39743252> accessed 02/05/19

political settings) the database will need to have a substantial cache or profile of terrorist speech and in contrast a substantial cache of non-terrorist speech. In most situations however, the databases have missing and incomplete data (because of the very unpredictable, interminable and ungraspable nature of terrorism itself) or they will have data mostly corresponding to one variable hence widening the probability for inaccuracy.[568] Further, a conceptual-regulatory paradox (*différance*) can be highlighted here in the sense that these database systems require a substantial cache of least terrorist speech to function. Thus not only does the exclusion not succeed but it also demands and requires that which it excludes (in an autoimmunary fashion) in order to function.

Because automated filtering technologies depend on having a reference database for extremist content (such as matching fingerprints or hashes), such a database is only practicable if accurate fingerprints/hashes of content are compiled within the database in the first place.

Yet again, the hyper-subjective determination of what terrorist/extremist speech entails returns us to the complicated notion of hauntology and its susceptibility to blur realities or mislead. This consequently raises questions as to whether the databases on which filtering tools function are suffused with false and misleading identifications where the reference hash or fingerprint does not in reality correspond to the content it purportedly identifies. Moreover, due to the impossibility of adequate human-juridical-ethical intervention, filtering tools are likely to wrongly classify and distinguish content leading to an influx of misleading data and a widening of the margins of error.

Inasmuch as some advocates of AI and cybersecurity believe that these false positives can be disambiguated or reduced drastically (almost to the point of greater accuracy,[569] or even perfection), I doubt that such processes can or could ever possibly be perfected accurately or even be "well accounted" for considering their sheer quantity. Realistically, in my opinion we cannot correct the uncanny. Which is to say, false positives in these circumstances are an inescapable by-product or consequence of the different on-going relational negotiations, and the rupture and tensions in, with, beside and between language writing and speech.

It is perhaps for this reason that examples of "false positives" i.e., situations where seemingly harmless content is wrongly censored, where content wrongly stays up when it should be taken down and, where technological tools and software virally mutate and "auto-destruct" our

[568] Prabhakar, M. Garcia-Sanchez, R. & Casimir, D. "Development and Optimization of Machine Learning Algorithms and Models of Relevance to START Databases," Report to the Office of University Programs, Science and Technology Directorate, U.S. Department of Homeland Security. College Park, MD: START, 2016. See also Duarte et al Mixed Messages? The Limits of Automated Social Media Content Analysis Centre for Democracy and Technology (2017) p.5

[569] A reliance on accuracy here is arguably based on subjective predictions that ratify the need for censorship in the first place.

impulses of aggressivity to censor and over-regulate in today's age of technological dominance and (techno- militaristic conquest in the interests of finitude)[570]are recurrently endemic. Automatic false-positives and false negatives are in reality never avoidable.

Perhaps then we should not blame these "tools" (i.e., technologies and software) because, as Heidegger suggests, they are only "revealing" the inevitable realities (i.e., the limitations, tensions, iteration, absence, *destinerrance*, and the inherent openness to pathogenic contamination[571] etc.,) of communication in nature, in the real world.[572] Perhaps these technologies and software are simply deconstructing code, communication and linguistics in an "other" incalculable uncanny register, in a language unfamiliar to us, in a spectral play upon play of différance, in a "speech coming from the other, a speech [*or call*] of the unconscious as well". [573]

As Derrida elaborates:

> I don't know —how the internal demon of the apparatus operates. What rules it obeys. This secret with no mystery frequently marks our dependence in relation to many instruments of modern technology. We know how to use them and what they are for, without knowing what goes on with them, in them on their side and this may give us plenty to think about with regard to our relationship with technology today — to the historical newness of this experience.[574]

Notice and Take down

Notice and take down (NTD) is a process operated by Internet intermediaries in response to government court orders or (police, hotlines, citizens and "other bodies duly authorised")[575] that content is illegal. With NTDs the Internet intermediary following a notice or complaint remove or take down content. There are two common forms of NTD procedures. The first is

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[570] Ronell, A. *Finitude's Score: Essays for the End of the Millennium* (University of Nebraska Press, 1994) p.44-47

[571] Metaphors of disease, infectivity and pathogenic contamination e.g. "virality" are often used to describe the challenges of dissemination online.

[572] Heidegger, M. The question concerning technology (New York: Harper & Row, 1977);"no matter how 'digital' we become, the continuing problem of social inequality along racial lines persists": Nakamura, L. and Chow-White, P. (eds) *Race after the Internet*. (Routledge, 2013) p.1

[573] Derrida, *Paper Machine*, p.23 I am speculating here, following Derrida that "the machine" itself could have unconscious desires that cannot be determined by logo-centric human interpretations.

[574] Ibid

[575] European Digital Rights, Joint Comments to the Dialogue on Notice and Take Down of illegal content July 2010 available at <https://edri.org/files/090710_dialogue_NTD_illegal_content_EuroISPA-EDRI.pdf>

the issuing of explicit “Takedown Orders”, and the second, the far more common approach, is the use of a “voluntary” NTD regime.

NTD has widely been applied in relation to copyright infringement but it also applies to libel, defamation and other illegal content such as images of child abuse and terrorist, extremist or radicalising content. It should be stressed here that the use of the word “voluntary” i.e., done out of free will, is in actual sense a misnomer. There remains a great deal of regulatory pressures responsibilities and coercions going on even within voluntary NTD regimes.

Within the context of terrorism or content that incites terrorism, the approach has been “voluntary,” similar to that of child images and extreme pornography. Thus, the government, through bodies like CTIRU, has encouraged the use of a STOP or REPORT button (akin to the IWF’s Hotline) to take down extremist content propaganda or content that amounts to “glorification” and direct /indirect “encouragement” of terrorism. And whilst this STOP button approach is flexible and less burdensome than statutory regulation, it obfuscates processes of due process, adequate judicial oversight and parliamentary scrutiny.[576]

Furthermore, that such a NTD approach is founded on an amorphous concept like terrorism widens the scope of proscription and creates a definitional, jurisdictional and interpretational inconsistency or ambiguity for Internet Service Providers (ISPs)[577] with regard to liability—what Stalla-Bourdillon has called “riding too many horses at the same time without having identified in the first place the precise direction to follow”.[578] For purposes of practicality, (i.e., consistency) or because of fear of liability and having a bad moral reputation, ISPs are likely to engage a broad-brush system that infringes on the rights to freedom of expression of end-users. Ian Brown suggests that only a few NTD regimes include any substantive protection for individuals’ rights to freedom of expression, association or privacy.[579] They are often introduced under the threat of legislation or litigation, agreed and operated behind closed doors “in the shadow of the law” with little participation by or consideration for citizens.[580]

E-Commerce Directive

[576] I am aware of the fact that judico-legal “oversight” is a regulatory/banoptic logic. But for purposes of scope a critical discussion of due process and oversight is not addressed in this thesis. That being said, I probe some of their interactions human rights considerations in chapter four of this thesis.
[577] How ‘Liberty’ Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation Ahlert, C et al., How ‘liberty’ disappeared from cyberspace: the mystery shopper tests Internet content self-regulation." (*RootSecure. com* 2004)*., www. Rootsecure available at:* < *net/content/downloads/pdf/liberty_ disappeared_from_cyberspace. Pdf*>
[578] Stalla-Bourdillon, S. Sometimes One Is Not Enough-Securing Freedom of Expression, Encouraging Private Regulation, or Subsidizing Internet Intermediaries or All Three at the Same Time: The Dilemma of Internet Intermediaries’ Liability. *J. Int'l Com. L. & Tech.* 7 (2012): 154. One could complicate this statement further by arguing that a “precise direction” to be followed doesn’t exist and that it is has not yet been agreed on.
[579] Brown, I. Beware self-regulation. *Index on Censorship* 39, no. 1 (2010): 98-106
[580] Ibid

The Directive 2000/31/EC (hereinafter Directive) gives general guidance on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. First and foremost, the Directive defines what ISPs are: "natural or legal persons providing information society service."[581] Information Security Services are defined as services normally provided for remuneration at a distance by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service".[582] The services encapsulated by the definition of ISS include ISPs and search engines as well as section 18 of Directive 2000/31/EC.[583]

Art 14 provides that member states shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information (such as defamatory content, content which breaches intellectual property laws, obscene content, terrorism-related content, and content which stirs up religious or racial hatred) and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. It is worth emphasising that this article does not hinder the possibility for a court or administrative authority, in accordance with member states' legal systems, of requiring the service provider to terminate or prevent content that constitutes an illegal infringement nor does it affect the possibility for member states of establishing procedures governing the removal or disabling of access to information.

Art 15 provides obligations on how monitoring is to be done. Art 15*(*1) stipulates that Member states shall not impose a general obligation on providers, when providing the services to monitor the information, which they transmit, or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. Additionally, Art 15 (2) grants Member states authority to establish requirements for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

The reasoning behind the Directive is to ensure legal certainty and consumer and investment security through the coordination and harmonisation of national laws in the internal market. This provides a favourable environment for the free flow and movement of information services. It is a harmonisation of the existing fragmented approach and multiplicity of laws and a move to encourage e-commerce and free flow of information in the common market by

[581] Article 2(b) Directive 2000/31/EC
[582] Ibid s (17)
[583] Section 18 Directive 2000/31/EC

limiting Intellectual property infringements online.[584] This move to enhance efficiency of e-commerce, however, potentially creates "over compliance" on the part of ISPs (who are exempt from liability using the host defence under Article 14 of the Directive) hence creating tensions with the right to freedom of expression by virtue of the fact that "hosts" and Member states can broadly censor content whilst circumventing standard requirements for due process, human rights safeguards and accountability.[585]

Whilst a general monitoring obligation cannot be imposed on ISPs, Member States still have a prerogative to implement blocking orders, which they can apply in scenarios where they feel a need to censor illegal content. This prerogative however can be used to the extreme. Between 2002 and 2004 for example, the Düsseldorf District administration issued 90 injunctive orders against ISPs in North Rhine Westphalia requiring them to block access to online platforms with right wing content.[586] Although this blocking/censorship can be a necessary move for the purposes of national security and public order amongst others, the methods of blocking can operate in a dragnet, covert and disproportionate manner (as I elaborate later in this chapter) and can truncate the right to freedom of expression of end-users. In light of the recent terrorist incidents and attacks in Europe, there have been proposals to curb online content that incites terrorism.[587]

However, this is not an easy task to accomplish. The EU legislation will need to establish common rules on the definition of terrorist offences, or offences related to a terrorist group or terrorist activities and penalties in this area. And even when EU legislation attempts to come up with common rules as evinced in the 2017 Directive on Combating Terrorism,[588] the very hauntological opacity of terrorism returns to undermine the regulatory process. Indeed as this thesis has shown so far terrorism is a highly subjective, contextual and ever-evolving term (as the old adage goes, one man's terrorist is another mans freedom fighter). It therefore remains to be seen whether such proposals and agreements can ensure harmonisation and certainty across borders when regulating terrorist content.

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[584] First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) available at: < http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0702/COM_COM(2003)0702_EN.pdf > p.12-14

[585] Internet censorship: US legislates as Britain volunteers, Library Association Record 100(9) (1998) 457

[586] Akdeniz, Y. Internet child pornography and the law: national and international responses (Routledge, 2016) p. 236

[587] AVMS: Definitions, hate speech and terrorism, accessibility and protection of minors - Presidency compromise proposals available at:<http://www.statewatch.org/news/2017/apr/eu-council-AVMS-terrorism-hate-speech-6597-17.pdf>

[588] See Directive (EU) 2017/541 Para 7

EU Commission recommendations on tackling illegal content online

In addition to the AVMS Directive,[589] the European Commission has issued a series of "non-binding" recommendations on tackling illegal content online[590] that enlist procedures to be taken by online platforms such as Twitter, Facebook and Google amongst others and member states to flag and remove such content that covers things such as terrorist content, incitement to violence, counterfeit products, and copyright infringement.[591]

The procedures within this recommendation are aimed at ensuring proactive detection of content whilst still ensuring that fundamental rights such as freedom of expression are retained. The new operational measures introduced in March 2018 are particularly focused on online terrorist content and its proliferation, which according to the Commission poses a particularly grave risk to "the security of Europeans, and as such has to be treated with the utmost urgency".[592]

Moreover, the recommendation suggests that online platforms should deploy more automated detection tools, to apprehend identify and keep down such content.[593] It also advises the platforms to regularly report to the authorities on what steps they are taking to curb such content. Once more as if to really drive the severity of the point home (like with the AVMS Directive and the Ecommerce Directive) the recommendations also put the ISPs and intermediaries in a very uncomfortable place where they have to expeditiously act upon indications of illegality within an hour or have no excuse when dealing with the threat of liability from states and law enforcement agencies and/or a negative appraisal from the Commission in regard to their "societal responsibility".[594] Inasmuch as the Commission stresses that the recommendations do not contain legally binding rules, the commission does not also hide the fact that it "urges" (i.e., persistently persuades) online platforms to step up and speed up their efforts to prevent, detect and remove illegal online content, in particular terrorist related, as quickly as possible. This places ISPs in an inescapable power/liability tether, bind, or a phantasmic shadow of control. They become hauntological, bound in fear,

[589] 2016/0151 (COD): DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2010/13/EU: The most recent revision of the AVMS directive was adapted on 6 November 2018

[590] European Commission, Communication from the Commission to the European parliament, the Council, the European Economic and Social committee and the committee of the regions: Tackling Illegal Content Online Towards an enhanced responsibility of online platforms available at: < https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF >

[591] European Commission, Press Release A Europe that Protects: Commission reinforces EU response to illegal content online (03/2018) available at: http://europa.eu/rapid/press-release_IP-18-1169_en.htm

[592] Ibid: The operational measures include e.g., a one-hour rule that requires companies to remove content within one hour from its referral. .

[593] Ibid

[594] Article 15(2) of the E-Commerce Directive

waiting interminably, Kafkaesque, in the sense that they are always under the guardianship of a more powerful gatekeeper.[595] Moreover, if they don't comply with these "nudges" then they face the challenge of having to comply EU enacting binding law (combined with the risks from reputational damage), which forces them to do these actions.

To this end, blocking and filtering becomes an incentive to arbitrary censorship that can lead to a preventive over-blocking of harmless content on the part of the ISPs. The Commission itself says that companies now remove on average 70% of illegal hate speech notified to them and in more than 80% of these cases, the removals took place within 24 hours but even with at impressive rate of takedowns and removals there is still a residual recurring feeling of impotence with regard to informational control on the part of the Commission.[596]

Yet again, what these recommendations disregard are the contextual and disseminatory challenges such as indeterminability of content inherent within the very speech and content they seek to contain. Rather than providing the clarity they seek to hold onto, these recommendations replicate hauntology. Like with the AVMS directive discussed previously, they reinscribe the (pre)calculated hauntological impulses of proactive filtering and blocking[597] which only engender processes of regulatory self inadequation.

Notice and Takedown for Incitement to Terrorism Content

The CTIRU

The Counter Terrorism Internet Referral Unit, (CTIRU) is a law enforcement body that is responsible for making requests to gatekeepers to block content. The CTIRU was launched in February 2010 and was created to respond to the increasing use of the Internet by terrorists, specifically for radicalisation and propaganda purposes. It is one of the regulatory bodies within the complex web of Internet regulation online. It was set up by the Home Office and the Association of Chief Police Officers and it works closely with the CPS and the National Counter Terrorism Security Office (NaCTSO). The CTIRU derives its legitimacy from S3 of the 2006 Terrorism Act, which gives the police power to demand the removal from public

[595] See Derrida, J. "Before the law." In *Acts of literature*, pp.181-220 (Routledge, 2017) Vismann, C. Files: Law and Media Technology (Stanford University Press 2008) pp.13-29; see also DiMaggio, P. & Powell, W. The iron cage revisited: Collective rationality and institutional isomorphism in organizational fields. *American sociological review* 48, no. 2 (1983): 147-160

[596] Kuczerawy, A. Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative. *Computer Law & Security Review* 31, no. 1 (2015): 46-56.

[597] Frosio, G, and Mendis. S "Monitoring and Filtering: European Reform or Global Trend?." *The Oxford Handbook of Online Intermediary Liability* (Oxford University 2019)

availability, within two working days, of content on the Internet deemed to be encouraging or inciting terrorists.[598]

The CTIRU makes reference to 2006 Act when it "flags" a website to a hosting company. Presumably, the content flagged would be terrorism related and would fall under s 3(7) and s 3(8) of the 2006 Act. These I have discussed extensively in a previous chapter but briefly, they would include articles or records and therefore publications that are likely to be understood as direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism and publications that are likely to glorify terrorism and information that is likely to be useful to any one or more of those persons in the commission or preparation of such acts.[599]

A thorough evaluation of the CTIRU's activities i.e., the nature of the content they are concerned with and the scope of their influence with regard to takedowns is almost impossible; they are very secretive and as such, there is a high degree of uncertainty with regard to the volume of content they takedown. Be that as it may, a reading of the government's latest Contest strategy document provides some insightful figures. In terms of takedown numbers and rates it was reported that the CTRIU had secured the removal of over 300,000 pieces of terrorist content between 2010 and 2018.[600] It has also been noted that the CTIRU has developed relationships with over 300 online platforms, and that they have a trusted flagger status with many of the major platforms like YouTube, meaning that they have "prioritised flag reviews for increased takedown actionability."[601]

The CTIRU points out that these removals have been a direct consequence of the formal use of existing terrorism legislation (i.e. the Terrorism Act 2006 and the Terrorism Act 2000) that encourages, promotes or glorifies terrorist acts or which otherwise incites or assists others to participate in such acts. But even though it is stated that the types of content *most often removed usually* breach Sections 57 or 58 Terrorism Act 2000 or sections 1 or 2 of the Terrorism Act 2006,[602] the lack of transparency combined with the vagueness of the way in which takedowns are described (e.g. the expression "*most often removed usually*") leaves

[598] See Metropolitan Police, Report extremist and terrorist material online 4/15/2016 available at: <http://news.met.police.uk/news/report-extremist-and-terrorist-material-online-160089 >accessed 24/05/2018

[599] See: section 3 (7) and section 3 (8) Terrorism Act 2006

[600] HM Government, Contest: The united Kingdom's strategy for Countering Terrorism (June 2018) available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf>

[601] See e.g., the YouTube flagger programme, available at: < https://support.google.com/youtube/answer/7554338?hl=en-GB>

[602] See e.g., CTIRU Takedown Demand, available at: <https://lumendatabase.org/notices/11757313# > accessed 17/03/2019

room to suggest otherwise. That is to say, it is fair to assume that some of the removals overseen by the CTIRU also stem from interpretations of the Prevent strategy and its need to combat the amorphously defined online radicalisation and extremism.[603]

It is worth also mentioning that other auxiliary legal provisions such as the Malicious Communications Act 1988, the Terrorism Act 2000 (the possession offences) and the Public Order Act and many other patchwork laws could possibly play a role in the regulatory or enforcement operations of the CTIRU.[604] Significantly, many of the removals are conducted in a co-regulatory role with the ISPs,[605] or web administrators, and they do not exactly follow the procedure outlined in section 3 of the 2006 Act. Concerningly, many of these flaggings are by the CTIRU's "ACT" and/or "STOP" Terrorists' and Extremists Online Presence campaign (a hotline), which encourages members of the public to flag extremist content. This is normally done by way of clicking on an ACT Terrorism report button[606] which on clicking, quickly directs the public/web user(s) to an anonymous form[607] that asks them to enter the address of the webpage where they saw the terrorist related content. The form categorises the following as terrorist related content:

1) articles, images, speeches, videos that promote terrorism or encourage violence
2) content encouraging people to commit acts of terrorism
3) websites made by terrorist or extremist organisations
4) videos of terrorist attacks [608]

That the hotline campaign invites the general public to monitor the Internet and report what they consider to be extremist is problematic. Which is to say, the hotline stretches the reach

[603] HM Government CONTEST: The United Kingdom's Strategy for countering terrorism p. 37 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97995/strategy-contest.pdf > accessed 24/07/16 In addition to the Prevent strategy one should also consider see also Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

[604] See my discussion of patchwork and overlapping laws in Chapter two.

[605] Fidler, D, P., Countering Islamic State exploitation of the Internet *Digital and Cyberspace Policy Program* (2015) Articles by Maurer Faculty. 2609 available at: <https://www.repository.law.indiana.edu/facpub/2609/ >

[606] See e.g. NPCC, Counter Terrorism Policing urging public to ACT against online extremism, available at: < https://news.npcc.police.uk/releases/counter-terrorism-police-urge-public-to-act-against-online-extremism>

[607] Home Office, Report Online material promoting extremism or terrorism, available at: < www.gov.uk/report-terrorism>

[608] The counter Terrorism internet referral unit lists the following as extremist or terrorist material: a) videos of violence with messages of 'glorification' or praise for terrorists; b) Postings inciting people to commit acts of terrorism or violent extremism; c) Messages intended to stir up hatred against any religious or ethnic group; Bomb-making instructions. Available at:<http://www.npcc.police.uk/NPCCBusinessAreas/PREVENT/TheCounterTerrorismInternetReferralUnit.aspx >

of counter-extremism vigilance but in doing so, it invites an indeterminate and pre-emptive range of ethical-legal determinations that potentially suspend the law and the all-important scrupulous juridical determinations of what is wrong from right. In this sense, the CTIRU's hotline mechanism is susceptible to collecting inaccurate and potentially illegal complaints.[609]

In addition to takedowns, the CTIRU also compiles a blacklist of URLs for material hosted outside of the UK, which would give rise to criminal liability under the provisions of the Terrorism Act 2006. This list is secret; it is not clear whether or not it goes beyond the remit of the Terrorism Act 2006. These blacklisted sites are then blocked on networks of the public estate, such as government buildings, schools and libraries. In November 2014, it was announced that all major UK ISPs would be incorporating the blacklist into their adult content filters, preventing access to such websites where subscribers do not specifically opt out of such filtering. There is no known formal appeal or review process for the CTIRU's blacklist and no accountability of transparency from them whatsoever. Moreover, the fact that law enforcement practitioners and the police predominantly oversee the blocking and filtering process negates the notion of independence, accountability and impartial oversight because in practice, no one but the police can review the decisions in question.

In the process of my research for this thesis, I tried to contact the CTIRU for interviews. My requests for interviews were ignored. Be that as it may, I managed to carry out an anonymised interview with a police officer from a country in the European Union (hereinafter ACEU)[610] who provided some insight on how police cybercrime units like the CTIRU function.[611]

Like the CTIRU, the ACEU cybercrime body is a unit, a "sub-sub-sub department" of the ACEU police of about maybe 20 or so police officers who are just given the task of determining what content deserves being taken down.[612] In his view, this police unit (given their close relationship to the executive) absolved themselves of some of the responsibilities of having to determine what constituted terrorism by placing this responsibility on ISPs and social network providers.[613] It is also easier for the government and the CTIRU perhaps for reasons of resource management and political pressure and (im)practicality "to pile pressure on company bosses for not doing enough".[614]

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[609] Although it is impossible to cite statistics from the CTIRU, one can compare its operations to the IWF (on which the CTIRU is modelled) whose 2016 NTD report reveals that only 28% of the complaints reported were correctly identified child sexual abuse images IWF Annual Report 2016 available at: <https://annualreport.iwf.org.uk/2016/ > accessed (15/05/2018)

[610] The country has been anonymised on the request of the interviewee.

[611] See Appendix, *Interview transcript B: with M an ACEU police official in Cybercrime*

[612] Ibid p.256

[613] Ibid

[614] The House of Commons Home Affairs Select committee, Hate crime: abuse, hate and extremism online, Fourteenth Report of Session 2016–17 Para 25 (25/04/2017)

Yet still, a crucial question remains how is “enough” (an indeterminable concept on its own) to be measured?[615] It seems that the very vagueness of “enough” is instrumental here in the sense that its ambiguity gives the executive and the police an excuse or justification to avoid accountability when dealing with inscrutable issues such as the undecidabilities of criminality, policing and terrorism as they occur in the context of the Internet:

> […]. So, we (as the police) don’t decide anything, we point it out to the company and then they place the responsibility for this judgment as a matter completely in the hands of that company.[616]

Moreover, there are ethical concerns around the fact that police officers in cybercrime units can stretch their determinations of “illegal content” to include what is objectionable and not necessarily illegal or criminal. Perhaps this is not their fault. Which is to say, it is the consequence of a much bigger societal problem, a systematic problem of interpretation that carries within it a particular post-9/11-7/7 outlook that blurs objectivity with regard to how we define, predict, interpret, pre-calculate or identify terrorism.[617] This blurring of objectivity arises out of the counter terrorism apparatus’s spectral entanglement with probability neglect with regard to determining what constitutes “terrorism”[618] or “incitement to terrorism”. In other words, from the point of view of the police a determination or interpretation of what constitutes terrorism is inescapably tied to a hyper-subjective banoptic system of cultural, emotional, linguistic and moral norms or pre-programmed biases that impedes an ethical responsibility of proportionality, objectivity and reasonableness:

> And so even if it is true (which it is) it should never be a reason for singling out these groups. You should always check against other factors objectively to determine whether or not this ‘hunch’ is right and based on facts. Especially where terrorism is involved, you see that many people in the ACEU public and also the ACEU police and ACEU prosecution *(hesitates)* seem to be a little less strict about how much of that objectivity they need to do. […] There are issues with the whole societal zeitgeist […]. It is a system bias and system biases are always bad. They may feel less a bias as they become part of systems and habits and procedures etc., – so there’s no

[615] As the former independent reviewer of terrorism legislation Max Hill QC has asked: “How do we measure ‘enough’? What is the appropriate sanction?” See: Grierson, J. Watchdog likens May's internet fines threat to Chinese censorship (03/07/17 The Guardian) available at: < https://www.theguardian.com/politics/2017/jul/03/watchdog-likens-mays-internet-fines-threat-to-chinese-censorship > accessed 25/05/2018

[616] *Interview transcript B,* p.277

[617] Zedner, *"Pre-crime and post-criminology?";* Sunstein, "*Terrorism and probability neglect*"

[618] See n.576 p.275: “the spectre of terrorism is a problem in the ACEU. The definition of what terrorism actually is as its being used in society right now has nothing to do with the definition of terrorism as proscribed in the law or even ten years ago”.

> "actual decision" about a single thing anymore. A personal bias can be solved by having another person look at it, but a system bias is much harder to solve.[619]

The intrinsic textual problematics of determination, interpretation and enforcement of incitement to terrorism seem to be compounded by the fact that the judiciary does not oversee the regulatory practices of the police officers in the ACEU. The issue concerning who oversees their regulatory practices remains unclear. Moreover, the police officers role in the equation appears to be a mere extension of state's "force of law" and disciplinary power in the sense that it has a legitimatised coercive influence or hold on lower-level doorkeepers like ISPs. This ambiguous or opaque lack of scrutiny thus potentially allows the ACEU to proactively stretch criminality and (indeed pre-crime) to legal-juridico areas that are not conventionally brought before the law. In other words, because the ACEU are stewards of the sovereign's force of law, they are obliquely shielded from accountability and from the burden of being legally challenged by individuals whose speech they censor.

> The ACEU police can inform the company that something is amiss and in accordance with this user policy the company can take it down. The thing is, the ACEU police are not just any citizen, they are an official/officials of the state and they are prompting this removal. Now there are people saying (just to emphasise: not necessarily my position – just opposing voices) that they should not leave this decision (of removal) to private companies who are not usually even based in the ACEU, as they would not be able to rightly assess the kinds of content aimed at harming ACEU society.
>
> Moreover, these companies are a non-body a non-judge but they are now judge, jury and executioners of the content. Well, one could say that it is fair for any one including the ACEU police to point out that this content is a violation and the rest is up to the company; they are simply prompting them. If the content is truly and fully more than objectionable thus criminal and not taken down because of the user licence the ACEU police may get the foreign authorities to execute an order. Obviously, most companies for what you might call good reasons will say this is 'apparently' illegal and will proceed to remove without any orders or warrants. This will reduce paperwork and the ACEU police rejoices.[620]

No doubt, there are legal and jurisdictional disparities between the ACEU model and the UK model. But there are also stark similarities between both models in the sense that they share the same goals of detecting, identifying, removing and taking down extremist content or content that incites terrorism. Similarities also exist structurally. Most of the takedowns under

[619] Ibid p.276
[620] Ibid p.274

the ACEU model (like with the CTRIU) work informally /non-bindingly in a soft-solution,[621] co-regulatory manner without judicial scrutiny. The ACEU police and the CTIRU also have structural similarities in that they are both doorkeepers of the state and executive they are thus willing to take a more hard-line approach.

This hard-line approach to counter terrorism and regulation is arguably driven by a collective feeling of insecurity in the post-9/11-7/7 continuum which prompts the need for wide legislation and enforcement through supplementary policies or strategies like Prevent in an attempt to counter terrorism's indeterminate threat. However, the indeterminability of law, technology and enforcement practices crystallise repeatedly into and with tensions of containability hence sustaining interplays of *différance* between gatekeepers, the law and the technology. As such, there is always an element of inadequacy and deferral, an unfathomable informational void that causes law and regulation to move at an interminably slower pace than the technologies and speech they seek to regulate. My interviewee elaborates thus:

> The problem is; law is slow. It is a condensation of the societal average and some problems are not at the centre of society they are at the edge currently. I think, for this particular issue, law is too slow. One big legal issue remains obviously, the transnational differences. And so, what we in the ACEU might deem objectionable or illegal and what the Germans deem objectionable and what the Hungarians deem objectionable are different. It gets even weirder if you go beyond Europe, say China and South America, or even average officially Islamic countries, which may be less inclined to address or co-operate on certain issues, because their societal issues are different and because they may have differences on how they view extremism. I do not know how to solve this.[622]

Cross-jurisdictional issues

It is worth probing the issue of transnational differences and the problems it may present for regulation. Indeed, ISPs may face more than one notice from a different number of countries (all with differing criminal interpretations of incitement to terrorism) altogether putting ISPs under immense pressure and cost and creating a litigation nightmare. To illustrate this, it is worth considering the *Licra vs. Yahoo* litigation.[623] Here, a Paris court held that the display of Nazi memorabilia[624] and propaganda on an auction site[625] by Yahoo! in France infringed the

[621] Mörth, U. *Soft law in governance and regulation: an interdisciplinary analysis*. (Edward Elgar Publishing, 2004)
[622] *Interview transcript B,* p.280
[623] *La Ligue contre le racism et l'antisemitism v. Yahoo! Inc, Order of TGI Paris* of 20 Nov. 2000
[624] Cohen-Almagor, R. Freedom of expression, Internet responsibility, and business ethics: The Yahoo! saga and its implications. Journal of business ethics 106, no. 3 (2012): 353-365

French Penal Code. The Paris court denied the argument by Yahoo!, which claimed that Yahoo!'s services were primarily directed to end-users in the US and that French courts had no jurisdictional competence on the issue. It held that the content on the Yahoo! servers impacted on French users, further that Yahoo! had knowledge that this content was being disseminated in France created something similar to the equitable protective duty (discussed in *Cartier* above) and meant that Yahoo! had to take necessary steps to take down the content. Consequently, the court ordered Yahoo! to impede access to the site to French users and required them to embed a warning of prosecution on the Yahoo! French website that would detract users from seeking out the content in question. Although Yahoo! argued that it would be technically impossible for Yahoo! to block all access to its sites from France, the court consulted experts who found that 70% of French end-users could be identified as French through their ISPs and that it was possible to impede these users by filtering/blocking their IP addresses. Inasmuch as Yahoo! eventually complied with the French authorities and took down some of the illegal material on its auction sites, my understanding of the outcome of that case is that Yahoo! decided itself to remove Nazi memorabilia from sale internationally, in a "public relations" move to protect its reputation.

When read in conjunction with *Godfrey v. Demon* and *Totalise plc v. Motley Fool Ltd.* (discussed above), what the *Yahoo!* Litigation demonstrates is the latitude of coercive control or power that states have over ISPs. It demonstrates that ISPs unavoidably comply with national regulations (in this case regulations such as glorification, direct and indirect encouragement, the dissemination of propaganda) and speech restrictive orders of a public and social order (in the interests of national security, territorial integrity, or public safety for the protection of health and morals)[626] in order to avoid hefty legal costs and potential reputational damage (as Yahoo! demonstrates) in particular jurisdictions.

In addition to government pressure, some have argued that ISPs also have a societal/moral/ ethical duty or a corporate social responsibility to ensure that offensive illegal and hateful content on their servers is not accessible.[627] The appeal of corporate social responsibility solutions in regulating difficult social problems such as the radicalisation of terrorists is understandable. On the one hand governments can be seen to be "doing something" that in the short-term may appear reasonably effective, while reducing enforcement costs and scrutiny from courts and legislatures and ISPs on the other hand are applauded for their "social responsibility" whilst potentially avoiding more "burdensome" regulatory responsibilities.

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[625] Ibid
[626] Article 10(2) ECHR
[627] Laidlaw, E. *Internet gatekeepers, human rights and corporate social responsibilities* PhD thesis (The London School of Economics and Political Science 2012);Cohen-Almagor, R. *Freedom of expression, Internet responsibility, and business ethics*

Nonetheless, the corporate social responsibility frame, (which is in fact a concessionary extension of the co-regulatory public-private cooperative frame) presents some difficulties when it comes to freedom of expression concerns, particularly with regard to blanket or broad-brush censorship. This broad-brush which mirrors what Marsden calls "a shoot first ask questions later approach"[628] has implications for freedom of expression that can be summarized in two points: 1) it favours a monolithic presumptuous viewpoint over others that is also liable to removing harmless non-majoritarian content and 2); it occurs within an environment of little or no adequate due process and judicial review.

Although the previous discussion on the liability of ISPs throws some light on the process of NTD generally, it still fails to throw light on the interpretational, contextual and jurisdictional challenges that are experienced when taking down terrorist/ extremist content i.e., which incites, glorifies or encourages terrorism, or is of an extremist nature. To examine the extent and nature of these challenges it is worth considering from a more practical point of view how Facebook negotiates some of these challenges using examples from my interviews.

Case study: Facebook and how it takes down content

To substantiate some of the observations highlighted in the previous sections. It is worth turning to empirical research I carried out with Facebook and its representatives in the UK. This research takes the form of semi-structured qualitative interviews. Generally, my interviews revealed that the problem of enforcing, filtering, blocking and moderating content was not only down to the way in which the legal provisions were drawn. They suggested that a massive part of the problem was structural i.e., caused by the homogenous analytic model of regulation. In other words, the key problems were triggered by the singularity of the analytical logic to identify, apprehend and sanction, an approach, which always missed the mark in its attempts to contain the heterogeneity of speech, writing and communication online. That is to say, the encumbrances Facebook faced when regulating content that incites terrorism were essentially emblematic of the undecidable problems of translation, editing and reading, — problems that (as suggested in chapter one of this thesis) are inherent to all forms of speech, textuality and writing.

My interviews seem to suggest that Facebook and other companies do try their best as far as is humanly or rather linguistically possible to pay attention to intercept takedown and filter the content in question. However, it needs to be acknowledged that they are dealing with indeterminate heterogeneous speech (in huge amounts) that ruptures stability and

[628] Marsden, C.T. Internet co-regulation: European law, regulatory governance and legitimacy in cyberspace (Cambridge University Press, 2011) p.164

containability. Therefore, to blame Facebook and other Internet companies "for not doing enough" [629] is merely an easy escape that phantasmically overshadows —– and even disappears or excludes —– critical analyses concerned with the symptomatic causes and the heterogeneous complexities of such speech. It also enables governments to evade their responsibilities and human rights obligations through by shifting them over to private Internet companies.

Analysing Facebook's community standards guidelines and policies

In a 2018 news blog by Facebook, they have outlined the fact that they define terrorism as "any non-governmental organization that engages in premeditated acts of violence against persons or property to intimidate a civilian population, government, or international organization in order to achieve a political, religious, or ideological aim".[630]

Facebook emphasises that its policy and guidelines are agnostic to the ideology or political goals of a group (or what Facebook calls a hate organisation),[631] which means that they include everything from religious extremists and violent separatists to white supremacists and militant environmental groups.[632] The key point they focus on is whether or not such groups "glorify", "encourage" or "celebrate" the use "violence" to pursue those goals.[633]

Facebook's community standards seem to place an emphasis on the notion of violence. But if one assesses what violence actually is from a critical historical perspective (*a subject that is beyond the scope of this thesis*), violence turns out to be a hyper-subjective and contentious notion. Such contestability arguably extra-escalates undecidability particularly in a diverse cross-cultural space like the Internet. Which is to say, the determination of what content is

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[629] Hope, C. & McCann, K. Google, *Facebook and Twitter told to take down terror content within two hours or face fines*. The Telegraph (19/09/19) available at:
< https://www.telegraph.co.uk/news/2017/09/19/google-facebook-twitter-told-take-terror-content-within-two/>

[630] Bickert, M. & Fishman, B. Hard questions: How we counter terrorism, Facebook Newsroom (06/15/17) available at: < https://newsroom.fb.com/news/2017/06/how-we-counter-terrorism/> accessed 21/05/2018

[631] According to Facebook's policy standards a hate organisation is: "Any association of three or more people that is organised under a name, sign or symbol and that has an ideology, statements or physical actions that attack individuals based on characteristics, including race, religious affiliation, nationality, ethnicity, gender, sex, sexual orientation, serious disease or disability" available at:
<https://www.facebook.com/communitystandards/dangerous_individuals_organizations >

[632] Letter from Lawyers' Committee for Civil Rights Under Law to Facebook's Content Policy, Product Policy, and External Relations Teams,
(08/06/18) Available at: <https://assets.documentcloud.org/documents/4910674/Letter-From-LCCRUL-to-Facebook.pdf>

[633] See Facebook Community standards part iii (13) on Violence and graphic content, available at: < https://www.facebook.com/communitystandards/graphic_violence>

"violent" will always remains suspended open, a matter for debate. In this regard, the guidelines are paradoxically more textually complex and confusing than they intend to be.

Understandably, the aim of the community standards is to make speech offences easily identifiable and apprehendable in an almost calculable manner. However, the Facebook community standards (just like any text) are not fixed and stable in their meanings. Moreover because they seek to contain or regulate a dynamic, global cyber-community, the iterable and disseminatory interpretations that accrue from are susceptible to drifting heterologically,[634] hence making their very operationalisation and enforcement intractable. Thus, the community standards inherently obfuscate and contaminate analytic singularity, stability and containability. They thereby begin to question the widely held assumption that speech can be contained, understood and grasped homogenously. For in reality, legal constatives such as "terrorism", "radicalisation", "pornography", "fake news", "hate speech", "propaganda", "obscenity", "violence and graphic content"[635] or even "cruel and insensitive content"[636] are fraught with impermanence and contestable interpretations understandings and so forth.[637]

To complicate this even further, it is worth mentioning that it is not only Facebook that flags content. The whole process of regulation has a multiplicity of analytical players or "editors" (from individuals to NGO partners, akin to "trusted flaggers")[638] who determine what content is flaggable/proscribable. And even though the introduction of these other editors is done on good grounds such as trying to limit bias, and human subjectivity. In a somewhat paradoxical move this only complicates regulation from the outset as it initiates and proliferates divergent tensions and plays upon plays of (*différance*) contested meanings. These offences then become mootable, impartial and inter-subjective. Their meanings evolve and mutate, contesting from inside out i.e., within and without. Thus, the various meanings, readings and interpretations of law compromise their closed structure by "inciting" open a shifting reverse or counterpoint dialogue within the very prescription of limits with regard to what is sayable and unsayable.

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[634] The heterological shifts in meaning with regard to the community standards are arguably down to the fact that a community is heterogeneous and never a homogenous essence: Derrida, J. Declarations of independence, *New Political Science* 7, no. 1 (1986): 7-15

[635] See *Facebook Community standards Part iii: Objectionable Content*

[636] Ibid

[637] […] Everyday, new challenges, new scenarios come up and maybe something that has never happened before will come up and in these situations there is no policy about it": Appendix, *Interview transcript A: with a former Facebook content moderator,* p.263

[638] Ibid: "[…] So we work with NGO partners in countries around the world who have more expertise in these areas than we do. We have a kind of symbiotic relationship with them to help with correcting and interpreting our policies. For example, we have a process whereby we can ask our NGO partners to become, 'trusted flaggers' but not like the Google model". *Interview transcript C*, p.286

In sum, Facebook has published and implemented guidelines and policies to guide its decisions to block content. But these guidelines are not consistent; they are ambiguous and often fluctuate.[639] This fluctuation is inevitable. It is a direct inescapable effect of attempts by Facebook to try and deal with the heterogeneity and plurivocality of online speech. And even though Facebook has review teams and moderators working at all hours of the day around the globe, to ensure that their policies and guidelines are complied with, the policies can auto-undermine themselves (e.g. through false positives, and cross-content issues with third-party Facebook apps) in their endeavour to cope with the multiplicity of speech and its contestable meanings.[640] Operationalising and enforcing these contextually contested meanings especially for issues like terrorism hence becomes a complex indeterminable ordeal.[641]

Facebook's use of Artificial Intelligence

We are not necessarily familiar with the sort of AI that Facebook uses to moderate content online. Nonetheless, Facebook has disclosed in a number of public statements that they use AI tools when filtering terrorism content online.

> We want to find terrorist content *immediately, before people in our community have seen it*. Already, the majority of accounts we remove for terrorism we find ourselves. But we know we can do better at using technology — and specifically artificial intelligence — to stop the spread of terrorist content on Facebook. Although our use of AI against terrorism is fairly recent, it's already changing the ways we keep potential terrorist propaganda and accounts off Facebook. We are currently focusing our most cutting edge techniques to combat terrorist content about ISIS, Al Qaeda and their affiliates, and we expect to expand to other terrorist organizations in due course. We are constantly updating our technical solutions, but here are some of our current efforts.[642]

[639] I substantiate this claim in the following section.
[640] Facebook, Commonly submitted false Positives 24/11/2013 available at: < https://www.facebook.com/notes/facebook-bug-bounty/commonly-submitted-false-positives/744066222274273/ >
[641] *Interview transcript C*: "… so this is really hard to operationalise and to draw up rules that can apply fairly". p.289
[642] Bickert, M. & Fishman, B. Hard questions: How we counter terrorism, Facebook Newsroom (06/15/17) available at:< https://newsroom.fb.com/news/2017/06/how-we-counter-terrorism/> accessed 21/05/2018 see also Cruickshank, P. *A View from the CT Foxhole: An Interview with Brian Fishman, Counterterrorism Policy Manager, Facebook* (Combating Terrorism Centre 09/17 Vol 10 issue 8) available at : < <https://ctc.usma.edu/a-view-from-the-ct-foxhole-an-interview-with-brian-fishman-counterterrorism-policy-manager-facebook/>

These public statements were confirmed in my interview with the Facebook Policy manager[643] who stated that Facebook uses tools such as image matching, language understanding and cross platform collaboration. For purposes of scope, I limit my discussion to AI or algorithms that are concerned with language processing.

As discussed earlier, the functional logic of NLP programmes (like those employed by Facebook) is to forestall "harmful" and "violent" expression by detecting and identifying "harmful" and violent cited keywords. My interview with the UK's Facebook Policy manager revealed that Facebook relied on and built a bank or library of known terrorist propaganda that goes into what is known as a "hash-sharing" database of images and words that is then blocked from being uploaded.[644] He also stated that the algorithmic tools were effective (although he also made later statements contradicting this which I will return to later) because they were intelligence led, identified propaganda quickly and prevented it from spreading fast and far.

Moreover, the notion that AI is "accurate" and "effective" was, contradicted by the Facebook Policy manager himself. The policy manager acknowledged the fact that AI was also error prone —I analyse this issue in more depth later in this chapter. He also expressed significant doubts about the predictive abilities and potential of AI by pointing me to an interview where Facebook have stated:

> AI can't catch everything. Figuring out what supports terrorism and what does not isn't always straightforward, and algorithms are not yet as good as people when it comes to understanding this kind of context. A photo of an armed man waving an ISIS flag might be propaganda or recruiting material, but could be an image in a news story. Some of the most effective criticisms of brutal groups like ISIS utilise the group's own propaganda against it. To understand more nuanced cases, we need human expertise.[645]

Arguably, Facebook's reservations about the efficacy of AI, (i.e., about AI's limits or inability to catch anything and its inability to interpret context clearly) fit within my description above of code and online communications, as disseminatory texts that rupture normative fixity and gesture towards the indeterminate and incalculable. Thus, because language based AI tools are always already embedded within an iterable and disseminatory ecological process of writing and communication, they are ever in a drifting process of languaging (i.e., of

[643] The Facebook Public Policy manager (Mr. Karim Palant) serves as a key point of contact concerning Facebook's policies as well as the Legislative issues that are central to Facebook's mission.
[644] See *Interview transcript C*
[645] Bickert, M. & Fishman, B. *Hard questions: How we counter terrorism*

reproducing and being produced as copies and duplicates of texts interminably looped in a network). The key point here is that even if extremist content (e.g. an extremist image) is first wrongly identified then corrected and filtered out, the fluidity and openness of both speech and AI itself means that this same image could be re-contextualised unforeseeably. All this is to say that the recurring problems and vulnerabilities of communication that plague languages are inherited by code and all its computational processes, hence creating unknowable/undecidable gaps in its translation/interpretation.

In fact, a recent project has shown that AI technologies and software programs can have encumbrances by virtue of the fact that they are engineered or designed based on subjective linguistic biases. As such, the more software and AI technologies develop human-defined abilities like "logic" and "common sense", the more they commensurably develop unintended ingrained human stereotypes and dislikes like ageism, ableism, racism and sexism[646] —"the monster bears the traits of its maker"[647]— and when little or no individuating data are available, stereotypes are highly likely to dominate the evaluation of the stereotyped target.[648] In this regard, they can become tools of further hauntological otherisation.

Thus, filtering tools and programmes have an encoded capacity to marginalise the non-normative (even when harmless) hence potentially distorting public opinion and infringing on the right to impart and receive information. In light of this, Facebook tries to inject more clarity into the regulatory and enforcement process by supplementing AI with human moderation. I explore how human moderators work in the next section.

Human moderation

Generally, the responsibility of content moderators is to assess whether or not the content in question goes against the company's community standards, if it does, the content comes down. Facebook employs teams of between 4500-7500 human reviewers around the world, who speak many languages.[649] As soon as these moderators are recruited, they undergo training on how to remove content. This training strictly follows the policies and community standards of Facebook and they apply the company's global policy.[650] It also involves identifying how certain words fall under certain proscribed categories for certain reasons.

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[646] Noble, *Algorithms of oppression;* O'Neil, *Weapons of math destruction*; Benjamin, R. Race after technology: Abolitionist tools for the new jim code (John Wiley & Sons, 2019)
[647] Ronell, A. The Walking Switchboard." *SubStance* 19, no. 1 (1990): 75-94
[648] Banaji, MR, & Bhaskar, R. Implicit stereotypes and memory: The bounded rationality of social beliefs. *Memory, brain, and belief* (2000): 139-175
[649] *Interview transcript C, p. 285*
[650] Ibid; See also *Interview transcript A*, p.262

Evidently, because of the differences and conflicts in jurisdictions, a lot of the training and indeed the moderation is done on a country-to-country basis.[651] Precisely, because of this reason, content moderators in their training and in their process of enforcement/moderation have to adhere not only to national counterterrorism legislation but also to country-specific counterterrorism strategies such as Prevent and its inauguration of contestable and confusing meanings of terms like "British values", "extremism" and "radicalisation". This very fact means that the moderators start to grapple with a regulatory structure that is conceptually anchored onto indeterminate meanings that have no fixity, meanings that are open, and indeterminate (i.e., fragmented, interdependent, contiguous, and diffused) with no clear boundaries.[652]

In our interview, the Facebook Policy manager also revealed that Facebook hires human moderators to limit the degree of contextual error that algorithms are susceptible of replicating.[653] According to him, Facebook's human moderators help to mitigate the extent of these false positives and provide extra safeguards by carrying out a rigorous interpretation and translation of the content against Facebook's community standards and the context in which they occur.

However, in probing this revelation further, the picture turned out to be more complicated than was initially communicated. He revealed that this is more complicated than first thought especially in regard to determining the political, cultural and moral nuances of incitement to terrorism. He intimated that being impartial and objective whilst determining these issues was impossible[654]partly because the law itself does not "clearly say this-is-what-terrorism content is".[655]

Nonetheless, he referred to the fact that Facebook engaged with "a number of NGO partners in countries around the world who have more expertise in these areas than we do in order to mitigate the implications of impartiality and bias".[656]

And further on:

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[651] *Interview transcript A*, p.262

[652] Derrida, J. Declarations of Independence, in Negotiations: Interventions and Interviews, 1971-2001 (Stanford: Stanford University Press, 2002), 46-54; Moreover, for Black regulation is decentred from a central authority (i.e. the state), fragmented, and its borders are indeterminable amongst its different players: Black, J. Critical reflections on regulation. *Austl. J. Leg. Phil.* 27 (2002): 1

[653]"so there is not an algorithm that judges context sufficiently at the moment. This means that they (algorithms) can bring up many false positives." *Interview transcript C*, p.285

[654]The Facebook policy manager states: "We are aware of the fact that we owe a duty of care to users to try and be as […] impartial […] and people could argue whether or not impartially is actually possible, whether or not we can be totally devoid of bias and so on. I don't think we claim that we can be impartial". *Interview transcript C,* p.286

[655] Ibid p.283

[656] Ibid p.284

> We are really conscious that it is far from perfect but it is an attempt to try and deal with the issue we are talking about which is this ability to define what is acceptable and what is not. The truth is the users of our platform are very vocal… and so where there are really controversial issues about what is and isn't truth what is and isn't extremism in parts of the world where there is a real tension around that like parts of the middle east –—where you can have two very sharp and divergent views on these things, we have to tread that line of trying to accommodate, of trying to find a balance…. so it's one of those things that is hard … it is hard to say that this group, 'X group', is highlighting something that is important or unheard and at that same point it is hard to determine whether 'X group' is fanning the flames of a dispute that internationally everyone is condemning. These are really hard judgments to make.[657]

To illustrate how moderation is affected by an inescapable impartiality and bias function in practice, it is worth considering some examples:

i) In September 2016 Shaun King – a writer for the New York Daily News, who frequently writes stories about police brutality and runs a community page with over 800,000 people– posted on his Facebook page a screenshot of an email that twice called him the N-word, saying: "FUCK YOU N*****!" [658] Within a matter of a few hours, the Facebook filters banned him claiming that he had violated its "community standards".

The decision to filter King's post is questionable as King was not inciting violence or expressing hatred towards Black people. His posting of the offensive email was an attempt to raise awareness it was "a name and shame act" to expose the sender of the email and their racism. Nonetheless, Facebook's moderation policy self-inadequated, which is to say, Facebook's automated filtering systems "lapsed" and it was unable to read nuance and to judge context rightly in this situation. In this sense, Facebook's error (which is also the result of a kind of temporal-textual deferral or a *human/machine* or *human/AI* disjunction) displays a particular spectral unreadability of a kind of dual-authored writing or reading that is created by the interface of (human/machine) synchronic engagement.

To illustrate the capricious difficulties inherent to moderation and with regard to King's censorship incident, the Facebook manager stated:

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[657] Ibid

[658] Smith, O. Facebook apologises for its censorship – and censors more people, The Memo (13/09/2016) available at:< http://www.thememo.com/2016/09/13/facebook-censorship-shaun-king-terror-of-war-vietnam-norway-apologises-for-its-censorship-and-censors-more-people/ >accessed (17/05/2017)

> But some of this language stuff is a challenge. I do not know so much about, it would be wrong of me to speculate, because I do not have the details. I know that whenever there is a tension like that of the Black Lives Matter, a sort of tension that deals with a massive issue like racial tensions in the US, this presents real challenges that always blow back on us. We are always a bit of a battlefield in these situations. Now, I also know that we took down a lot of the Charlottesville white extremist content, we took a lot of that down, which was again controversial the other way and there was also a lot of debate as to whether that was terrorist content or not … I wouldn't want to be too definitive because I don't know too much about this.[659]

ii) In addition to King's Censorship incident, another incident that shows how deeply challenging and "unshakeable" this notion of contextual interpretation is, was the censorship of news concerning the Rohingya massacre in Myanmar. On this the Facebook Policy manager commented:

> I can see that there are challenges if there is a minority group involved. Somebody pointed it out to me the other day. Generally, we can be attacked for removing a piece of content and silencing a particular group, at the same time as being attacked for leaving up the same content because it is upsetting or graphic. Sometimes the same publication or group will do both at different times because these are hard judgments, and people can hold two contradictory views about what the right thing to do is.[660]

These aforementioned scenarios (and indeed many others)[661] disclose the actual contextual and interpretational/ linguistic difficulties of speech moderation generally. In fact, in a 2017 paper the Centre for Democracy and Technology highlighted that English-language processing tools may have disparate accuracy levels for minority populations.[662] The paper found that NLP tools often struggle with variations in dialect and language use across different demographic and cultural groups of English speakers and as such, popular NLP tools tend to misidentify English dialects such as African American Vernacular English as non-English.[663] The problem with technological regulation is essentially one of textual interpretation and translation. Understandably, the decision to have human moderators as a

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[659] *Interview transcript C,* p.287
[660] Ibid p.285
[661] See also Graham, C. *Facebook hands Celeste Liddle a third ban, defends naked woman on bike with dildo*. (Newmatilda.com, 2016) < https://newmatilda.com/2016/03/15/celeste-liddle-banned-again-naked-woman-bike-dildo/> accessed (18/08/2018).
[662] Duarte, N. et al Mixed Messages? The Limits of Automated Social Media Content Analysis. *Center for Democracy and Technology* (2017) p.4 available at: <https://cdt.org/files/2017/11/2017-11-13-Mixed-Messages-Paper.pdf>
[663] Ibid

matter of ensuring more accuracy is a good step. However, it does help to solve some interpretational challenges Facebook and other online platforms face. This is to say, it is questionable whether having human moderators can or will ever solve all these problems of mistranslation considering the fact that the very processes of translation (whether human or techno-automated) remains a language that is always-already fraught with the contextual complexities of language and writing such as *destinerrance*.

To be clear, I am not suggesting that regulation should be stopped; this would be absurd. Rather, I am presenting regulation and enforcement as a structural dilemma that puts different gatekeepers as regulators/enforcers in an irreconcilable position. Which is to say, human moderators and AI tools are all haunted by the same textual-structural conundrum. They cannot have a conclusive grasp of the targeted content in question. They cannot analyse, detect or apprehend extremism, radicalisation and incitement to terrorism with clarity and certitude.[664] This is essentially an enactment of immanent hauntological logics, an automated depiction of the inescapable uncanny traces of writing still always return to haunt meaning.

Recurring Con-textual/analytic complications

Furthermore, the filtering of speech raises questions about the "criminal interaction order" (i.e., the commitment of individuals to commit crime when they interact with potentially criminal content online).[665] Hence, criminal identities online are not essentially stable; they are in a state of digital drift, which makes them unpredictable to regulate, monitor and police. Filtering even becomes more fraught with complications when it has to deal with detecting foundational concepts like "non-violent extremism", which by their undecidable/inscrutable meaning(s) makes it impossible for the authorities and regulators to assess, measure and detect the content in question empirically.[666] Moreover, because radicalisation is a process, individuals can easily dis-embed or withdraw themselves from it. In any event, not everyone who reads extremist content becomes a terrorist or becomes radicalised. This accordingly complicates traditional causation and crime paradigms.[667]

With inchoate crimes like incitement to terrorism, the causal link between reading and/or publishing terrorist material online and committing the crime of terrorism is absent. Even if there was a link, I doubt that such a link could be demonstrably/empirically measured.

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[664] Ibid
[665] Goldsmith, A. & Brewer, R. *Digital drift and the criminal interaction order*
[666] Ibid
[667] Ibid

Terrorism is a multi-dimensional dynamic[668] that is not primarily driven by online "ideological"/ "speech" radicalisation. A blanket filtering of the content therefore seems unreasonable, it punishes individuals without having a causation/proximity element i.e., the requisite *mens rea* and *actus reus* for what they read (not necessarily what they think). Moreover, it perpetuates a culture of fear speculation and suspicion through "Pre-crime" thus engendering more pre-programmed false positives (even from the point of view of human reviewers/moderators) and going against the requirement for reasonable grounds for suspicion under the UK's Police and Criminal Evidence Act 1984.[669]

It is also worth mentioning that blocking and filtering technologies also paradoxically yield symbiotic possibilities of invention, improvisation (for improvisation always occurs within limits and frameworks)[670] and subversion. This view is reflected in the scholarship of commentators like Levine who has argued that writers or speakers can be "spurred on" by the impediments of censorship to innovate new styles of communication, which anticipate and bypass the calculable limits imposed by censorship.[671] This suggests that there is a recurring tension or play of *différance* (through delays, deferrals and exclusions) that signals a shutting off of access to the law interminably. This means that regulation itself can be undermined and can undermine itself both from within and without for there is a play of *différance* between those in the know and those in the dark. Eva Horn observes that the power/control/regulatory dynamic of inclusion/exclusion generates a "secrecy effect" that prevents silence.[672] This secrecy effect in turn triggers a public *ad infinitum* discussion, suspicion and speculation on whatever information is withheld hence initiating a counterproductive over-abundance of communication.[673] Like with Foucault's Freudian observation that in modern society, repressed sexuality is discussed endlessly, the repressed secrets of censorship becomes endlessly talked about undermining the very notion of fixity, stability and control on the part of the regulator, — "*revenants* pass through walls".[674]

Indeed, even in the most repressive regulatory regimes, with the most technologically advanced filtering system in the world, "closed off words" still give rise to a regeneration, a bypassing and an invention of infinite textual possibilities based off of those very closed off words. Hiruncharoenvate for instance, has shown how digital activists employ non-deterministic homophones of censored keywords to avoid detection by keyword matching

[668] Crenshaw, M. *The causes of terrorism.* Comparative politics 13, no. 4 (1981): 379-399
[669] Police and Criminal Evidence Act 1984, s. 6(1)
[670] Ramshaw, *Justice as improvisation*
[671] Levine, M.G. *Writing through repression: literature, censorship, psychoanalysis* (Johns Hopkins University Press, 1994) p.2
[672] Horn, E. "Logics of political secrecy." *Theory, Culture & Society* 28, no. 7-8 (2011): 105-109
[673] Ibid
[674] Derrida, *Specters of Marx* p.57

algorithms on Chinese social media/online communication websites.[675] Meg Jing Zeng underscores a relevant practical example of such non-deterministic circumvention wherein Chinese women and feminist activists on social networking websites like Weibo use the hashtag #RiceBunny as a substitute to the #MeToo campaign.[676] With #RiceBunny, users manipulate emojis (+ pictographs and homophones) of rice bowls (*which sound "Mi")* in addition to emojis of bunny heads (*which sound "Tu*") hence creating (*Mi +Tu = #MiTu / #MeToo*) in order to avoid censorship and detection by the software and the authorities.[677]

Because homophones like #RiceBunny are or were not pre-determined by the software (and its designers) they create new unprogrammable situations for censors. These new unforeseen homophones can stay up on the Internet undetected three times longer than their censored counterparts. Consequently, in a play upon play of meaning, the cancelled-out or excluded other returns to the fore. It subverts the "logical systematicity"[678] of that which seeks to censor it in a timely fashion by "determining its conditions of existence, fixing at least its limits, establishing its correlations with other statements that may be connected with it, and showing what other forms of statement it excludes".[679] In this regard, online censorship (as a form of negative-writing or cancelled out writing) from the very beginning (by ascribing or inscribing *différance*) creates the possibilities for a reverse-play of power or counter-power situations. As I have already noted in chapter one, such reversed speech acts and utterances are performed in irreducible guises that divert from pre-established and pre-determined linguistic speech norms.[680] These irreducible heterogeneous guises are always already present from the outset "invaginating"[681] texts/code as well as speech in a hermeneutic circle inseparably structured by a double contrary motion.[682] Thus, in such a movement, words (even closed-off, cancelled-out words) are appropriated by subjects to conjure up historical, present and futural meanings and uses —- even those for which they were never intended. These methods of anticipating and bypassing the calculable limits imposed by filtering and blocking have become more widely disseminated and are now easier to use meaning that the futural possibilities for intertextual plays on meaning are incalculable.

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[675] Hiruncharoenvate, C. "Understanding and circumventing censorship on Chinese social media." PhD diss., (Georgia Institute of Technology, 2017) see also, Hiruncharoenvate, C. et al. Algorithmically Bypassing Censorship on Sina Weibo with Nondeterministic Homophone Substitutions. In *ICWSM*, 2015 pp.150 -158

[676] Zeng, M. J. *From# MeToo to# RiceBunny: How social media users are campaigning in China*. *The Conversation* 5 (2018):< https://theconversation.com/from-metoo-to-ricebunny-how-social-media-users-are-campaigning-in-china-90860 >accessed September 13 2018.

[677] Ibid

[678] Spivak, GC. *Outside in the teaching machine: The politics of translation* (Routledge, 1993) p.180

[679] Foucault, *The Archaeology of Knowledge*, p.30

[680] Butler, *Excitable Speech*

[681] Invagination is the inward refolding of form, "an inverted reapplication of the outer edge to the inside of a form where the outside opens a pocket… an internal pocket larger than the whole; for Derrida when/where invagination happens, the limits of the border are limitless: Derrida, J., & Ronell, A. *The law of genre* p.59

[682] Moten, F. *In the Break,* p.6

What this means from the point of view of regulation is that the Internet creates an incalculable absence/presence, an *unheimlichkeit* uncanniness or impression that frustrates the regulatory and repressive structure of the singular archive, or the familiar/familial/filial whole that seeks to impose order by deleting it. Therefore, in a kind of ineluctable catachresis, excluded or closed off words inevitably inhabit an encrypted dystopic space of power, a space of incomplete powerlessness (encoded *secretly* already on the inside) that always already returns to haunt the very processes of predetermined meaning, closure, spatiality and regulation.

Moreover, these very social networking websites sometimes undermine their own censorship efforts by providing inbuilt privacy-enhancing features such as closed groups that paradoxically engender the proliferation of extremist content and allow readers and consumers of extremist content to associate with each other clandestinely. This can be done even with simple inbuilt technological tools measures (such as secret groups, pseudonyms, passwords, encryption tools as well as a automatic sharing-systems of sentiment analysis)[683] that enable users to bypass or circumvent and undermine calculable filtering and blocking procedures. In this sense, programmed online communication technologies corrupt, co-implicate, compromise, overwhelm, and circumvent their own systems of regulation and censorship in an incalculable textual movement of "unprogrammable play" —reinscribing yet again a bind or tether of *différance*.

It cannot be stressed enough that this "unprogrammable play" is spectral that it is almost automatically uncontrollable. This is to say, "unprogrammable play" it imbues online texts and speech with the uncanny capability to gravitate underground, to the dark web where it then becomes uncontainable. On this very point the Facebook policy manger states thus:

> Online generally? […]. There is clearly going to be somewhere else online for terrorists to take advantage of, like the dark web etc. It is going to be like a game of cat and mouse trying to stop these people. But can we continue to improve and reduce the amount of terrorist content online on major platforms that the vast majority of Internet users spend their time on? I think we can, we can get better and better and better at that. Can we completely eliminate it? — you know?[684]

In light of this, it is clear that the circumventing of blocking/filtering leaves a considerable undecidable/unknowable reopening for content that incites terrorism. This is an intractable dilemma. Filtering does not and cannot completely pre-empt the information disseminated by

[683] Bernal, P. *Fakebook: why Facebook makes the fake news problem inevitable* NILQ 69 Vol. 4(2018): 513-30
[684] *Interview transcript C*, p.290

terrorists or extremists let alone address the material causes and triggers of radicalisation/extremism/terrorism.

Freedom of expression, discrimination and otherisation

To show how the emancipatory capabilities of the right to freedom of expression are diminished by blocking and filtering, I turn to the work of communications and public opinion scholars who show that "when individuals believe their views differ from the majority" they become less willing to disclose their political views.[685] This argument is based on the premise that illegalised/criminalised content is usually non-majoritarian and it challenges normative/monolithic political structurings. Accordingly, if individuals at a political or religious discussion in the real world or online are aware of the fact that they are being monitored that their interactions and speech is being observed for particular radical or extremist trigger words such as "*jihadi*" they withdraw, disengage. In this act of coerced subjection and self-disengagement, individuals sacrifice their rights and opinions in fear of being suspicious, in fear of being profiled as dangerous "extremist" others. Stoycheff substantiates this view in a 2016 study on the chilling of speech,[686] where she shows that filtering and blocking practices lead to a significant chilling effect on speech because they trigger conformist or normative behaviour.[687]

Additionally, that speech published online leaves traceable digital footprints indexed to other rights like digital and informational privacy (unlike real world speech) suggests that individuals will even be more paranoid and hesitant to speak online. This in essence forecloses the validation of their right to freedom of expression hence limiting their individual agency.[688]Arguably, these individuals will be more paranoid simply because their views are not given room for the articulation further more information about how and why such speech is taken down or filtered remains opaque to online users.[689]

In this regard, the inevitable discussions and disagreements about what is offensive, extremist or acceptable in a democratic society and within public debate are disappeared and disavowed.[690] Whilst, the censorship of speech may have valid national security aims, one

[685] Stoycheff, E. "Under surveillance examining Facebook's spiral of silence effects in the wake of NSA Internet monitoring." *Journalism & Mass Communication Quarterly* (2016)
[686] Ibid
[687] Ibid
[688] Ibid
[689] Crawford, K. & Gillespie, T. What is a flag for? Social media reporting tools and the vocabulary of complaint." *New Media & Society* 18, no. 3 (2016): 410-428
[690] Ibid. See, also Balkin, J. Media access: a question of design. George Washington Law Review (2007) 76(4): 933; Baym, N. & boyd, d. Socially mediated publicness: an introduction. Journal of Broadcasting & Electronic Media (2012) 56(3): 320–329.

could equally argue that it is also detrimental to freedom of expression individual autonomy and pluralism or plurivocality of a democratic society. This is because through its exclusion of what it determines to be dangerous for national security (e.g., through notions like "British values") state censorship is likely to espouse an overrepresentation of an insular/exclusive/monolithic liberal-utilitarian[691] culture that is lacking in its ability to accommodate difference or "a critical openness" [692] to the speech of the other.

Filtering and hauntology

Broadly speaking, filtering does the work of shutting off in order to ensure propriety, conformity and homogeneity. The very mechanism of filtering rests on its ability to "name", "classify" and categorise certain forms of speech (e.g., as "unequal", "irrational" or "extremist") so as to shut them off. In this prior system of naming and classifying, as Derrida has shown, there is an *originary* or prior violence that comes suspended before the law.[693] This pre-eminent exclusion in many cases does not seek to understand the nuanced complexities and entanglements of situations. It cauterizes, it labels, and it blacklists and in doing so, it reinforces hierarchies/territories —it shuts off. This pre-eminent violence in naming means that content is excluded for its difference and its "otherness". However, in a play upon play of *différance*, the cancelled out other always returns to the fore to subvert/haunt the "logical systematicity"[694] of systems that seek to censor it, by "determining its conditions of existence, fixing at least its limits, establishing its correlations with other statements that may be connected with it, and showing what other forms of statement it excludes".[695] Thus, online censorship (as a form of negative-writing or cancelled out writing) from the very beginning (by ascribing or inscribing *différance*) creates the possibilities for a reverse-play of power or counter-power situations. Such reversed speech acts and utterances are performed in irreducible guises that divert from pre-established and pre-determined linguistic speech norms.[696]

In a frustrated effort to deal with this subversiveness as well as the inadequacy caused by the fugitivity of speech and its heterogeneity, filtering and counter-terrorism mechanisms tend to

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[691] Kapur, R. "Human rights in the 21st century: Take a walk on the dark side." *Sydney L. Rev.* 28 (2006): 665

[692] Hall, S. & Back, L. At home and not at home: Stuart Hall in conversation with Les Back. *Cultural Studies* 23, no. 4 (2009): 658-687; Young, I.M. Communication and the other: Beyond deliberative democracy in Benhabib, S. (ed)(1996) *Democracy and Difference–Contesting the boundaries of the political*. (1996) p.133

[693] In *Of Grammatology*, Derrida identifies naming as an act of "originary violence" productive of both the disciplinary violence of the law and the cognate violence of its infractions. See also: Dawes, JR. Language, Violence, and Human Rights Law." *Yale JL & Human* 11 (1999): 215

[694] Spivak, GC. *Outside in the teaching machine: The politics of translation* (Routledge, 1993) p.180

[695] Foucault, *The Archaeology of Knowledge*, p.28

[696] Butler, *Excitable Speech*

fall back into the spectral logics of the banopticon in a vicious cycle that exacerbates fear aggressivity and hostility.[697]In this banoptic mode, which is a pre-shutting off of positions, even human rights positions, become more entrenched rather than flexible and reflective,[698] their structure becomes more suited to postponing the justice indefinitely, exceptionally.[699]As scholars like Hall[700] and Said[701] have argued, this "naming"/"otherisation" and the fear and anxiety of speech that we can not bear (within which it functions) is reinforced endemically (consciously and unconsciously) through pre-history, historical conjectures, the practices and sentiments of the media, politicians, law enforcement, institutions and the public in a complex feedback loop of rationalised pre-command and pre-control – through the "banopticon",[702] for purposes of security and public order. This banopticon is autoimmune in the sense that in as much as it depends on the authority and power of the sovereign and the authority of law, it also works against these very structures and inadequates or undermines them interminably. Thus, a blurry zone or an auto-compulsive negative feedback loop[703] of precarity is endangered where (in the interests of a pre-calculated liberal-utilitarian means-oriented justice) the rights and selfhood of certain individuals are subordinated or truncated as they are seen as impending threats to the sovereign. Within the context of post-9/11-7/7 online speech regulatory paradigms, this blurry zone inflects a predefined racialised assemblage[704] which disproportionately restricts the speech of Muslims both online and offline.

To illustrate this briefly, it worth considering the case of Mohammed Umar Farooq, a postgraduate student in "Terrorism, Crime and Global Security", who was wrongly classified as a radical terrorist following from the Prevent Duty. Although the Mohammed Umar Farooq incident occurred offline, it could have easily occurred online through filtering under the Prevent statutory duty, which requires "relevant higher education bodies" to monitor IT equipment so as to prevent people from being drawn into terrorism.[705] In fact, in early 2017,

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[697] Kundnani, *The Muslims are coming!* p.11
[698] Kapur, R. *Human rights in the 21st century*
[699] Derrida, J. Before the Law, in Acts of Literature, ed. Attridge, D (London: Routledge, 1992), p. 206
[700] Hall, S. et al, Policing the crisis: Mugging, the state and law and order; Said, *Orientalism,* p.80
[701] Said, EW. Covering Islam: How the media and the experts determine how we see the rest of the world (Random House, 2008)
[702] Bigo, D. Security, exception, ban and surveillance. *Theorizing surveillance: The panopticon and beyond* (2006): 46-68.
[703] Ronell, A. *Finitude's Score: Essays for the End of the Millennium*. (1994) p.300; McIntyre, T. J., and Colin Scott. "Internet Filtering: Rhetoric, Legitimacy, Accountability." *Regulating technologies: Legal futures, regulatory frames and technological fixes* (2008) p.112; Lifton, RJ. American Apocalypse: *How "superpower syndrome" is ravaging the world* The Nation (04/12/2003) Available at: < https://www.thenation.com/article/american-apocalypse/ >
[704] Weheliye, *Habeas viscus;* Brown*, Dark matters;* Harcourt, B. E. Against prediction: Profiling, policing, and punishing in an actuarial age (University of Chicago Press, 2008)
[705]Prevent Duty Guidance: for higher education institutions in England and Wales para. 27 available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education__England__Wales_.pdf >

King's College London introduced a notification on its email login page for students and staff members informing them that they were consenting to having their emails being "monitored (possibly filtered) and recorded".[706] Consequently, Mohammed Umar Farooq's incident helps to illustrate the possible implications of censorship and filtering on freedom of expression and minority groups both online and offline. On 23 March 2015, Mohammed Umar Farooq (MF), was approached by two members of staff whilst in the library at Staffordshire University. The three had a brief discussion initiated by one of the female staff members touching on (polarising and subjective) issues such as Islam, homosexuality, the Islamic State, Sharia, British values and democracy.[707] After the conversation, one staff member noticed that the conversation raised too many red flags and decided to report the student to a security guard. The staff told the security guard: "There is a man, who is Asian and with a beard, who is not a student and is reading book on terrorism". The member of staff also went further to say, "check him out", as she suspected he is a "radical terrorist".[708] A short while later, a security guard approached MF claiming that he had received a complaint from staff members. MF was deeply offended and filed an internal complaint. In MF's internal complaint, he asked the staff members why they had questioned him. The staff members refused to answer any of the questions.[709] MF's case highlights how individuals from minority groups are censored and monitored wrongly (even by humans) based on their difference or alterity.

Due to the recurring climate of fear that already exists with extremism in the post-9/1-7/7 continuum, it is concerning that Prevent, in a manner similar to section 57 of the Terrorism Act 2000,[710] obfuscates the distinctions between fear, Islamophobia, extremism and radicalisation. This in the long run is susceptible to creating a liberal-utlitarian attitude of calculation and suspicion in which individuals are pre-cauterised (and red-flagged based on the difference of their speech) regardless of whether or not they commit or are capable of committing terrorist-related offences[711] hence contributing to a systematic culture of stigmatisation, marginalisation, and exclusion of "othered" forms of expression. It is no wonder thus, that it has been recommended in a recent court of appeal decision —*R (on the application of Salman Butt) v. The Secretary of State for the Home Department* [712] — that section 26 of the Counter Terrorism and Security Act 2015 be expressed in less trenchant

[706] Weale, S. London university tells students their emails may be monitored The Guardian (20/01/2017) available at <: https://www.theguardian.com/uk-news/2017/jan/20/university-warns-students-emails-may-be-monitored-kings-college-london-prevent > accessed 20/02/2017
[707] Prevent watch, Case report: Postgraduate student on Terrorism available at: < http://www.preventwatch.org/incident-postgraduate-student-on-terrorism/ > accessed 20/02/2017
[708] Ibid
[709] Ibid
[710] Section 57 of the Terrorism Act 2000
[711] Brown, I. & Douwe, K. "Terrorism and the proportionality of internet surveillance." *European Journal of Criminology* 6, no. 2 (2009): 119-134
[712] [2019] EWCA Civ 256

terms so as to ensure that decision makers make better balanced, accurate, and less "presumptive" decisions when assessing whether or not speech is of an extremist nature.[713]

Moreover, these foregoing problems of interpretation and enforcement are exacerbated and haunted by structural and material inequalities from the real world. MacKinnon observes that moderators (and algorithmic designers) "who play the roles of lawmakers, judge, jury, and police all at the same time of such content"[714] have a distinct culture (predominantly middleclass, male, western and white) that is not reflective of the broader diversity, plurivocal and subtle complexities of subjective experiences (race, sex, gender, class, literacy as well as language, amongst others) that form the views of the average "global" internet user in the post-9/11-7/7 continuum.

Conclusion

The enforcement and interpretation of incitement to terrorism offences follows a particular regulatory logic that already assumes a univocal clarity or determinability of meaning and interpretation as to what speech offences mean. Understandably, the aim of this is to make offences easily identifiable and apprehendable in an almost calculable manner. But when we probe the nature of these online speech offences (e.g., "terrorism" and one could also include the concepts of "obscenity" as well as "hatred") and indeed the nature of the technologies that are used to identify apprehend and impede these offences it becomes clear that we encounter an inescapable and indeterminable obfuscation an autoimmune motion within their very structure that undoes their stability. We are thus faced with a dilemma, an insurmountable challenge, wherein regulation is indispensible yet also counterproductive from both an enforcement/technological and legal/human rights perspective. This is an irreconcilable conundrum.[715]

At any rate, the aspects of regulating online communications technology in the context of incitement to terrorism are inextricably linked to an infinity of memories and cultures i.e., the religious, philosophical, juridical, and so forth".[716] As such they cannot simply be expressed with clarity, accuracy, stability and perfectibility. Indeed online communication technologies

[713] Ibid, Para 172-177; See also: HM Government, Revised Prevent Duty Guidance: for England and Wales: Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf > p.4
[714] Mackinnon, R. Consent of the Networked: The Worldwide Struggle for Internet Freedom (Basic books, 2012) p. 154
[715] See *Transcript C*
[716] Derrida, *Force of law* p. 947

are essentially “textual mediums” always embedded within an iterable and disseminatory ecological process of writing and communication. They are ever in an iterable process of speech making. Which is to say, they are contaminated with all the recurring problems and vulnerabilities of communication hence creating unknowable or undecidable gaps in hermeneutic interpretation/translation/containability and regulation. All these gaps of autoimmunary backfire if taken together, reveal a phantasmic “nonhorizon of knowledge”,[717] an unintelligible “other” meaning i.e., (a “powerlessness to comprehend recognise, identify, name, describe, foresee”)[718] that interminably haunts speech regulation online.

With respect to regulatory ethics, this interminable haunting or undecidability is not completely meaningless in a nihilistic sense. Rather, its very impossibility infers that there is always-already a reversible possibility, an “imperceptible “contact, juxtaposition, porosity, osmosis, friction, attraction and repulsion,”[719](i.e., an inevitable intractability to every decision of regulation that requires an impossible kind of faith, a transgressive responsiveness),[720]as well as a relationality to the other that can only be measured in our “inability to read” [721] and attune to the unforeseeable plurivocality of their call in order to “negotiate the dangers and pleasures of the worlds they encapsulate and explode”.[722] I attempt to elaborate how this re-negotiation of relationality or transgressive responsiveness could be done using the notion of “the ghost dance” in chapter five.

[717] Derrida, *Philosophy in a time of Terror*, p.94
[718] Ibid
[719] Nancy, J.L. *The creation of the world, or, globalization* (Suny Press, 2007) p.110
[720] Responsiveness is interchangeable with the notion of radical ‘responsibility’ or ‘responding to the *wholly* other’ as in Derrida, J. *The Gift of Death, & Literature in Secret* (University of Chicago Press, 1995) p.26-27
[721] Moten, *In the Break*, p.64
[722] Chun, W. H. K. *Programmed visions: Software and memory* (Mit Press, 2011) preface xii

Chapter 4

Human rights law and incitement to terrorism

Introduction

The human rights issues this chapter is concerned with are those provided under the European Convention of Human Rights, which has been incorporated in UK law under the Human Rights Act 1998. The rights under focus in this chapter are those that are engaged by the incitement to terrorism provisions discussed previously in chapters two and three.

Accordingly, this chapter is broadly interested in probing two interrelated questions, namely:

1) What ethical[723] and human rights issues arise when trying to identify, apprehend and contain speech that incites terrorism?
2) How does and how could human rights law sustain the ethical-theoretical tension of having to ensure a justifiable balance between countering speech that incites terrorism on the one hand and the right to freedom of speech and its related rights on the other considering that human rights law operates within an irreconcilable aporia of *subjectivity vs. subjection*?

This chapter is for the most part subjunctive or perhaps hypothetical in the sense that it draws from freedom of expression decisions that are (not actually, but rather) loosely connected to the notion of incitement. Thus, it attempts to imagine how courts would conceptually interpret incitement to terrorism decisions. This is done for two reasons: 1) because the very concept of incitement to terrorism is drifting, elusive and contestable there are – and may be – wide

[723] Again, for clarity, "ethics" should be read as an infinite responsibility and openness to the singular heterogeneity of the other. Such openness "begins with the respectable dignity of the other as the absolute unlike … as unrecognizable, beyond all knowledge, all cognition and all recognition". See*:* Derrida, *Rogues* p.60. This in my view is a distinct deviation from a Levinasian ethics that is still troubled by phallogocentrism and Jewish nationalism. For a more comprehensive discussion that highlights these differences in ethics, see: Anderson, N. Derrida: ethics under erasure (Bloomsbury Publishing, 2012); Hägglund, M. "The necessity of discrimination: Disjoining Derrida and Levinas." diacritics 34, no. 1 (2004): 40-71; Eisenstadt, O. "The problem of the promise: Derrida on Levinas on the cities of refuge." CrossCurrents (2003): 474-482

variances with regard to what may be considered incitement to terrorism, and 2); because there is a dearth of case law under the European Court of Human Rights (ECtHR) with regard to cases pertaining especially to speech that incites terrorism.[724]

This chapter proceeds as follows. In part I of this chapter, I look at the interpretation of fair balancing principles under the Convention (i.e., the principles of subsidiarity, proportionality and the margin of appreciation) and how they apply generally to the right to freedom of expression. In part II, I look more specifically at the right to freedom of expression under Article 10 of the Convention. Part III looks into how other related rights to freedom of speech under the Convention (i.e., Article 7, Article 9, and Article 14) are correspondingly shaped by restrictions on art 10. Part IV gathers together the foregoing analyses from parts I, II, and III to assess how they affect human rights considerations more generally.

Part I: Interpretive principles under the Convention

Alongside the guidance provided by the wording of particular provisions in the Convention, the process of interpretation is governed by a number of interpretive principles. Some of these principles are sharply distinct from each other, while others interlink. Generally, however, these interpretive principles appear to converge into an interpretative framework that focuses on a fair balance of competing rights i.e., where private rights are calibrated against public rights. Although these principles provide interpretive clarity and flexibility to a certain degree, they also paradoxically engender complex interpretational entanglements that place limits on individual rights especially in scenarios where individual rights are balanced against competing public interests. In this sense, they form a kind of overlapping/conjugated proscribing alliance with the incitement to terrorism criminal law provisions discussed previously in chapter two. Ultimately, this presents difficult questions with regard to their role in proportionately balancing the right to freedom of expression.

In light of this, it is important to address some of the fair balancing principles that underpin the balancing approach. The next sections therefore look at different Convention mechanisms or principles within human rights that are invoked under the calculus of fair balancing to limit human rights. Consequently, in the next sections I look at the principles of subsidiarity, proportionality, the margin of appreciation and the notion of derogation.

[724] My focus in this chapter is not on the normative basis for the decisions, but on the undecidable "phenomenology" of judging or calculating law and justice in liberal-utilitarian terms. I am concerned with interrogating the sustained forces/ paradoxes at play within human rights law.

Subsidiarity

Subsidiarity can be defined as a principle that requires each social and political group to help smaller or more local ones accomplish their respective ends without, however, arrogating those tasks to itself.[725] In the context of this discussion subsidiarity plays out when transnational courts defer to national courts in order to avoid having an overbearing juridical influence on them and to allow for a more informed kind of decision-making. Indeed, provisions in the Convention suggest that the role of the Court in Strasbourg is only subsidiary to that of member states. Article 13, of the Convention, which embodies the principle of subsidiarity provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In addition to Article 13, Article 1 provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in s I of this Convention".[726] This also confirms that the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is with the national authorities.

Further, under Article 35, applicants are required to consult with and exhaust all domestic enforcement procedures before petitioning the Court. At any rate, subsidiarity means that domestic institutions are under an obligation to try to remedy alleged human rights violations, but in resolving such disputes states and domestic institutions are advised to follow their own local arrangements.

It should be noted that the principle of subsidiarity and proportionality is also related to the Court's margin of appreciation doctrine. All these principles favour governance and jurisdiction at national level rather than transnational level.[727] In the following paragraphs, I show how the subsidiarity principle operates and how it has been applied in practice. As mentioned earlier, because precise formulations of subsidiarity are hard to predict (owing to the inescapable vagueness of incitement to terrorism and the wide variety of expressions it already inscribes) this section presents a general exploration of the subsidiarity principle in relation to the right to freedom of expression and its interplay with public order offences.

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[725] Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 American Journal of International Law 38; Kleinlein, T. "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution." International & Comparative Law Quarterly 68, no. 1 (2019): 91-110; Mowbray, A. "Subsidiarity and the European Convention on Human Rights." Human Rights Law Review 15, no. 2 (2015): 313-341

[726] Article 1 ECHR

[727] n.675

When the subsidiarity and indeed proportionality principles are applied in the context of the right to freedom of expression, it becomes apparent that the state will enjoy a wide margin of appreciation that can be justified on the grounds of preserving and protecting public interests such as the rights of others in a democratic society. To demonstrate this, I turn to *Hogefeld v. Germany*.[728] This decision concerned the restriction of speech of a former member of the Red Army Faction (RAF), a left-wing "terrorist" movement that was responsible for numerous attacks on personalities in the 1970s. The applicant had been approached for a number of interviews but the Frankfurt Court of Appeal barred her from being interviewed by press and radio journalists. She consequently argued that her right to freedom of expression within the meaning of Article 10 of the Convention had been violated. The question for the ECtHR in this case was whether or not the German domestic authorities had pursued a legitimate aim in limiting the applicant's speech.

The ECtHR noted that terrorism by the RAF had been a major threat to national security and public safety in Germany for more than 20 years and that fighting terrorism, which included taking preventive measures against the recruitment of members and supporters for terrorist organisations, was a legitimate democratic interest of every State. The fact that the applicant had been a former member of the RAF and one of its main representatives therefore, meant that the restrictions imposed on the applicant's right to freedom of expression was proportionate and pursued a legitimate aim in accordance with Article 10(2) of the Convention.

Although not necessarily an incitement to terrorism case, the very blurry, ambiguous or indeterminable nature of "incitement to terrorism" demands that we briefly touch on the decision in *S.A.S v. France*.[729] This case concerned a French national, born in Pakistan who wished, of her own volition, to wear a *burqa* (full-body covering with a mesh over the face) and niqab (a full-face veil with just an opening for the eyes) in public. In October 2010, the French Parliament passed a law that made it a criminal offence for persons to wear clothing that veiled their faces in public places. The law was introduced because the government considered that facial concealment in public places was contrary to the French Republican value of fraternity and because it undermined a degree of "civility that was necessary for social interaction".[730]

Consequently, the applicant submitted that the law violated her right to respect for her private life (regarding her desired appearance) under Article 8 and her freedom to manifest her

[728] App. No. 35402/97 (2000) 29 E.H.R.R. CD173
[729] [2014] ECHR 695
[730] Ibid Para 25

religious beliefs guaranteed by Article 9 of the Convention. On assessing whether the law was necessary in a democratic society, the Grand Chamber stated:

> […]. As regards Article 9 of the Convention, the State should thus, in principle, be afforded a wide margin of appreciation in deciding whether and to what extent a limitation of the right to manifest one's religion or beliefs is 'necessary'.[731]

Acknowledging the role of the principle of subsidiarity, the Court held that there was no breach of the applicant's rights as France could justify the restrictions legitimately as they protected the rights of others by preserving the French social value and significant public interest concern of "living together".[732] In other words, "living together" was a crucial public interest concern that allowed for and justified a truncation of individual rights in this situation. Hence, it gave the state a varyingly amenable, wide and exceptional degree of discretion in certain matters (especially in "matters of public order, religious harmony and tolerance in a democratic society, particularly between opposing groups")[733] a degree of wide exceptional powers susceptible to rendering specific minority viewpoints and forms of expression of individual rights discardable and persuasively so.

SAS is significant because inasmuch as it shows that subsidiarity allows national authorities to exercise judicial caution and circumspection when balancing rights, it also reveals an underlying tension and susceptibility of balancing to lead to an irresolvable situation where individual rights are at the discretion of national authorities. Thus from the outset, the "national aspect or "constitutional order" – [remains] privileged, prominently in the foreground.[734] This potentially presents an irresolvable structural and epistemic tension particularly between the national understanding of rights and a universal understanding of rights.[735]

It is perhaps for this reason that commentators like Carozza have suggested that subsidiarity calls into question rights considered "fundamental", "universal", and "human",[736] as it ultimately gives states the final say in how to assess rights limitations based on their particular socio-political concerns. Granted, rights remain protected by the sovereign state, this is important. But the very fact that they could at the same time be indeterminably limited

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[731] Ibid Para 129
[732] Ibid Para 17
[733] *Lautsi & others v. Italy* [2011] ECHR 2412 Para 60
[734] Sauvé J.M, Subsidiarity: a two-sided coin? Seminar organised by the European Court of Human Rights (30/01/2015) p.11 available at: < https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf >
[735] See Trotter, S. 'Living Together', 'Learning Together', and 'Swimming Together': *Osmanoğlu and Kocabaş v Switzerland (2017)* and the Construction of Collective Life, *Human Rights Law Review*, Volume 18, no 1 (2018): 157–169
[736] Carozza, *Subsidiarity as a structural principle of international human rights law*

or “overstretched” by the state on its own terms as, “it sees fit” contradicts the very values of certainty and consistency that human rights seek to uphold.

Proportionality

Generally, proportionality involves an inquiry into the balance between the benefit gained by a restrictive measure and the loss suffered by an impact on the right in question.[737] The overall aim of proportionality is to protect certain individual, fundamental interests – not only from arbitrary state power, but also from collective interests.

Proportionality is most relied upon in situations where the Convention expressly allows for restrictions of rights. Thus, for qualified rights i.e., rights stipulated under Articles 8-11 of the Convention, there are exceptions such as “is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.[738]

In these instances, proportionality has to do the difficult double aporetic work of ensuring that state/public interests are secure without violating individual rights. This is to say, proportionality denotes the need (by the state) to contain and it thereby functions as an internal limitation. To do this, proportionality employs calculi such as “the legitimate aim” of a given restriction, together with its interrelated concepts or calibrations of legality, necessity, and foreseeability.[739]

These calculi of proportionality have been applied in decisions like *Okçuoğlu v. Turkey*[740] to protect individual rights from interference by the state. In *Okçuoğlu*, Mr. Okçuoğlu participated in a round table discussion. His comments were later published in an article entitled *the past and present of the Kurdish problem*. He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder. Okçuoğlu argued that his right to freedom of expression had been infringed upon. He also argued that the wording section 8 of the 1991 Act (which proscribes dissemination of propaganda against the indivisibility of the State) was vague and allowed for disproportionate interferences with his individual right to freedom of expression.

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[737] Barak, A. Proportionality: constitutional rights and their limitations (Cambridge University Press, 2012); Barak, A. "Proportionality and principled balancing." Law & Ethics of Human Rights 4, no. 1 (2010): 1-16; Lazarus,L, McCrudden, C, & Bowles, N. "Reasoning Rights: Comparative Judicial Engagement." (Hart 2014) pp31-113

[738] Articles 8-11 of the Convention

[739] n.734

[740] App No 23536/94, [1999] ECHR 42

In arriving at its decision, the Court applied a proportionality test wherein it looked at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. Determining whether the restriction was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient",[741] the Court found that the interference by a public authority with the applicant's right to freedom of expression was proportionate because it was prescribed by law and pursued a necessary legitimate aim, namely the protection of the national security and territorial integrity of the State, and the prevention of words that have the potential to exacerbate national security situations. In citing *Okçuoğlu*, I am not interested in showing whether or not a limiting of Okçuoğlu's rights was justified in this case but rather, I am interested in showing the implications such a decision has for proportionality. This is to say, that when limiting speech (as in *Okçuoğlu*), proportionality intends to contain the expected harms that accrue from such the harmful speech at issue. However, the mere fact that speech harms are not necessarily clear, because they are empirically indeterminable or non-identifiable (owing to the very iterable nature of speech and of terrorism and of incitement) suggests that harms attributed to speech can correspondingly be drawn changeably.[742] The threat becomes non-identifiable and so does the very concept of proportionality. In this regard, a "vague suspicion" that an individual could have crossed the line from legitimate expression to glorifying, or "inciting terrorism" (even when that individuals speech is peaceful) [743] could be drawn (as a proportionate action) especially in a time when the threat from terrorism is palpable yet spectrally incalculable/interminable as is the case with the post-9/11-7/7 continuum.

The implications of such a reading of proportionality is that it ultimately operates within a liberal-utilitarian calculable logic that seeks to make separate distinctions between what is harmful and what is not harmful for the liberal utilitarian purposes of utility, deterrence and means-oriented justice. But in times of palpable fear and precarity proportionality undergoes an autoimmunary invasion wherein schematic legal distinction becomes a biopolitical operative mechanism (galvanised by the force of law) that calculates a means oriented justice of deterrence and yet fails to distinguish peaceful political speech or dissenting political speech from actual terrorist violence. And so under the arithmetic of proportionality an ethical

[741] Ibid Para 61

[742] Endicott, T. *Proportionality and Incommensurability* in Huscroft G, Miller BW and Webber, G eds. Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press, 2014);Tsakyrakis, S. "Proportionality: An assault on human rights?" International Journal of Constitutional Law 7, no. 3 (2009): 468-493; Urbina, F. J. "A critique of proportionality." Am. J. Juris. 57 (2012): 49

[743] Webber, F. Apologists for terrorism: dissent and the limits of free expression Institute of Race Relations (29/01/2015) available at: < http://www.irr.org.uk/news/apologists-for-terrorism-dissent-and-the-limits-of-free-expression/ >

and conceptual slippage of "non-harm" as harm occurs aboundingly.[744] An example of this, as Webber notes, is where expressing support for Palestine becomes equated (*over-determinedly*) with a support for terrorism,[745] or even where support for other human rights concerns like anti-deportation or unlawful imprisonment or socialism or animal rights become equated with terrorism as has happened in the UK at times.[746]

Because at its core proportionality engages public/private trade offs, and because it requires an assessment of whether or not the limitation of a right impairs the right, it is worth noting that it is applied contextually and thus inconsistently. In trying to preserve the interests of freedom and security of the public majority, the rights and freedoms of those individuals with minority viewpoints (even when these viewpoints are harmless) can be truncated in a manner that goes beyond the aims being pursued.[747] This occurs inevitably because proportionality confers states with a wide margin of appreciation in reacting to speech and public order situations.

Moreover, the very inconsistent and indeterminable nature of terrorism means that the kinds of speech the state may consider harmful, threatening or violent are never absolutely clear. A body of human rights law and public order cases suggests that minoritarian forms of expression[748] always-already run a high risk of being curtailed because they tend to be presupposedly marked as harmful or disruptive to the normative *status quo* or the established liberal-utilitarian order. In this regard, liberal-utilitarian speech restrictions remain irreconcilably haunted by or exposed to the self–inadequation of an impossible yet presupposed capture or closure. This is the working of an autoimmunary "force of law" that uses the language of freedom, rights, security, necessity, and balancing to justify subjection and curtailment by the state sovereign.

I make this point not to condemn speech restrictions *tout court* but to further problematise them by stressing that they are anchored to a large extent on a calculated conceptual

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[744] I want to suggest that such a slippage is autoimmunary, and is an inescapable mark of hauntology, of haunted speech and of its spectral hermeneutics: n.37

[745] n.740

[746] Consider for example the case of the Stansted 15 immigration protestors who blocked the runway of a Boeing 767 secretly chartered by the Home Office and were consequently convicted of terrorism offences at Chelmsford crown court: Iqbal, N. Stansted 15: 'We are not terrorists, no lives were at risk. We have no regrets', The Guardian (16/12/2018) available at: < https://www.theguardian.com/world/2018/dec/16/migrants-deportation-stansted-actvists>

[747] Carne, G. Brigitte and the French Connection: Security Carte Blanche or A La Carte'9 (2) Deakin Law Review 573, 613-14(2004)

[748] Many forms of expression (see my discussion of seditious libel and blasphemy in chapter two) have been deemed to be harmful even when they do not present an actual verifiable risk, threat or harm. Read together, these cases (e.g., *Gough v. United Kingdom* (2015) 61 E.H.R.R. 8) suggest that proportionality can side with sovereignist inclinations and ossify entrenched positions of public order that are determined by national narratives of morality and normative speech.

undecidability, which is the very force and condition of law. Understanding this presents us with an aporia stemming from the fact that speech restrictions under proportionality are inchoate and presuppositional, in the sense that they purport to contain in-calculable harms accruing from speech acts that are "yet to come".[749]

All this being said, the very indeterminable nature of speech restrictions under proportionality does not render the law helpless or illegitimate. In fact, this indeterminability is the very condition of the law, which is to say that all law needs a degree of undecidability in order to deal with future anticipated events.[750] It is therefore not surprising that there is also a degree of variance with regard to readings of proportionality. And so, inasmuch as there are instances where the state's (or majority) stance on what is harmful is sustained under proportionality and rightly so (as in *Soulas & others v. France*),[751] there are also more delicate scenarios, where what the state may deem to be harmful may not in reality be harmful and thus proportionality is used as an intervention in order to protect the interests of socio-political minoritarian speech.[752]

To briefly illustrate this latter "otherwise" approach, I turn to *Sürek v. Turkey (No 4)*.[753] Here, the applicants (the major shareholder and editor of a weekly Turkish political review were convicted by a security court of disseminating propaganda against the indivisibility of the state, following publication of an interview with a PKK leader and a joint declaration issued by four left wing groups. As such, both the applicants were found guilty, sentenced to six months' imprisonment and fined.

Their appeals to the Turkish court of cassation were dismissed and their sentences confirmed. They then applied to the Commission, complaining that their convictions constituted an infringement of their right to freedom of expression under Article 10 of the Convention. The Commission held, granting the applications, that while the convictions and sentences were accepted to be violations of the right to freedom of expression as guaranteed by Article 10, the infringements were prescribed by law and pursued the legitimate aims of protecting national security, territorial integrity and the prevention of crime. However, the convictions and sentences were disproportionate to those aims in that they exceeded what was necessary in a democratic society. For the Commission, proportionality had to be

[749] See also Chassagnou *and Others v. France* [GC] (1999) Application nos. 25088/94 & 28331/95
[750] I elaborate more on this tension of undecidability or indeterminability in chapter five
[751] Application no 15948/03 (2008)
[752] Malik argues that even in scenarios where proportionality protects human rights, proportionality is first and foremost concerned with managing/policing public order rather than in ensuring the rights and protection of minorities. In this sense even though it protects minorities it first and foremost prioritises the legitimacy of the state: Malik, M. *Extreme speech and liberalism* In Hare, I and Weinstein, J. (eds) Extreme speech and democracy (OUP 2009) pp.96-120
[753] [1999] 7 WLUK 160; 7 B.H.R.C. 339

considered against the background of the case as a whole, particularly in view of the role of the press in a political democracy and its role in disseminating information and ideas. Thus, in the instant case, the PKK leader's interview did not, taken as a whole, reveal an incitement to violence or hatred. In imposing the convictions and the sentences the security court had had insufficient regard to the public's right to know the views expressed by the PKK leader. Thus, there had been a violation of Article 10.

A similar interpretation to *Sürek (No.4)* has been taken in *Ceylan v. Turkey*, where an article written by a trade-union leader described the Turkish military operations in the South East as "state terrorism", "genocide" and "bloody massacres" and called for a reaction from the democratic forces of the nation. Here, the Court, pointing out the importance of political speech, found that "the article in question, despite its virulence, did not encourage the use of violence or armed resistance or insurrection" and accordingly registered a violation of Article 10. It is fair to say that *Sürek (No.4)* and *Ceylan* are similar to *Hogefeld* in the sense that they all concern the containment of speech that could have incited terrorism. However, the outcome of the decisions against the respondent states (i.e., Turkey and Germany) is markedly different, which suggests that the court's position with regard to the respondent states shifts and is not always consistent.[754] This conflicting approach in interpretation is complex and difficult to grasp and a thorough analysis of it is not possible here. Such an analysis has already been done by scholars like Londras who claim that the ECtHR's conflicting approach —– regarding the different states (i.e., Turkey and Germany) —– is due to the fact that Germany qualifies as a "high-compliance state" and Turkey does not.[755] In this regard, the ECtHR has "a lot to lose if states begin to question its legitimacy."[756] Hence, it prefers to appease and defer to states with its decisions particularly those concerning contentious questions like terrorism. In this sense, the principle of proportionality leaks into, and remains inseparable from the principles of subsidiarity and of the margin of appreciation.[757]

Notwithstanding, what remains clear is that determinations and interpretations of proportionality are variable and inconsistent. Owing to this inconsistency, we are then pushed to consider the question of whether restrictions of rights freedom of expression under

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[754] E.g., the Court's decision in *Sürek v. Turkey* (No. 1) significantly departs from Surek no 4. In Sürek (No.1) the applicant was prosecuted for the publication of two readers' letters harshly criticising the Turkish military operations in the South East. The ECtHR did not find a violation of Article 10, as: "the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence.

[755] Heinze, *Hate Speech and democratic citizenship*, pp.70-78

[756] de Londras & Dzehtsiarou, *Managing judicial innovation in the European Court of Human Rights*, p.7

[757] See *Bank Mellat v. HM Treasury [2013] UKSC 39* para 70-71: [T]he Strasbourg court recognises that it may be less well placed than a national court to decide whether an appropriate balance has been struck in the particular national context. For that reason, in the Convention case law the principle of proportionality is indissolubly linked to the concept of the margin of appreciation.

proportionality are compliant with the principle of legality. In determining legality the court will also examine the necessity of the restrictions and the gravity of the relevant restrictions or their legitimate aims. Furthermore, the Court also places emphasis on the fact that restrictions must be narrowly interpreted, as necessary. This reasoning has been established in *Observer v. United Kingdom*[758] where publishers, editors and reporters of the Guardian and the Sunday Times complained that the granting of interlocutory injunctions restraining them from publishing extracts from Peter Wright's book *Spycatcher* (a memoir containing confidential information about the national security services, MI5, that would likely comprise national security) contravened the freedom of expression provisions contained in Article 10 of the Convention. The key point of interest in this case (particularly in relation to proportionality/the severity of the restrictions at issue) is that the interlocutory injunctions were deemed to be disproportionate and unnecessary after 29th April 1987. Indeed, it was found that the injunctions were intended to be temporary measures and because they had been in force for a longer time period, the particular risks to national security had changed and the injunctions thus ceased to be necessary. *Observer* stipulates that legal measures should not be severe i.e., that they should not foreseeably exceed (both in terms of duration and gravity of enforcement) the risks they seek to contain. Thus, restrictions should, for example, not prohibit discussion or dissemination of the information received pertaining to political discussion even if there are serious doubts about its veracity and reliability.[759]

What is significant about *Observer* is that it focused on the requirement that restrictions should be proportionate i.e., "necessary in a democratic society" and it did so within the context of national security considerations. The court was of the view that the circumstances in which the information was published (i.e., whether or not the publication presented a foreseeable risk to national security) should be taken into consideration to ensure proportionality. And although a proper balance of proportionality is hard to achieve in the context of national security and terrorism owing to the very unforeseeability[760] (i.e. extensiveness, and overdetermined scope) of these concepts and owing to the fact that the circumstances in which terrorism occurs or is likely to occur are also unpredictable, one could still argue that the notion of reasonableness as emphasised in the House of Lords decision in *R (Laporte) v. Chief Constable of Gloucestershire Constabulary*[761] provides some hypothetical guidance with regard to how such unforeseeability could be navigated.

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[758] [1992] 14 E.H.R.R. 153

[759] See also *Salov v. Ukraine* (2007) 45 E.H.R.R. 51, Application No.65518/01

[760] Current incitement to terrorism offences are so conceptually overdetermined that they potentially catch forms of speech that do not necessarily incite violence but are merely contestable. It is also worth mentioning that Duffy and Pitcher draw our attention to the fact that the lack of definition of national security is noted in the *Observer case*. Duffy, and Pitcher, *"Inciting Terrorism? Crimes of Expression and the Limits of the Law* p.369

[761] [2006] UKHL 55

Although not an incitement to terrorism case *per se*, *R (Laporte)* points to a scenario concerned with a speech/public order offence (an offence that could also be drawn under the overarching notion of incitement to terrorism) and is thus relevant to this discussion. In *R (Laporte*), the House of Lords allowed an appeal concerning the right to freedom of expression of an anti-war protestor who had been prevented by the police from attending an anti-Iraqi war protest at an RAF airbase. The Lords were of the view that such prevention was unlawful and an unreasonable interference with the exercise of her rights of freedom of expression and assembly protected by Articles 10 and 11 of the Convention. Crucially, in *R (Laporte)* a link was made between the speech in question and its proximity to harm or imminence. Because no harm had yet occurred mere anticipation of a real possibility was not enough based on the evidence of the case. In this regard, there was no reasonable apprehension of an imminent breach of public order and thus it was held that the restriction on Laporte's rights was disproportionate.

R (Laporte) is a significant case for our discussion. Its requirement for "imminence" as a form of "reasonableness" infers a potentiality for the correction of the deficit of clarity and foreseeability in the law. It also provides crucial guidance on how proportionality can be read in public order situations as it potentially narrows the scope and severity of the speech restrictions at hand. *R (Laporte)* shows that in as much as there is an element of undecidability in this area of the law owing to the extensiveness of it, there is still an improbable potentiality for elsewhere interpretations that allow for the possibility of interpretations that are more open to the unanticipatable heterogeneity of the other. I come to this later. In any event, the notions of necessity and legitimate aims undergird all calculated evaluations of proportionality but these evaluations are hard to predict foreseeably because they in effect seek to contain the incommensurable. Thus, we cannot predict readings of proportionality with certainty.

Margin of appreciation

Like with proportionality, the doctrine of a margin of appreciation plays a salient role in fair balancing under the Convention. Fundamentally, the margin of appreciation functions on a liberal–utilitarian calculus that seeks to accord states with a nation-specific latitude or discretion when restricting rights and carrying out their functional duties.[762] The term "margin

[762] For a more comprehensive analysis of the margin of appreciation, consider Yourow, H. C, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Kluwer Law 1996); Legg, A. The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (OUP 2012)

of appreciation" first appeared in 1958 in the Commission's report in the case brought by Greece against the United Kingdom over alleged human rights violations in Cyprus.[763]

In the context of speech that incites terrorism, the margin of appreciation becomes relevant because it plays a crucial role in an assessment of how the right to freedom of expression is limited, in the sense that it allows states to provide reasons that justify speech restrictions. Here, I look at some speech specific instances that illustrate this operation. My starting point is *Handyside v. UK*.[764] In *Handyside*, a publisher purchased British rights to *The Little Red Schoolbook*; a Danish book aimed at a readership of children and adolescents aged 12-18 written by Søren Hansen and Jesper Jensen in 1969 that discussed sexuality. In the UK, the book became subject of extensive press comment, with mixed reactions with regard to its liberal attitudes towards sex. Summonses were issued against Handyside for having in his possession obscene books for publication for gain. Handyside ceased distribution and advised bookshops accordingly. At trial, Handyside was found guilty of possessing obscene publications for gain and ordered to pay costs. His appeal was dismissed. For the ECtHR the issue in *Handyside* concerned whether or not Handyside's conviction under the Obscene Publications Act was justifiable under Article 10(2) as a constraint on the right to freedom of expression on the grounds of the protection of morals. The ECtHR held that there was no violation of the applicants' Article 10 rights. Invoking the doctrine of a margin of appreciation, the court stated that: "By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those moral requirements as well as on the necessity of a restriction or penalty intended to meet them".[765]

What is significant in *Handyside* is that the Court does not get into a particular determination of the merits and disadvantages of censoring the speech in relation to rights protections under Article 10. Such a determination is left to the states (under the margin of appreciation) as they are in the best situation to calculate and determine what is necessary, or harmful, and what is not. The issue here however is that such a flexible position[766] exposes the aporia of *singularity v. incommensurability* and exaggerates (through a hyperbolic appropriation of the force of law)[767]human rights law's inability to limit the harms it seeks to contain on a much

[763] The Cyprus Case (Greece v. the United Kingdom) (1958-59) 2 Yearbook of the European Convention on Human Rights, 172-197
[764] *Case of Handyside v. The United Kingdom* (1976) Application No. 5493/72
[765] Ibid Para 48
[766] Flexibility is double-edged and obfuscating. It can be used to limit rights but it can also be used to protect rights. Yet again, this tension exposes us to the aporia of *subjectivity vs. subjection* that is inescapably inherent within all human rights law. My discussion in this section privileges subjection over subjectivity.
[767] Derrida, *Death Penalty* p.72

wider scale.[768] This in turn makes human rights restrictions more susceptible to being applied in a homohegemonic and discriminatory fashion by the sovereign and other relevant public authorities.[769] Indeed, such an aporia is apparent in the ways in which the margin of appreciation permits wide discretions (e.g., with regard to the "protection of morals", or "tolerance") and does not challenge the law at issue, even when the law is arguably misconceived in the sense that it is inchoate and intends to calculate harm before it occurs. In this sense the limits imposed by the margin of appreciation become a sovereignist calculation justified by a kind of utility of securitisation or deterrence that achieves an ends-oriented justice that always already eschews an unanticipatable and unprogrammable justice[770] that is attuned to the heterogeneity of the other.

Moreover, in some instances as evinced in *Greece v. UK,*[771] the margin of appreciation is applied somewhat generously i.e., in a manner that sidesteps the doctrine of proportionality. It appears that with the margin of appreciation, the Court gives credence to the fact that "… the Government concerned retains, within certain limits, its discretion in appreciation of the threat to the life of the nation". Thus, by potentially equipping states with a carte blanche to extend the application of the law and its thresholds into unknown contexts, without an application of the limits imposed by proportionality, the margin of appreciation allows for a drawing and reinforcing of homo-hegemonic boundaries of moral normativity and propriety. In this sense, the margin of appreciation starts to embodies the monopolistic qualities of the force of law that lead to an incalculable censoring of heterogeneous forms of expression like jokes,[772] or cartoons,[773] or statements of political dissent[774] that may in no verifiable way undermine democracy, public safety, order, or morals.

An example of such censorship occurs in *Chorherr v. Austria.*[775] Here, *Chorherr* demonstrated peacefully during a military ceremony to commemorate the 30th anniversary of Austrian neutrality and the 40th anniversary of the end of World War II. During the ceremony the applicant together with a friend distributed leaflets calling for a referendum on the purchase of fighter aircraft by the Austrian armed forces. The leaflets in question carried the slogan "Austria does not need any interceptor fighter planes". During the distribution of these leaflets, there was a commotion amongst the spectators whose view was blocked. The

[768] Webber, Grégoire C The negotiable constitution: On the limitation of rights (Cambridge University Press, 2009) pp. 90-100
[769] Even if human rights restrictions were to be applied under strict notions of legality, like the rule of law, such a notion of legality would still be recursive, self-affirming and tied to a particular liberal-utilitarian monolithic geographical conceptualisation of law and the sovereign.
[770] For Justice exceeds law and all pre-calculation, and not by simply opposing law.
[771] *Cyprus case* (*Greece v. The United Kingdom 1958-1959*)
[772] See my discussion of *Chambers* above
[773] See my discussion of *Leroy* below
[774] See my discussion of *Abdul above & Chorherr* below
[775] (1994) 17 E.H.R.R. 358, Application No. 13308/87

applicant was thus arrested for breach of the peace. Chorherr's appeal was dismissed by the Austrian Constitutional Court on the basis that his arrest was aimed at putting an end to his breach of the peace. Chorherr consequently submitted an application complaining that his arrest and detention violated his right to liberty contrary to Article 5 of the Convention and that his right to freedom of expression guaranteed by Article 10 was unjustly interfered with. In determining whether there was a violation of Article 10 of the Convention, the Court applied the margin of appreciation and in doing so it considered whether the interference complained of could be regarded as "necessary" in a democratic society. It was held that that inasmuch as public order offences have to be relatively broadly defined there must be an objective. The objective in this case was to ensure that reasonable and appropriate means could be used by the public authorities to ensure that lawful gatherings could take place as peacefully and as necessary. Because the applicant's behaviour was beginning to engender a commotion among the spectators who wished to attend the parade peaceably and was likely to escalate his arrest and detention was necessary. Thus, for the court, the restriction was not excessive and had not overstepped the margin of appreciation. Like with *Handyside*, the decision in *Chorherr* suggests that in every freedom of expression rights balancing scenario, states had a licence to limit the right justifiably based on their peculiar contextual needs. In this sense, the margin of appreciation mirrors and amplifies the subsidiarity role of the Convention, which grants states a sole self-defined discretion as necessary with regard to the protection of human rights.

I want to stress that the state having a sole-defined discretion does not always mean that a state will abuse its margin of appreciation. Indeed, the ECtHR will sometimes require under a quality of law test that a national law provide safeguards against arbitrary application.[776]Moreover, the European Commission for Democracy through Law argues that unrestricted state power runs contrary to the rule of law and that laws must indicate the scope of the discretion that they afford to the state to protect against arbitrary application. And so, in certain situations, such a sole-discretion will require and for the state to adequately and appropriately protect the rights of others in a society as demonstrated in decisions like *Jean-Marie Le Pen v. France* Application. Which is to say, the margin of appreciation can indeed have convenient motivations such as the protection of the rights of others in a society as demonstrated in decisions like *Jean-Marie Le Pen v. France* Application[777] and *Féret v. Belgium*.[778] I outline the facts in *Le Pen* and *Féret* briefly below.

[776] Consider e.g., *Gillan and Quinton v. United Kingdom* Application no. 4158/05 where the court held that the law must provide safeguards against arbitrary application so as to meet the quality of law requirement.
[777] (2010) Application No. 18788/09
[778] (2009) Application No 15615/07

In *Le Pen*,[779] the applicant who was president of the French "National Front" party was convicted for incitement to discrimination, hatred and violence towards a group of people on account of statements he had made about Muslims in France in an interview with *Le Monde* where he stated among other things, that "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge". The applicant argued that the conviction breached his right to freedom of expression. The Court was of the view that, the applicant's comments had certainly presented the Muslim community as a whole in a disturbing light and that they were likely to give rise to feelings of rejection and hostility. For the Court, the reasons given by the domestic courts for convicting the applicant had thus been relevant and sufficient. The Court found that the interference with the applicant's enjoyment of his right to freedom of expression had been necessary in a democratic society.

In *Féret,*[780] the applicant, a Belgian member of Parliament and chairman of the political party Front National/Nationaal Front in Belgium was convicted of incitement to racial discrimination for disseminating leaflets that had slogans like "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". Here, the Court held that there had been no violation of Article 10 of the Convention because the applicant's comments had intended to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. His message, conveyed in an electoral context, had carried heightened resonance and clearly amounted to incitement to racial hatred. The applicant's conviction had been justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community. A restriction of such speech was thus of the utmost necessity.

Evidently, *Le Pen* and *Féret* show that limitations on speech can be convenient in the sense that they can suppress speech that seeks to disrupt the security and welfare of others especially those from marginalised groups. But such determinations of speech do not always come to a reasonable decision insofar as marginalised groups are concerned. Indeed, as I have argued throughout this thesis the very liberal-utilitarian nature of law can also lead to a pre-determined foreclosure of minoritarian forms of speech even when they are harmful. We therefore have a conceptual aporia or penumbra (*i.e., of subjectivity vs. subjection*) wherein the margin of appreciation can be used to "protect" minoritarian individuals – albeit in a somewhat paternalistic mode – yet at the same time it can be used compulsively to symbolically mark the limits to which minoritarian viewpoints can be expressed or tolerated in public discourse.[781]

[779](2010) Application No. 18788/09

[780](2009) Application No 15615/07

[781] Although beyond the scope of this thesis, it is worth noting the contested uses of Islam within public discourse in the post 9/11-7/7 continuum. Islam can be used to potentialise liberal-utilitarian norms. On the one hand it can be used to criminalise certain expressions of Islamophobia. On the other, it can be used to punish certain gestures that are read as Islamic/radical/terrorist. All these parameters are

Such a reading in my view suggests that the margin of appreciation is ultimately anchored to a liberal-utilitarian calculus or system of calibration that seeks to preserve "poetic processes" of pre-calculating "imaginative geographies"[782] in a way that disavows, assimilates and subsumes the unbearable and differentiated alterity of the other through an interminable bind of *différance*. Indeed, a fair assessment of legality might be impossible. But (regardless of whether an assessment of legality is fair or not),[783]in the context of terrorism related crimes, such an assessment will always already function within an economy/transaction/social contract of means-oriented liberal utilitarian imperatives justice based on utility and security of the sovereign. Put simply, as Benvenisti observes, national courts as always already remain the best judges of their particular situations and hence the final authority on their assigned margin of appreciation.[784] To this end, the Court can abstain from evaluating the decisions made by national authorities as to whether there has been a violation of the individuals' rights seeing as arguments in favour of human rights protection advanced by transnational International human rights organisations to correct some of the states' inadequate rights assessments[785] would be given little credence.

Furthermore, from a practical/ law enforcement point of view, the wide margin of appreciation accorded to states could create a crisis of undecidability and indeterminability by widening the reach of speech offences connected to incitement to terrorism. This could potentially undermine the intended efficacy of law enforcement, as it will have placed way too much power in one direction, through an interpretive broadening of the scope of a state's margin of appreciation, almost by default, even without the need for a declaration of a state of emergency under Article 15.[786]

Although my discussion here has observed that the margin of appreciation tends to favour the sovereign's sole-defined ("almost by default") position of what constitutes necessity or pressing need, it is instructive to note that there are still situations where the Court can

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calculated by the state in a compulsively repetitive hauntological modality. Thus, the state's idea of Islam itself can be read as a discursive object that is deployed to differentiated (but self-same/*monologic*) calculated ends e.g., the schema of *subjectivity v. subjection* that is used to distinguish, contest, and adjudicate the citizenships and rights of others. See e.g., Razack, S. "Geopolitics, culture clash, and gender after September 11." Social Justice 32, no. 4 (2005): 11

[782] Said, *Orientalism*

[783] Such an assessment of fairness would still be aporetic and self-inadequating because it would still irretrievably function within the logics of *subjectivity v. subjection*.

[784] Benvenisti, E. Margin of appreciation, consensus, and universal standards. *NYUJ Int'l L. & Pol.* 31 (1998): 844

[785] The ECtHR is limited in how far it can be innovative owing to a number of factors like: the status of the state in question and the political significance of the rights at issue. See de Londras, F. & Dzehtsiarou, K. "Managing Judicial Innovation in the European Court of Human Rights." *Human Rights Law Review* 15, no. 3 (2015): 523-54; Dothan, S. "Judicial Tactics in the European Court of Human Rights." Chi. J. Int'l L. 12 (2011): 115

[786] Ibid: de Londras and Dzehtsiarou, see also Agamben, *State of Exception*

challenge a state's margin of appreciation. These situations arise when the ECtHR decides that national authorities have not remained within their limits. The dissenting opinion of judge Mosler in *Handyside* intimates this. It emphasises that restrictions should only be applicable if they are necessary and proportionate. Judge Mosler stresses that because Article 10 is so valuable for every democratic society, its limitations "must be examined from every aspect suggested by the circumstances".[787]

Thus, in a decision like *Vereinigung Demokratischer Soldaten Österreichs und Gubi v. Austria*[788] which concerns the determination of whether the restrictions on the distribution of a critical magazine, *Igel* to soldiers violates Article 10 rights, the Court decided that such a restriction exceeds the margin of appreciation. This for the Court was *inter alia* down to the fact that the contents of the articles were not constitutive of a serious threat that undermined military discipline as they were not hostile but of a "critical approach" and "satirical nature".[789] What is conceptually significant in *Vereinigung Demokratischer Soldaten Österreichs und Gubi* is that the Court abjures law's liberal-utilitarian calculus of means-oriented justice and security and instead attunes itself to justice and the iterable and heterological nuances of speech such as its inherent ability to have divergent/plurivocal meanings like satire and critique. In this sense the Court problematises the state's homohegemonic and liberal-utilitarian calculations of harmful speech.

All in all, despite the fact that ambiguities and structural limits are inscribed, encoded and inaugurated within the margin of appreciation, it is still important to stress that there is always-already a radical potentiality for an "otherwise" incalculable reading of the margin of appreciation that goes beyond the state's homogenous conceptualisations of speech and monolithic sensitivities even within overdetermined limits. This potentiality immediately indicates that human rights determinations are already incomplete, that they also call for the need for a shift toward an improbable "elsewhere" or "otherwise" that could hold out for the promise of an unanticipatable justice of the other beyond liberal-utilitarian scales of utility and deterrence as means-oriented justice. I explore the horizons of this "otherwise" register briefly in my reading of some of the cases in this chapter but I discuss them in greater detail in chapter five through the notion of the ghost dance.

Part II: Article 10 and related rights under the Convention

Having discussed the core principles applied when carrying out fair balancing, it is worth looking more closely at the rights engaged by incitement to terrorism by drawing from case

[787] Ibid Para 3
[788] (1995) 20 E.H.R.R. 56, Application No. 15153/89
[789] Ibid Para 79

law examples in order to see how the fair balancing principles are articulated i.e., how the courts execute interferences with rights. In the following section I look at Article 10 of the Convention, the primary right engaged by speech that incites terrorism. In addition, I also consider Article 7, Article 9 and Article 14 of the Convention as potential supplementary and interrelated rights at issue.

1) Article 10

Art 10 of the Convention provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The tensions between terrorist speech and freedom of expression are complex. This is because the right to freedom of speech provided under Article 10 is not an absolute right but rather a qualified right. Hence, it has restrictions prescribed by law and necessary in a democracy that are tethered to it under Article 10(2). National security is one of these restrictions and it encompasses terrorism. Thus, if limitations on the right to freedom of expression are proportionate and legitimate they can be used to interfere with the right to freedom of expression. It must be shown that the interference in question was necessary in a democratic society for one or more of these exceptions. The problem however, is that the very nature of the justifications for the restrictions at play (e.g., national security) are indeterminable. This as we shall see has the potential to inscribe unpredictable and inconsistent readings with regard to the proportionality and legitimacy of the restrictions at issue. In the following paragraphs I analyse a number of case law decisions so as to enumerate this textual and conceptual problematic.

In *Zana v. Turkey*[790] the applicant Mehdi Zana, a Turkish citizen and former mayor of Diyarbakir was charged for making the following remark: "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake".[791] On 30 August 1987 the "press offences" department of the Istanbul public prosecutor's office began a preliminary investigation in respect of the applicant, among others, on the ground that he had "defended an act punishable by law as a serious crime". Accordingly, the applicant was charged with supporting the activities of an armed organisation, the PKK, an "armed organisation" under Article 168 of the Criminal Code. Following the applicant's conviction and sentence by the Turkish courts, he argued amongst other things that the conviction was an "interference" with his exercise of his freedom of expression. This point was not contested. The question for the court was whether or not the applicant's conviction amounted to an interference with Article 10(1).

In answering this question, it was held that there was no breach of the applicant's Article10 rights. The court was of the view that the applicant's statements had been made at a time when serious disturbances were raging. That the applicant's statement was published in a major national daily newspaper meant, from the point of view of the court, that it was likely to "exacerbate an already explosive situation". Consequently, it was justifiable for the national authorities to take the measures they took as part of the fight against terrorism and maintaining public safety and order. The interference therefore pursued a legitimate aim. Further, the court held that it was within a state's margin of appreciation to ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.

In *Leroy v. France*[792] the applicant Denis Leroy, a French a cartoonist, working for various local publications, including the Basque weekly newspaper Ekaitza, was convicted for inciting terrorism (l'apologie du terrorisme) following the publication of a drawing which concerned the attacks of 11 September 2001. On 11 September 2001, the applicant submitted to Ekaitza's editorial team a drawing depicting the attack on the twin towers of the World Trade Centre – its four skyscrapers collapsing in a cloud of dust having been struck by two aeroplanes – with a caption parodying the advertising slogan of a famous brand ("Sony did it"). The caption went thus: "*We have all dreamt of it... Hamas did it*". The drawing was published in the newspaper on 13 September 2001. In its next issue, the newspaper published extracts from letters and emails received in reaction to the drawing. The public prosecutor brought proceedings against the applicant and the newspaper's publishing director on charges of

[790] (1999) 27 E.H.R.R. 667
[791] Ibid
[792] Application No. 36109/03

complicity in condoning terrorism. In January 2002, the court convicted them of these charges and ordered them to pay a fine of EUR 1,500 each, to publish the judgment at their own expense in Ekaitza and two other newspapers and to pay costs. In September 2002, the Pau Court of Appeal upheld the judgment of the first-instance court. In particular, it held that:

> […] by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ('We') with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act.[793]

The French court of cassation dismissed the main part of an appeal on points of law lodged by the applicant. Leroy consequently lodged an application with the ECtHR on 12 November 2003. According to the Court, the interference with the applicant's right was prescribed by French law and pursued legitimate aims, like the maintenance of public safely and the prevention of disorder in the aftermath of a highly significant terrorist attack. Having regard to the modest nature of the fine imposed and perhaps, more importantly the context in which the impugned drawing had been published, the Court found that the measure imposed on the applicant had not been disproportionate to the legitimate aim pursued. Accordingly, it was held that there was no violation of Article 10.

What is striking in *Leroy* is the fact the courts all had a unanimous opinion regarding the impact of the applicant's cartoons. From the point of view of the government, the cartoons imposed a predominantly univocal impression on society and thus warranted an outright ban. Arguably, this reading is spectrally influenced by the sociogeny,[794] or socio-cultural sensibilities of the French public and their phantasmic "affective sensorial" attachments to fear of death and destruction in the face of 9/11.This is evident in the fact that the court failed to appreciate the applicant's own indicated intentions (i.e., his satirical Anti-American stance) and instead focuses on the impression made by the cartoon in "its dream of the demise of US imperialism"[795] as a kind of expression of encouragement and support for terrorism.

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[793] September 2002 judgment of the Pau Court of Appeal, Application No. 36109/03, available at: < http://cyberlaw.org.uk/2008/12/13/leroy-v-france-application-no-3610903-chamber-judgment-of-02102008/>

[794] Wynter, S. "Towards the Sociogenic Principle: Fanon, The Puzzle of Conscious Experience, of "Identity" and what it's like to be "Black". *National Identities and Sociopolitical Changes in Latin America* (1999): 30-66.

[795] Leroy argued that his aim in drawing the cartoon was to critique US imperialism. He also highlighted that cartoonists illustrating actual events do not have much time for distanced reflection.

If we reconstruct the chain of events leading to this rather sensational decision (i.e., the fact that it occurred in the aftermath of 9/11 and it alluded to it) it appears that the Court was preoccupied with the transferential effects of speech and its "projected" links to terrorism based on its interpretation of the phrase "we have all dreamt of it". These were links that were insinuated without a sufficient proof of liability in terms of harm. In this sense, the notion of the dream, which can be read as a psychic dream of interminable trauma in the aftermath of the 9/11 attacks signifies a kind of palpable collective anxiety or terror from the viewpoint of the French public, a terror that is reminiscent of the public order offences of treason and sedition — crimes that involve imagining the death of the sovereign as well betraying the (western) collective values and terms of "order" and "belonging". In this regard, Leroy's rights are intentionally limited in a desperate attempt to confront or counter such phantasmic/psychic reverberations of his speech. Thus, in a Hobbesian hauntological movement, harm to the collective/corporeal body or the sovereign (*and its death or destruction*) became the origin of the law.[796]

Leroy should be read in contrast to *Hashman v. United Kingdom*.[797] In *Hashman* the applicants blew a hunting horn and engaged in hallooing with the intention of disrupting the activities of the Portman foxhunt, which was a legal activity and thus interfering with the rights of others. A complaint was made on the grounds that the applicants' actions disturbed the peace. The key question that was relevant for the court and for our discussion here was whether the applicant's speech actions and their *contra bonos mores* [798] behaviour justified a restriction of their rights under Article 10. The Court held that there had been an unjust interference with the applicants' Article 10 rights, as their behaviour did not amount to a breach of the peace. Crucial to the Court's reasoning was the requirement of a degree of foreseeability. The Court was of the view that the applicants could not anticipate a risk of a breach of the peace based on their behaviour. Thus *Hashman* held that behaviour that is *contra bonos mores* was not enough for a restriction under Article 10.

In addition to *Hashman*, another decision in contrast to *Leroy* worth touching on is *Incal v. Turkey*.[799] Here, the applicant was a member of the executive committee of the Izmir section of the People's Labour Party, which requested permission to distribute a leaflet that criticized measures taken by the local authority and highlighted the existence of a "Kurdish" problem. By virtue of his participation in the decision to distribute the leaflet, Incal was convicted of disseminating separatist propaganda capable of inciting people to resist the government and commit terrorist offences. Relying, *inter alia* on Article 10 of the Convention, Incal complained

[796] Derrida, J .The beast and the sovereign, Vol I (University of Chicago Press 2009); Hobbes, T, Leviathan.1651. (Harmondsworth: Penguin 1968)
[797] (2000) 30 E.H.R.R. 241
[798] *Contra bonos mores* refers to "conduct which has the property of being wrong rather than right in the judgment of the majority of contemporary fellow citizens": Ibid Para 13
[799] (2000) 29 E.H.R.R. 449, Application No. 22678/93

that he had not had a fair trial before the National Security Court and that his conviction infringed his right to freedom of expression. Consequently, the ECtHR held that unanimously that there had been a breach of Article 10 of the Convention and that the speech at issue if read in context, could not be taken as an incitement to the use of violence, hostility or hatred between citizens.[800] The Court emphasised that in the interests of speech in a democracy the actions or omissions of the government had to be subject to close scrutiny and criticism even by public opinion. Thus, although the government had to keep hold of a dominant position that limited criticism it nevertheless had to make sure that its restrictions were not excessive and that a degree of pluralism, tolerance, and broadmindedness with regard to political and social speech was provided for,[801] this was an essential factor to be taken into consideration by the Court.

Both *Hashman* and *Incal* depart from *Leroy* in the sense that they infer that restrictions on speech ought to be not contingent on assessments of harm that are mono-logically projected, insinuated or conjecturally pre-calculated by the sovereign on the grounds of utility or deterrence — for such determinations are hard to make owing to the very iterability of speech — but that they should be assessed from a broader vantage point that undoes the logics of calculability, i.e., in a modality that is concerned with the heterogeneity and plurivocality of speech in a democratic society.[802]

Accordingly, if read in the context of incitement to terrorism offences, *Hashman* and *Incal* would suggest interpretations on speech could be anchored on a more careful or considered scrutiny of the intentions, demands and contours of the speech of the other (i.e., on the heterogeneous contingent ethical, cultural, and political significations of such speech) rather than on conjectural hauntological projections that are hinged on what the majority of the population pre-calculates as what is wrong or harmful or politically acceptable.

Significantly, as discussed earlier in this thesis, by requiring a more cautious requirement of foreseeability, the decisions in *Hashman* and *Incal* complicate univocal understandings of speech. Which is to say they problematise the view that speech is merely causal and determinable by intricately embedding speech within an on-going historical, socio-political and material backdrop. In this sense, they thus point us in a different interpretational direction that ensures that differences in viewpoints under Article 10 and indeed under all forms of expression are accommodated and not pre-constrained.

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[800] Ibid Para 1

[801] Ibid Para 38 and Para 53

[802] Belavusau, U. "*Dernier Cri from Stasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania), A*." Eur. Pub. L. 16 (2010) p.383

A right to receive information

An oft-neglected component of the right to freedom of expression that requires our examination here concerns the fact that the right to freedom of expression provides for a right not only to impart information but also the right to receive information. Arguably, if this component were given more significance, limitations such as those seen to be justifiable in *Leroy* would have a lesser weight under the proportionality calculus for the reason that freedom of speech would cease to be a private right and would be interpreted more relationally i.e., as a complex process of intra and inter-communication between people. This argument, which seems to me to be convincing is articulated in the dissenting opinion of Judge Pettit and Judge Pinheiro Farinha in the *Observer* case:

> In this respect, there was a violation of the right to receive information, which is the second component of Article 10. To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.
>
> However, the majority of the Court concerned itself with the first aspect rather than the second. If the state believes that a publication puts at risk state secrets or national security, there are other procedural means at its disposal. If the state contests a failure to comply with the duty of discretion on the part of a retired civil servant, appropriate procedures are available. In the present case the state did not prosecute Mr. Wright. However, the United Kingdom should, by virtue of the positive obligation imposed by the European Convention, have secured the public's right to be informed.[803]

This dissenting opinion makes an interesting observation in as far as the regulation of the right to freedom of expression is concerned. Perhaps, if we viewed the right to freedom of expression on its public merits as a right to receive information, the liberal-utilitarian rubrics of the balancing calculus would change.

That being said, both the information in question and the circumstances in which it is published are of crucial importance. As such, the balancing calculus would be applied in a highly malleable fashion in order to meet the exigencies and needs of the situation as provided for by law. But even within this space of flexibility, malleability, following *R (Laporte)* and *Hashman* it would still be imperative for laws that restrict speech to be applied in a reasonable and proportionate manner that is: 1) reflective of the immediate likelihood or imminence of the risk at hand and 2) demanding of the most careful scrutiny as established in

[803] (1992) 14 EHRR 153, Para 201

Sunday Times v. United Kingdom.[804] The recurring conceptual problematic with such a formulation of balancing is that it is still grounded in liberal-utilitarian scales of utility, "scales without scales" of deterrence and well being like "necessity" that first conceptually prioritise/hierarchise the monolithic interests of the sovereign and function within an aporetic frame (*of subjection v. subjectivity*) that ultimately disavows the alterity of the other.[805] Furthermore, wide human rights interpretive principles and their restrictions potentially compound the practical challenges of speech regulation and enforcement in the sense that their widening of thresholds leads to a psychic lack and a corresponding increase in demand for enforcement and regulatory resources. This, as I have shown in chapter three, does not necessarily stop the dissemination of heterogeneous speech. Rather, it sustains and accelerates undecidability within the law, in the sense that it exposes laws and enforcement to an interminable instability that remains haunted by the very heterological difference and unprogrammability of speech.

b) Freedom of expression online

As much of my discussion so far has centred on the limits of speech in the real world, it is now important for us to consider freedom of expression online or digitally and how it is regulated in the context of incitement to terrorism. For this, I turn to *Yildirim* in order to unearth some of the implications of wide indeterminable speech restrictions.

In *Yildirim*, the applicant, a Turkish national, operated a blogging website hosted by the Google Sites service, on which he published academic work and his opinions on various matters. On 23 June 2009 the Denizli Criminal Court of First Instance ordered the blocking of an Internet site whose owner had been accused of insulting the memory of Atatürk.[806] The order was issued as a preventive measure in the context of criminal proceedings against the site's owner. Although neither Google Sites nor *Yildirim*'s own site were the cause of these proceedings, the Turkish Telecommunications and Electronic Data Authority (TİB) responsible for implementing the order had needed to block *sites.google.com* entirely in order to block the offending site in particular because of technical issues. Accordingly, the criminal court granted that request. Yildirim complained that it was impossible for him to have access to his Internet site on account of a measure ordered as part of a criminal case that had no connection with his website. Relying on Article 10 of the Convention, he claimed that this measure breached his right to freedom to hold opinions and to receive and impart information and ideas.

[804] (1991) 14 EHRR 229

[805] Even when such a formulation protects the rights of the other, such a protection is always precarious for it is always already subject to being withdrawn in a paternalistic or brutal fashion. Hartman, *Scenes of Subjection*

[806] Mustafa Kemal Atatürk founded the Republic of Turkey and was its first president.

Consequently, the ECtHR held that there had been a violation of the applicant's freedom of expression enshrined in Article 10 of the Convention on the grounds that the Turkish government had not satisfied the burden of showing that the imposition of such a restraint was justified. The ECtHR emphasised that there must be a strict legal framework to ensure that the restriction of content online was not done *ultra-vires*. The Court was also of the view that the claimants must have access to judicial review procedure.[807]

The decision in *Yildirim* is an emphasis and a re-articulation of the fair balancing principles of proportionality discussed above that yet again denotes similar standards of legitimacy to those defined above, namely:

> 1) that interferences and collections of data in cyberspace should not be indiscriminate;
> 2) that they should have proper oversight and procedural safeguards and
> 3); justified within a democratic society i.e., any national legislation to that effect must be clear and precise and must provide sufficient guarantees of the protection of fundamental rights, such as the right to freedom of expression.

Accordingly, filtering or censorship of content must be strictly limited in scope in line with the requirements of necessity and proportionality. Lists of blocked websites together with full details regarding the necessity and justification for blocking each proscribed website should be published; — an explanation as to why a page has been blocked should also be provided on a page that is substituted for the affected websites. It is worth noting that these standards have also been re-echoed by the UN Special Rapporteur on freedom of expression.[808]

Invoking the judgment in *Handyside*, the UN Special Rapporteur stresses that the right to freedom of expression includes "views and opinions that offend, shock or disturb".[809] He indicates that restrictions on freedom of expression should not be applied to activities involving political debate; elections; human rights; government activities; corruption in government; peaceful demonstrations/political activities, including for peace or democracy; and expression of opinion, dissent, religion or belief, including by minorities/vulnerable groups). The Rapporteur also emphasises the need for clear and unambiguous laws as a basis for any censorship/filtering, to prevent arbitrariness. Additionally, the Rapporteur confirms that: (i) search engines and other intermediaries should not be required to monitor

[807] *Yildirim v. Turkey,* Application No. 3111/10, Para 29
[808] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, 17th session, 16/05/2011, A/HRC/17/27 available at: < https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>
[809] Ibid

their networks pro/actively in order to detect possible illegal content,[810] and (ii); that it should be possible to challenge blocking and filtering orders before an independent and impartial tribunal and seek clarification and remedies.[811]

Nonetheless, it is important to note that there are limits to these prerequisites. For instance, these limits will not be applicable in situations where an individual's online activities fall within the ambit of crime, as they will then have been already criminally "prescribed by law". Thus, in situations where one posts illegal or unconstitutional content even if one does not intend to do, as was the case in *Nix v. Germany*[812] where the applicant used the picture of the former SS chief Heinrich Himmler with the swastika (a Nazi totalitarian symbol) as an "eye-catching" device to protest against the practices of the local employment office, one still remains not exempt from criminal liability as such a restriction of free speech remains within the state's margin of appreciation.[813] Crucially, it should be emphasised that this is strictly a margin of appreciation issue that, as *Vajnai v. Hungary*[814] indicates, depends on the relevant state's socio-political history. Therefore, such a restriction will rely on whether or not the state thinks that there is a clear pressing social need (or cultural memory) that justifies the limitation in question and whether or not the need is proportionate to the legitimate aim pursued.

Noteworthy perhaps, in the eyes of the ECtHR, is the fact that a legitimate aim pursued underpins the need to protect the rights of others. To this end, a legitimate aim pursued may take the use of national security regimes even without resorting to Article 15 as the decision in *Hogefeld* discussed above intimates. The state authorities would then have a legitimate democratic right as well as an incalculable discretion to protect the state against the activities of whom it defines as a terrorist. This is most likely to trump all other considerations in the interests of keeping the "peace". But inasmuch as such a position may provide the state's enforcement apparatus a broad discretion with regard to whom it goes after, it (rather counterproductively, in an autoimmunary logic) inscribes a layer of textual incoherence within the human rights interpretive principles, hence revealing how ambiguity becomes the very force of the law, but also the promise of an incalculable and unanticipatable justice that embraces the heterogeneity of the other as I show later in this chapter.

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[810] See The House of Commons Home Affairs Select committee, *Hate crime: abuse, hate and extremism online*

[811] Supra n.767

[812] Application No. 35285/16

[813] Baker, Autonomy and hate speech pp.146-147; Moreover, perhaps more importantly in the context of online regulation, such a reading becomes spectrally "unadressable" (exempt from "closure") because it also fails to grapple with the cross-jurisdictional challenges (e.g., the fact that internet users not based in Germany can still use and circulate these symbols freely) ISPs face when dealing with iterable/disseminatory content online: Ertür, *Law of Denial*, pp.3-4

[814] Application No. 33629/06

The right to freedom of expression online: Some online peculiarities

Perhaps, the most problematic aspect of human rights insofar as Internet regulation is concerned is liability or human rights compliance of private Internet companies. This is an issue that is complicated by the status of ISPs and other Internet gatekeepers as private bodies (i.e., self-regulatory companies operating independently from the state) and not public bodies. It therefore becomes impossible for individuals to know whether or not they can make claims when their rights are infringed by ISPs and other internet gatekeepers because section 6 of the HRA Act is only binding on "public authorities" i.e., persons "of whose functions are functions of a public nature".

Moreover, as I have suggested previously, ISPs are also potentially criminally liable under the incitement to terrorism provisions. They are obliged to assist the government in preventing crime and disorder or else face large fines and reputational ruin. Rather than make themselves appear as if they are endorsing extremist content, ISPs tend to co-operate more willingly with security services and the police (out of necessity) in the prevention and enforcement of terrorist-speech related crimes. It is this somewhat fuzzy process of extrajudicial co-operation between law enforcement (such as the CTIRU and online ISPs and content providers) that poses difficult questions with regard to transparency and adequate freedom of expression safeguards online.

Because the process of speech regulation is rooted in a proscription of offences (such as glorification, encouragement, extremism) that are indeterminable, wide and finitely differing in jurisdictional representations and scenes of utterance, the offline regulatory challenges of undecidability are also transposed online through filtering, surveillance and blocking practices. Indeed, as I have indicated above, many of these practices are non-transparent, complicated by diverse cross-jurisdictional legal complexities, the *destinerrant* heterogeneity of speech (i.e., its potentiality to always return, spectrally, sometimes in an even more concealed way), as well as the lack of processes of judicial review and redress. This means (practically speaking), that the protective human rights standards articulated in *Yildirim* could still remain inaccessible, unpredictable and perhaps impossible to implement and enforce effectively in the post-9/11-7/7 continuum. And yet, as the Court stipulates under Article 7, the law must give the public the capacity to "foresee" the circumstances in which their right to speech might be lawfully infringed upon.[815] Notwithstanding, in stark contrast to *Yildirim*, the decision in *Delfi AS v. Estonia*[816] suggests that the filtering and NTD removal of third party user generated comments posted by readers that are perceived as offensive on an Internet news portal does not amount to a violation of the Internet users' Article 10 rights. Crucially, as

[815] I explore the implications of Article 7 in relation to Article 10 subsequently in this chapter
[816] Application No. 64569/09

a point of emphasis, in *Delfi* it was determined that the restrictions on the Article 10 rights were permissible because 1) they pursued the legitimate aim of "protecting the reputation and rights of others" especially considering that information posted on the Internet could potentially remain there indefinitely and cause much greater harm and 2); under a fair balancing test such restrictions were necessary in a democratic society.

Delfi is a defamation case. But if we place *Delfi* within the context of incitement to terrorism, what it suggests is that ultimately a determination of whether or not restrictions concerning an offence (in this case incitement to terrorism) infringes on Article 10 is dependent on whether these rights protect the rights of others and on whether such restrictions are proportionate and necessary. Consequently, the benefits of the Internet — especially its capability to expand the freedoms of speech and expression[817] — had to be balanced against "liabilities", such as the uncontrollable spread of harmful speech.[818] *Delfi* therefore suggests that Article 10 rights restrictions by ISPs could be justified on determinations for the greater welfare of democratic society i.e., in favour of lesser harms to the general public in a democratic society. How such determinations are made however is hard to foresee given the cross-jurisdictional nature of the Internet and the ambiguous and divergent meanings of incitement as well as terrorism.

In any event, what the decisions in *Yildirim* and *Delfi* suggest is that these decisions ultimately hinge on the interpretation of the Court (*something again that this thesis cannot predict with clarity*). There is thus a possibility for the Courts to rule such a decision conservatively, in favour of the protection of the rights and safety of others as in *Delfi* and to place extensive restrictions on certain forms of speech but crucially, at the same time, there is always a possibility for the Courts to rule such a decision more broadmindedly in favour of online individual speech rights as in *Yildirim*. To be clear, I raise this point not to conclusively say *tout court* that the law is unfair or misconceived, but rather to provide a deeper aesthetic critique of the very aporetic, textual and conceptual problematic (of reading or interpretation) that is immanent — in a sort of double bind or "dialectical seesaw"[819] — within the law. I analyse this problematic as well as the significance and implications of its aporetic double movement later on in this chapter.

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[817] Consider also, *Jersild v. Denmark* (A/298) [1994] 9 WLUK 124.

[818] Concerning general Internet regulatory policy, the decision in *Delfi* implies that it is not desirable to expect third parties to assume the burden of monitoring the Internet for criminal activity. This can of course lead to unfair and non-transparent practices in regulation hence going against the decision in *Yildirim*, which requires for transparency, fairness and impartiality in situations involving restrictions of Article 10 rights.

[819] This describes an on-going tension that presents both the progressive possibilities of law and the limits within law: Spillers, H.J., *Or Else…*CONVERGENCE / POLITICS / VOL. 1 NO. 3-4 available at: <https://alinejournal.com/convergence/or-else/>

III: An analysis of Article 10 related rights

1) Article 9: The right to freedom of thought, conscience and religion

Closely linked to the notion of freedom of expression (and indeed the right to freedom from discrimination) is Article 9. It thus merits an examination here. In this section, I approach Article 9 mainly from the stance that wide unclear laws can impose inadvertent legal limits or boundaries that can censor or prevent religious and political minorities from expressing themselves freely. My discussion here does not assume that Article 9 will always apply to incitement to terrorism. It merely extrapolates, which is to say that the very ambiguous nature of the incitement to terrorism offences suggests that Article 9 rights could still be at play in situations where incitement to terrorism is concerned.

Article 9 of the Convention provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private to manifest his religion or belief in worship, teaching, practice and observance.

Like other rights discussed in this thesis, when there is a conflict between Article 9 and other competing rights interferences can be made for the purposes of tolerance and for the protection of the rights and freedoms of others. Article 9 thus is strongly rooted in the fair balancing principles.

The key case in relation to Article 9 is *Otto-Preminger-Institut v. Austria.*[820] This decision was concerned with the censorship of a film *Das Liebeskonzil* in the applicant association's cinema in Innsbruck on the ground that showing it would constitute the criminal offence of blasphemy because the film ridiculed God, Christ and Mary, central figures of the Catholic Church. The applicant association complained that these measures violated its right of freedom of expression as guaranteed by Article 10 of the Convention. The question for the Court was whether or not such a restriction was legitimate. In its decision, the Commission maintained that it was up to the domestic courts to interpret and apply the domestic law as they saw fit and that the private interferences by the state were justified on the general overall public grounds of coexistence and tolerance. The Court ruled that there was a "pressing social need for the preservation of religious peace" and that it was "necessary to protect

[820] [1994] ECHR 26, Application No.13470/87

public order against the film,"[821] since the film disparaged Roman Catholicism. The Commission following the margin of appreciation and the principle of subsidiarity was of the view that the state had absolute authority to apply the law as it saw fit it. In my view, this is a self-inadequating and misconceived approach because it perceives non-majoritarian opinions as potentially harmful. In its intent to contain harm, this liberal-utilitarian approach also in an autoimmune motion opens itself out to a heterogeneity (or excess) of incommensurable harms that it cannot contain. All this overdetermines the boundaries of harm and legality further hence making legal interpretation and enforcement self-inadequating and intractable.

It is fair to say, and indeed important to note, that the facts in *Otto Preminger* are quite removed from cases that could be considered incitement to terrorism. Notwithstanding, the very ambiguity of the offence of incitement to terrorism and its indistinguishable criminal categories gives us the liberty to read *Otto Preminger* on comparable taxonomical grounds. Thus, if *Otto Preminger* is read in the context of incitement to terrorism, from the point of view of fair balancing it becomes clear that such a position can lead to a blanket censorship (and self-censorship) of varied forms of expression (such as harmless religious dress, humour, satire and ridicule, as in *Leroy*) from the outset, — all in the aims of preventing the dissemination of harmful speech. This occurs because such forms of expression can pliably be reconstructed as constituting a "pressing social need" however vaguely defined. In this regard, non-majoritarian viewpoints or forms of expression become phantasmically formulated (i.e., based merely on conjecture or presupposition) in the sense that they project certain forms of speech as harmful even when such projections are spectral legal fictions that are uncountable, incalculable i.e., not empirically provable. Thus, with evaluations of harmful speech this empirical tension always remains.

Another decision worth considering is *R (on the application of Begum) v. Denbigh High School Governors.*[822] Here, the appellant a school appealed against the decision where the respondent a Muslim student had been unlawfully excluded from school for failure to comply with her school's dress code. Begum had wished to wear a *jilbab* to school, rather than a *shalwar kameez* as required by the school's dress code. The school denied Begum from attending school in a *jilbab*. Begum maintained that the *shalwar kameez* did not comply with the requirements of her religion even if it was accepted by mainstream Muslims. The school's complaints committee decided that the uniform policy satisfied the requirements of the Islamic dress code. There were three other schools in Begum's catchment area where *jilbab* was permitted but Begum's application to one of those schools was unsuccessful. The respondent argued that the other two schools were more distant. Thus, the respondent lost nearly two years of school before a different school accepted her. The House of Lords held that the

[821] Ibid Para 52
[822] [2006] UKHL 15

school's refusal to allow Begum to wear a *jilbab* at school did not interfere with her right under the HRA 1998 and Article 9 of the Convention: "the right to freedom of thought, conscience and religion" (which also corresponds to the right of freedom of expression) to manifest her religion and, even if it did, the school's decision was objectively justified given the circumstances under Article 9(2). The key issue of relevance for this discussion was whether or not the respondent's freedom to manifest her religious belief by way of dress was justified. Like in *Otto Preminger*, it was held that Article 9 was not absolute and could be interfered with if there was a justification; as such Begum's right to wear the *jilbab* was rejected. *Begum,* like *Otto Preminger,* displays a haunting fear or (in)sensitivity on the part of the Court with regard to its calculable predictions of "adverse repercussions" that such a uniform would have caused. Whilst this seems like a reasonable way of preserving a semblance of normative order and safety in its preservation of a harmonious coexistence it, in a rather aporetic vein, disavows Begum's alterity in the sense that it cauterizes Begum as an impending "risk", "threat", or "disruption", rather than an individual whose personhood and autonomy deserves an encounter of relationality on equal terms.[823]

Like with *Otto Preminger*, in *Begum*, the Court misses an ethical opportunity to re-enchant human rights in a manner that moves beyond a provincialized restrictive liberal-utilitarian register and allows for a relationality to non–majoritarian viewpoints or forms of expression, something which could be argued, is better in the long run for the purposes of democracy and "living together". This failure to read interpretive principles in a more relational mode comes at a potentially heavy cost. In the long run, it leads to a silencing of othered voices that are arguably necessary in contemporary plurivocal/cross-cultural societies. This silencing occurs within a mode that engenders a singular meta-narrative (based on the exclusive moral/socio-cultural consensus or reason of the majority), a mode that tends to view the alterity or difference of the other as something anticipatorily disruptive, harmful or risky that needs to be surmounted or quelled.[824] Whilst this may be an effective means of ensuring public order in the short run, in the long run, it most likely leads to an epistemic alienation, marginalisation[825]or racialisation of minoritarian viewpoints through undue suspicion or

[823] I explore how such an encounter of relationality could be imagined in the next chapter

[824] Benvenisti, E. "Margin of Appreciation, Consensus and International Standards", (New York University Journal of International Law and Politics, 1999) p. 851

[825] Although some western feminists may argue that the veil as form of expression is dehumaning and not a free choice, equally, non-western feminists like Sherene Razack and Arundhati Roy argue that the key problem here is one of coercion and spectral repugnance or desire/fear, "*coercing a woman out of her burka is as bad as coercing her into one*". Thus the nature of the responses to Muslim women wearing the niqab ignores complex social-poliinterplayical issues (i.e., issues at the nexus of race, gender and geopolitics) in favor of lumping veiled Muslim women together, as a presupposed "threat" or "disruption". Hence, it coerces them to yield (*subjectivity v. subjection*) to a western cultural imperialist gaze. See: Razack, *A Site/Sight We Cannot Bear*; Roy, A. Capitalism: A ghost story (Haymarket Books, 2014) pp.67-68; Furthermore, Fanon in "Algeria unveiled" uncovers the veil as a symbol of anti-colonial resistance that strikes fear in the mind of the coloniser. Fanon, F. "Algeria unveiled" In Decolonization, Routledge, 2004) pp.60-73

presumptions of guilt based on notions like "Muslims are risks and are at risk",[826] and is engendered when people are punished for what they think /believe even when their viewpoints pose no actual threat to a political-social order. Such a position overrepresents and oversimplifies a liberal-utilitarian meta-calculus of risk that tends to ignore the fact that speech is an on-going process of iterable discourse and dialogue between individuals.[827] It eschews the fact that speech is a contested process without singular control, anticipation, exclusivity and purity,[828] that demands for a scope of relationality (with the alterity of the other) so as to allow for an on-going mutual deliberation and mediation of relationality, heterogeneity, and difference.

Notwithstanding, despite the fact that the aforementioned decisions tend to be reluctant to provide a space for relationality in their desire to preserve a normative status quo, it is worth noting that Article 9 also provides us with an "otherwise" reading that evolutively strays from the normative status quo and is more attuned to the alterity of the other. To illustrate this, I turn to the decision in *Ivanova v. Bulgaria*,[829] where the applicant complained that she had been unfairly dismissed from her job because of her affiliation with a Protestant religious group called "word of life". Here, the Court found that Government's restriction of the applicant's Article 9 rights was contradictory and ambiguous and that it constituted a flagrant violation of the applicant's right to freedom of religion. Of significance in *Ivanova*, is the fact that the Court seemed to be attuned to the applicant's relational particularity in relation to the exclusory violence (of subjection, subordination, assimilation and disavowal) embedded in the liberal-utilitarian logics of rights restrictions. Indeed, by focusing on the applicant's non-majoritarian religious particularity, and on the fact that the applicant had been "alienated"[830] by the school (through its coercive demands on her to renounce her religious beliefs in order to keep her job), the Court in a movement of justice rightly read upheld the applicant's personhood and selfhood stating that the applicant had undergone "significant public prejudice" and experienced "feelings of distress helplessness, and emotional suffering" as a result of her Article 9 rights violations.[831] This decision is important because it moves away from calculations of harm and in an "otherwise" interpretation of justice attends

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[826] Heath–Kelly, C. 'Counter-terrorism and the counter-factual: producing the 'radicalisation' discourse and the UK Prevent strategy', British Journal of Politics and International Relations (2013) 15:3, 394-415; Harcourt, B. E. Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counter-Terrorist Measure and Does It Violate the Right to be Free from Discrimination? (Law & Economics Working Papers, University of Chicago 2006) available at: <https://chicagounbound.uchicago.edu/law_and_economics/329/>

[827] Murray, A.D. Internet Regulation in *Handbook on the Politics of Regulation* Levi-Faur, David (ed) (Edward Elgar Publishing, 2011) p.277

[828] Ramshaw, *Justice as improvisation,* p.53 citing Landgraf, E. *Improvisation as Art: Conceptual Challenges, Historical Perspectives* (Bloomsbury Publishing, 2011)

[829] Application No. 52435/99

[830] Ibid at Paras 31 and 81

[831] Ibid Para 95: A similar ethical reading to *Ivanova* happens in *Eweida v. UK* where the Court pays attention to the applicant's selfhood.

unconditionally to Ivanova's alterity. Perhaps then, if we were more receptive to such an attentiveness of the relationality of the other in the context of incitement to terrorism, individuals with minoritarian viewpoints would not feel so alienated and so disenfranchised. More crucially, if we were attuned/responsive to the *unheimlich* speech of the other not as a potential threat to our normative liberal orders but as a communication of "life being lived relationally",[832] then perhaps, we would not be so keen to restrict the other's rights as we would view them as an ongoing manifestation of illimitable heterogeneous speech in a plurivocal world.

2) Article 14: Discrimination

A number of other rights can be engaged conjunctively when restricting speech including the right to a fair trial, the right to freedom of assembly and association, the right to liberty and the right from discrimination. I focus on the right to discrimination (albeit briefly, for purposes of scope) because it is central to my theorization of speech[833] as a calculated monolithic rubric that is in direct opposition (*différance*) to heterogeneity. I also touch on discrimination because as I have implied so far, the very exclusionary logic of censorship or regulation is contiguous to "othering"/discrimination.

As this section will unravel, the criteria for the applicability of Article 14 in conjunction with Article 10 remain unclear. Perhaps for this reason that discriminatory practices concerning the restriction of speech are often taken for granted, and yet discriminatory practices still spectrally haunt law in this area. It is therefore worth our while to explore discrimination in relation to speech restrictions generally.

Article 14 of the Convention provides:

> The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Under Article 14, a state can argue that censorship or restriction of certain forms of speech even when discriminatory are reasonable and the result of objective factors and thus permissible. As such, the government can always draw a distinction between permissible

[832] Gilroy, P. Lecture I. *Suffering and Infrahumanity Lecture I*I. Humanities and a New Humanism (*Tanner Lectures* 2014)
[833] I have suggested in chapter two that the very notion of censorship entails a kind of exclusion and is thus linked to the notion of discrimination.

differentiation and unlawful discrimination. In this manner, Article 14 significantly concedes to the principles of subsidiarity and margin of appreciation. In the *Belgian Linguistic case*,[834] the Court held:

> The principle of equality of treatment is violated if the distinction has no reasonable and objective justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles, which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[835]

Furthermore, the ECtHR has stated in *Vallianatos and Others v. Greece* [836] that under Article 14," the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment".[837]

In some cases, the Court chooses to return to the principle of margin of appreciation when interpreting discrimination. One such case is *Eweida and others v. United Kingdom*.[838] Here, the applicants complained that domestic law failed to protect their right to manifest their religion. Ms Eweida and Ms Chaplin complained specifically about restrictions placed by their employers on their wearing of a cross visibly around their necks to express their religion. The applicants invoked Article 9 of the Convention, taken alone and in conjunction with Article 14. Although the Court recognised that the employment decisions constituted discrimination based on religion, it did not apply a very weighty reasons test. Rather, it applied a wide margin of appreciation to the State, and allowed for a restriction of the applicants' expressive rights because "regard must be had in particular to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole".[839]

Indeed, if the logic of cases like *Eweida* is applied to incitement to terrorism provisions and policies generally, i.e., if we considered that individuals were to make complaints of discriminatory practices that incitement to terrorism laws and policies generate, it is very likely that the state would counter these complaints indefinitely by using the dominant consensual position of presenting "reasonable grounds", under the pretext of national security or public

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[834] Case relating to certain aspects of the laws on the use of languages in education in Belgium or *Belgian Linguistic case (No. 2)* (1968) 1 EHRR 252
[835] Ibid Para.10
[836] *Vallianatos and Others v. Greece* (Application Nos. 29381/09 and 32684/09) Para .76
[837] Ibid Para 76
[838] *Case of Eweida and others v. The United Kingdom* [2013] ECHR 37
[839] Ibid Para 84

emergency or public order, as a convincing (yet undecidable) argument to justify its actions. A balance that ensures the fair and proper treatment of people from minorities and/or their forms of expression and avoids any abuse of a dominant position, would thus be almost unattainable since such fair balancing at its core always already seeks to calculably preserve or normalise the *status quo* and its "norms of propriety"[840] through the suppression, compulsion, subjection of minority viewpoints, under what Simmons calls "the pretences of equality".[841]

Inasmuch as the aforementioned interpretations of Article 9 rights can be read as restrictive, it is worth noting that there still remains a significant potentiality for Article 9 protections if Article 9 is read in an incalculable register that moves beyond liberal-utilitarian rubrics that permits for interpretations of relationality. Such a potentiality can be gleaned from the case of *D.H. and Others v. the Czech Republic*.[842] Here, the applicants, Roma people, who had been placed in special schools under a policy established by the education system, argued that they were the victims of discrimination in the Czech Republic. In their submission, the applicants averred that the school policy instituted racial segregation and discrimination that were reflected in the existence of two separately organised educational systems for members of different racial groups. Consequently, the Court held that the difference in treatment between Roma children and non-Roma children was not objectively and reasonably justified, and there was not a reasonable relationship of proportionality between the means used and the aim pursued.

DH is relevant to this discussion because if transposed to the context of freedom of expression, it points us to an alternative reading of discrimination. In other words, in *DH,* the Court interprets the relationality in a mode that goes beyond the liberal-utilitarian norms of propriety and is more attuned to the alterity of the other. In this sense, *DH* provides some ethical intimations for the ways in which the haunted speech of the other can be interpreted. It is significant for example that the Court in *DH* departed from the calculable liberal-utilitarian logics of reconciling competing interests (in order to ensure normativity and general welfare for the majority) and placed greater emphasis on the particularity as well as the singularity of the applicants e.g., by stressing the fact that the Chamber's requirement to prove discrimination was unrealistic and illogical since discriminatory practices could also be transmitted "by well-intentioned actors through ignorance, neglect or inertia".

[840]Post, R. 'Hate Speech' In Hare, I, and Weinstein, J, (eds.), *Extreme Speech and Democracy* (OUP 2009) p.136
[841] Simmons, W.P. *Human rights law and the marginalized other* (Cambridge University Press, 2011) p.52
[842] 47 E.H.R.R. 3 Application No.57325/00 [2008]

Furthermore, the Court problematised the government's unlimited and unjustified margin of appreciation[843] by considering the surrounding contextual and cultural circumstances and drawing links between statistical data and the disproportionate effects of the legislation in question.[844] It was also open to the critical question of whether "European governments were capable of coping with increasing racial and ethnic diversity and of protecting vulnerable minorities".[845] As such, *DH* offers us with a crucial interpretation of Article 14 that potentially undoes, unsettles and transgresses liberal-utilitarian approaches and socio-political norms that tend to privilege the dominant consensual and homo-hegemonic positions (e.g. "presenting reasonable grounds" or "very weighty reasons") as evinced in *Eweida.*

In sum, *DH* gives us a more relational reading of Article 14 that does not misperceive, and disavow the alterity of the other*.* Turning back to our discussion of Article 14 and speech regulation (and following *DH*) it can be argued that although Article 14 tends to be read in a manner that sustains and extends the state's banoptic and disciplinary power, its very textual ambiguity still holds out an "otherwise" unanticipatable promise of justice that is responsive/attuned to the singularity and speech of the other.[846]

3) Article 7

A recurring issue in this thesis has been whether or not the limitations on freedom of expression are compliant with the requirement for legality under the Convention. This question of compliance spectrally recurs because there is an apparent lack of clarity with regard to what constitutes incitement to terrorism and how this correspondingly impacts on our assessments of violent, threatening or harmful speech. Therefore, to understand this issue, it is worth our while to look more directly at Article 7 of the Convention.

Article 7 of the Convention, provides: [847]

> 1) No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

[843] Ibid Para 139
[844] Ibid Para 184
[845] Ibid Para 143
[846] I discuss this otherwise promise in chapter 5 using the notion of "the ghost dance".
[847] Article 7 of the ECHR

2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 7 is read in conjunction with Article 8(2) “in accordance with the law” and that in Article 10(2) “prescribed by law”. Article 7 therefore requires that an offence must be clearly defined in law, with sufficient precision to enable a person to foresee, the consequences which a given course of conduct may entail. As my discussion in chapter two has shown, however, it appears that because of the wide-ranging nature of incitement to terrorism laws and their overlaps with other provisions, it becomes difficult for individuals to foresee whether or not they are liable for an offence. Is it then possible for individuals to rely on Article 7 in order to argue that incitement to terrorism laws are not sufficiently clear to enable them to determine with accuracy what speech acts would or would not incur criminal liability? This is a problem that I seek to interrogate in this section.

First, in assessing the foreseeability of legal instruments it appears that the Court interprets the actions of the applicant in relation to the foreseeability of the measure in question. This is ultimately a matter of interpretation as established in *Sunday Times*:

> [...] one of the requirements flowing from the expression “prescribed by law” was a measure's foreseeability. A norm could not be regarded as a “law” unless it was formulated with sufficient precision to enable the citizen to regulate his conduct: he had to be able—if necessary with appropriate advice—to foresee, to a degree that was reasonable in the circumstances, the consequences which certain action might entail.[848]

Put differently, an individual’s actions or omissions and their contextual consequences (in relation to the interpretation of the law at issue) are crucial in determining whether or not a law is foreseeable. This may simply be saying that for the Court, if an individual committed a crime and there was a reasonable expectation from the wording of the statute that such an act or omission was a crime, the relevant law would be sufficiently precise and foreseeable. In addition to the above criteria, the ECtHR will sometimes require under a quality of law test that a national law provide safeguards against arbitrary application.[849] Moreover, the European Commission for Democracy through Law argues that unrestricted state power runs contrary to the rule of law and that laws must indicate the scope of the discretion that they afford to the state to protect against arbitrary application of national laws.

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[848] *Sunday Times v. United Kingdom (1978-1979)* 2 EHRR 245, Para 49

[849] n.776: court requires that the law must provide safeguards against arbitrary application to meet the quality of law test.

To further probe the workings of foreseeability, it is worth turning to the decision in *Cantoni v. France*.[850] Here, the applicant, Cantoni was convicted under Article L. 511 of the French Public Health Code at the instigation of the Yonne Pharmacists' Association for unlawfully selling pharmaceutical products. The applicant had sold in his shop aqueous eosin at 1% strength, 70% modified alcohol, 10-volume hydrogen peroxide, vitamin C (tablets of 500 mg and sachets of powder of 1000 mg), inhalations made out of plant essences, pocket inhalers, antiseptic sprays and mineral supplements. In taking this matter to the Court the applicant argued that the code on which his conviction had been based (i.e., Article L. 511 of the Public Health Code and its definition of "medicinal products") was not sufficiently clear to enable him to determine with accuracy what acts would incur criminal liability. The Commission upheld the decision of the national courts stating that the law was sufficiently clear. Importantly, the commission was of the view that legal statutes "often leave grey areas at the fringes of definition"[851] and for this reason, the law was as "sufficiently precise" as it possibly could be.[852] Thus for the commission, the applicant "Mr. Cantoni, who was, moreover, the manager of a supermarket, should have appreciated at the material time that, in view of the line of case-law stemming from the Court of Cassation and from some of the lower courts, he ran a real risk of prosecution for unlawful sale of medicinal products".[853]

The judgment in *Cantoni* has been echoed in a number of cases where the ECtHR has upheld that the applicants ought to have anticipated that their acts or inactions would have incurred liability. For instance, the ECtHR has reached a similar conclusion in respect to the convictions of directors of a cigarette distribution company for printing on its cigarette packets a phrase, which was not prescribed by law in *Delbos and Others v. France.*[854] Here, the applicants complained that there had been a breach of the "principle of legal certainty". They submitted that the wording of the Articles L. 355-27 II of the Public Health Code was not "reasonably foreseeable" and could thus not be seen to give rise to a criminal conviction. The wording of Article L. 355-27 II required that the statement: "Tobacco seriously damages health" should appear in full and unaltered. In this case, the lack of clarity was with the term "unaltered". The Court held that the law was clear and that the applicants' addition of the words "according to Law no. 91-32" was a reasonably foreseeable alteration of the message and hence a "breach of the provisions" of Article L. 355-27 II. Similarly, in *Radio France and Others v. France*,[855] (where *Radio France* an audio-visual company made statements through a series of news flashes and bulletins in 1997 that affirmatively mentioned a contested article,

[850] (45/1995/551/637) Judgment of 15 November 1996
[851] Para 35
[852] There is a hermeneutic tension here, in the sense that sufficient precision affirms that that sufficiency a priori falls short of the requirement of precision.
[853] Ibid
[854] Application No. 60819/00 [2004]
[855] Application No. 53984/00 [2004]

which alleged that a civil servant, Mr. Michel Junot, the deputy prefect of Pithiviers, had supervised the deportation of a thousand Jews) it was held that there was no breach of Article 7 because the domestic courts' interpretation of the French law on public defamation was consistent with the nature of the offence of defamation and reasonably foreseeable.

If these decisions are read in the context of incitement to terrorism, speech crimes like "encouragement" and or "glorification" of speech, despite their textual excesses, could still be (read as consistent with the nature of the offence, and thus) reasonably foreseeable, they could be read as crimes that meet the "quality of law" test too. Put differently, the wording of the text does not have to be precise. This is impossible, as vagueness of the law does not negate foreseeability and sufficient precision. Precisely because of Article 7's legitimisation of opacity, one's speech can still be legitimately criminalised even in situations where the harm accruing from one's speech is conjectural.

To belabour this point, if say, an individual said something that glorified terrorism — however widely interpreted it is and it was deemed that the "members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by the them" — the Court could potentially maintain the view that the individual could have reasonably foreseen that his speech would incur criminal liability. A key structural antagonism ensuing from reading the law in such an elastic manner is that it privileges the sovereign's deterministic calculation of what constitutes incitement to terrorism (whether it be "glorification", "encouragement" or *apologie*) from the outset and prevents questions of the law's substantive legality from being interrogated even when the law is tenuously drawn and disproportionately applied. As mentioned in chapter two, this problem is compounded by the fact that the very notion of "terrorism" is already notoriously difficult to define and that it tends to be drawn incalculably. This returns us back to the liberal-utilitarian calculus of deterrence and utility oriented justice, which as I have argued so far is always already susceptible to disavowing the alterity of the other.

The fact that the Court has stated that it is not concerned with the appropriateness of the methods chosen by the legislature of a contracting State (a statement perhaps prompted by the principle of subsidiarity and the margin of appreciation) suggests that in any event, the ECtHR would be hesitant to intervene in this matter. Ultimately, this deference to the national legislature and national courts instigates an asymmetrical tension that to a great extent makes Article 7 redundant especially in the context of inchoate speech offences like incitement to terrorism.

In determining "foreseeability", the circumstances within which certain criminal laws are passed and the wording of such laws in relation to the relevant national circumstances are given a high level of credence by the Court. This formulation has an affinity to the operations

of the margin of appreciation and subsidiarity to the extent that the Court defers to the national authorities by giving them a degree of discretion on how to deal with domestic matters. Thus, if a domestic matter entails inconceivable, unforeseeable crimes to-come, (such as terrorism and incitement to terrorism) it is highly likely that the relevant law will also be broad and inconceivable in order to attempt to deal with the exigencies of the situation. For this reason, the ECtHR has accepted that vague definitions and vague legal enactments can be sufficient even in situations where they carry with them penumbrae of doubt. Hence "there will often be grey areas at the fringes of the definition. But crucially, this penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7".[856]

This position, (that states have a wide latitude to define and enforce crimes and that good law can have grey definitional areas) has been reiterated in the case of *Kokkinakis v. Greece*[857] where the applicant Kokkinakis who had converted to the Jehovah's Witness faith was sentenced and imprisoned for acts of proselytism under Greek law (section 4 of Law no. 1363/1938), which made proselytism an offence. Kokkinakis applied to the Commission on 22 August 1988 claiming *inter alia* that his conviction for proselytism was in breach of the rights secured in Article 7 on the grounds that the law was not sufficiently precise and clear in regard to how proselytism was defined.[858]

Kokkinakis is significant because it suggests that broad legal proscriptions are not necessarily in conflict with Article 7. Furthermore, it upholds that the issue of constitutionality of the law is a domestic issue, a matter of subsidiarity. A fair assessment of legality in *Kokkinakis* was arguably hindered from the outset owing to the fact that Article 7 is always already inextricably entangled with the notions of subsidiarity and the margin of appreciation. This sovereignist entanglement (so to speak) means that Article 7 determinations are precluded from being reviewed transnationally altogether. To this end, perhaps owing to sovereignist and socio-political reasons, states are guarded from criticism and review in regard to how they formulate their laws even when these laws could be extra wide and opaque (e.g., through their overlapping nature) as I have argued in chapter two. Which is to say, that for the most part, a state's hauntological excesses in respect to legislating widely are likely to remain unchallenged and this in turn is likely to enable an arbitrary application of the law through the state's wide "margin of appreciation". This is an irreconcilable weakness of Article 7 with regard to individual human rights protections.

Another significant factor that plays a role in determining foreseeability under Article 7 (especially in the context of post-9/11-7/7 terrorism) is an assessment of terrorism that takes into consideration the current framework of international law and international treaty law. This

[856] *Cantoni v. France*, Para 32
[857] Application No. 14307/88
[858] Ibid Para 40-41

mode of determining foreseeability seems to spring from Article 7(2), which refers to the general principles of law recognised by western "civilised nations". Such an interpretation i.e., of international law as a determinant of foreseeability has been confirmed in the case of *Jorgic v. Germany.*[859] In this case, Jorgic, a national of Bosnia and Herzegovina of Serb origin, was arrested when entering Germany and placed in pre-trial detention on the grounds that he was strongly suspected of having committed acts of genocide. The applicant argued that it had not been foreseeable for him at the time of the commission of his acts that the German courts would qualify them as genocide under German or public international law. The German government claimed that the crime of genocide was foreseeable because it was recognised as a crime under the principle of universal jurisdiction which all States establish over crimes against international law, such as acts of genocide, which were directed against the interests of the international community as a whole, irrespective of where or by whom those crimes had been committed.

In its unanimous decision the ECtHR held, siding with the German government, that:

> [W]hile many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts. In these circumstances, the Court finds that the applicant […] could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he committed in 1992. In this context the Court also has regard to the fact that the applicant was found guilty of acts of a considerable severity and duration: the killing of several people and the detention and ill-treatment of a large number of people over a period of several months as the leader of a paramilitary group in pursuit of the policy of ethnic cleansing […]. Therefore, *the national courts' interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen* by the applicant at the material time [emphasis].[860]

In light of the decision in *Jorgic*, one ought to discuss the impact of international principles of international crime pertaining to incitement to terrorism in order to examine how they impact on how foreseeability under Article 7 in the context of incitement terrorism.

The offence of incitement to terrorism under international law is covered under the UN Resolution 1624 (2005) which was adopted on 14 September 2005, two months after the 7/7 bombings in London, which had killed 52 commuters and injured 700 people. Following the

[859] Application No. 74613/01
[860] Para 113-114

July 2005 (7/7) bombings, the UK adopted a series of retaliative counterterrorism management measures, including the deportation of foreign extremist Muslim clerics, the closure of mosques, the proscription of extremist Muslim groups in order to cope with the urgent or emergency nature of the crisis. It is in this context that the UK sponsored Resolution 1624 (2005)[861] stressing that speech associated with terrorism was a crime connected to terrorism and a crime on its own that was deserving of proscription by all means.

Briefly, in terms of scope, the preamble of Resolution 1624 (2005),[862] which condemns incitement to terrorist acts and the glorification of terrorist acts and restates that incitement to terrorism is in conflict with the purposes and principles of the UN. The resolution also calls upon states to adopt such measures by all means as may be necessary and appropriate and in accordance with their obligations under international law to:

a) Prohibit by law incitement to commit a terrorist act or acts;
b) Prevent such conduct;
c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.[863]

It is worth noting that the textual nature of these international resolutions is opaque. They are in essence opaque, adopted in order to deal with the unpredictability and presumed imminence of terror – a ghostly operation. Moreover, Resolution 1624 (2005) in an intertextual movement, extrapolates from UN Resolution 1373 (2001), which was adopted unanimously on 28 September 2001 following the 9/ 11 terrorist attacks on the US and expressly demands also in vague, wide-ranging precalculated terms[864] that criminal measures be implemented in the fight against terrorism.

The opacity within both the aforementioned resolutions sets the tone (a moral and persuasive one) for most contemporary incitement to terrorism regulations internationally. In this way, the very vague and overdetermined or wide-ranging manner of both resolutions suggests that the offence of incitement to terrorism is intentionally constructed so as to reflect attempts to deal with the recalcitrant fear and undecidability of terrorism as a threat in the post-9/11-7/7 continuum. Consequently, if one were to try to use Article 7 as a means of challenging the scope and foreseeability of incitement to terrorism laws in the UK, it is also at the same time unlikely that they would succeed for the simple reason that the "essence of incitement to

[861] Resolution 1624 (2005), adopted on 14 September 2005 by the Security Council
[862] Ibid
[863] Ibid: point 1 of UN Resolution 1624 (2005)
[864] The already vague term "indirect encouragement" which later appears in the Terrorism Act 2006 appears specifically in the UN Security Council resolution 1624.

terrorism" as proscribed in international law is exceptionally wide-ranging and thus somewhat self-destabilizing despite its intentions of preemption, closure, capture, and containment.

In any event, it is clear that the international community has agreed to proscribe speech inchoately, pre-emptively and (un)foreseeably in order to deal with the dynamic and recurrent challenges of and immediacies or urgencies of terrorism in the post-9/11-7/7 continuum. There is not much Article 7 can do to undo this problem which is also psychically tied to persuasive moral forces and questions of a geo-historical and socio-political nature (scenes of subjection) that accrue from and yet move spectrally way beyond the closure of law.[865]

Thus, in spite of the lack of clarity and breadth of the law in this area, and in spite of the fact that the law does not provide clear indications of what exactly it targets, it remains highly unlikely that incitement to terrorism offences would be seen to infringe Article 7 of the Convention. This is due to the sovereignist/imperial liberal-utilitarian impulse of international law and its totalising perception of post-9/11-7/7 terrorism. In other words, the post-9/11-7/7 emergency era, justifies, rationalises and extends or completes international law's empire in its aim of fighting international terrorism.[866] Which is to say, courts and public authorities are sympathetic to the sovereign's need to defend itself from potentially harmful terrorist speech.[867] Their very authority and survival depends on it. As such, Incitement to terrorism laws are always already spectrally configured as good international laws (with sufficient precision) despite their definitional excesses. In this sense, Article 7 serves to reinforce the legality of counterterrorism laws for the sovereign's own liberal-utilitarian ends. But as I have argued through out this thesis, the very expansiveness of such international arrangements opens itself to a multitude (or spectral proliferation) of cross-jurisdictional definitions that render any notion of clarity undecidable with regard to what constitutes incitement to terrorism despite the law's intentions. This is an irresolvable ghostly hermeneutics, a hauntological aporia.

Part IV: Negated rights?

At the risk of sounding needlessly repetitive, I want to stress that I raise these seemingly conflicting human rights fair balancing approaches in this chapter not to suggest that human

[865] The move to legislate widely against terrorism even in international law can be read as an amplification of violent western liberal-utilitarian epistemes of securitocracy. It is a *sensus communis* measure that arguably serves the banoptic or biopolitical purposes of maintaining normative structures of political power, i.e., of subjection, sustaining dialectics (e.g. *the west v. Islam*) and silencing dissent.
[866] Humphreys, S. Legalizing lawlessness: On Giorgio Agamben's state of exception. *European Journal of International Law* 17, no. 3 (2006): 677-687
[867] Goold, Benjamin J., Liora Lazarus, and Gabriel Swiney. "Public Protection, Proportionality, and the Search for Balance." Ministry of Justice Research Series 10, no. 07 (2007)

rights law should be renounced, dispensed with or rejected; (I am acutely aware of the pragmatic limits involved with the espousal of such critiques of human rights, even though they do remain to some degree pertinent) but rather, to stress that the interpretive human rights principles which intend to be conceptually and structurally calculable (like all law) also display intrinsic conceptual and textual tensions (e.g. subjectivity vs. subjection) and plays of *différance* that open up the indeterminate and incalculable. Put another way, my appraisal of human rights in this chapter has attempted to explore the ethical hauntological fraught accruing from human rights [868] as well as the (im)possibilities[869] of justice immanent in the human rights interpretive principles.

Importantly, the concerns underscored in this chapter may suggest that we could do better if we radically dismantled law and did away with human rights. This direction however is not a viable alternative given the ethical exigencies of the ongoing situation of law making and enforcement in the post 9/11-7/7 continuum. Thus, as a conceptual compromise (in lieu of an abolitionary legal ethics and politics to come),[870]I suggest that human rights and speech restrictions could be read in a deconstructive mode that gestures towards law's impossible reserve for justice)[871] so as to preserve and secure a relational leeway, or an interstitial ambit for the irreducible speech and identity of the other.[872]

Inverting human rights?

If read in a transgressive counter movement, the textual and hermeneutic limits of opacity within the human rights principles (i.e., its non-firm improvisatory changeability) always-already presents us with a strategic possibility to recover and unfold the protective possibilities of human rights. This turn towards a reparative configuration of rights has been evident in my discussion of cases such as *Ivanova*, *R (Laporte)* and *DH* as well as, *Yildirim*, *Incal* and *Ceylan*. Granted, it is extremely difficult to get a definitively clear or predictable sense of this operation of possibility within rights. But nevertheless, with my discussion of *Ivanova, R (Laporte), Incal*, *Ceylan* and *DH*, I have intimated that human rights always-

[868] "The Undecidable remains caught, lodged, at least as a ghost—but an essential ghost (*un fantome essentiel*) —in every decision, in every event of decision". Derrida, Force of Law, p.965; Grosz, E. "The time of violence: Deconstruction and value." Journal for Cultural Research 2, no. 2-3 (1998): 190-205.
[869] I explain the notion of impossibility in greater detail in the following chapter.
[870]Saleh-Hanna, V. Black Feminist Hauntology: Rememory, the Ghosts of Abolition? *Champ pénal/Penal field* 12 (2015); Davis, Angela Y., and Dylan Rodriguez. "The challenge of prison abolition: A conversation." Social Justice 27, no. 3 (81 (2000): 212-218; Kaba, Mariame Towards the Horizon of Abolition: A Conversation with Mariame Kaba "*Interview by John Duda* 9/11/ 2017: available at < thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba>
[871] I expound on this idea using the concept of the ghost dance in Chapter 5
[872] Marks, S. *Human rights in disastrous times.* In Crawford, J and Koskenniemi, M (eds.) The Cambridge Companion to International Law (Cambridge University Press, Cambridge 2012) pp. 309-326

already hold a promise or potentiality/malleability to go beyond the banoptic, disciplinary and homo-hegemonic logics of human rights, —- through their responsive consideration of the singularity, particularity, and heterogeneity of the other in divergent situations. I have suggested that human rights interpretive principles if read in an otherwise mode remain transcendentally open to interpretations that are responsive to the heterogeneous speech of the other.

It is the very structural and textual opacity within human rights that can also (paradoxically) allow for interpretations that reroute or detour human rights in an ethico-transgressive register of unanticipatable justice that is more attuned to the heterogeneity of the other. Such a transgressive reading occurs through incalculable processes and estimations that move beyond pre-set or pre-calculated thresholds or boundaries of liberal-utilitarian risk and instead function in an unanticipatable register of justice that pays attention to the difference and alterity of the other. Arguably, such considerations are what allow for the possibility of infinitely responsive interpretations that not only critique monologic calculations of violence but also relational in their absorption of the heterogeneity and plurivocality of the other. I show how these considerations could be intimated in greater detail through the concept of "the ghost dance" in the following chapter.

Conclusion

This chapter has held a sustained discussion of questions that are concerned with the ethical challenges of balancing the right to freedom of expression with counterterrorism practices generally. To address these questions it started off with a conceptual exposition of the fair balancing principles and discussed some of their merits as well as their limits with regard to freedom of expression and its related rights. In doing so, this chapter has underscored the irreconcilable aporias of *freedom vs. unfreedom /subjectivity vs. subjection/singularity v. heterogeneity* that are embedded within the very structure of human rights.

Notwithstanding, this chapter has also noted that although the extensive, opaque and calculably aporetic nature of human rights can be manipulated by the sovereign in a suppressive fashion[873]for its own liberal-utilitarian ends, this very aporia, simultaneously (in a somewhat inverted/otherwise movement) allows for the possibility of a shifting or counter-conjuring of human rights in a different incalculable register of unanticipatable justice that is open to the alterity of the other. As decisions like *Hashman*, *Ivanova*, *Vereinigung Demokratischer Soldaten Osterreichs*, *Sürek (No.1*) and *DH* have shown, this "inverted", or "otherwise" movement eschews liberal-utilitarian foundations of exclusion and

[873] Vismann, *Jurisprudence: a transfer science*, p.281

carceral/penal (e.g. the aporia of *subjectivity v. subjection*) and presents the possibility of a genuine ethical responsibility based on the precedence of the heterogeneity of the other and not on monolithic state sovereign or self/group interests.[874]

The ethical challenge then for us is to navigate the aporetic double bind of human rights in a "hyperethical"[875] incalculable mode of a justice always "yet to come" that betrays the liberal-utilitarian logics of calculation and is more attuned to the alterity and heterogeneity of the other. I show how such a tentative ethical navigation could work using the notion of "the ghost dance" in the following chapter.

[874] Thurschwell, A. "Specters and scholars: Derrida and the tragedy of political thought." German Law Journal 6, no. 1 (2005): 87-99; Fitzpatrick, P. The revolutionary past: decolonizing law and human rights. *Metodo: International Studies in Phenomenology and Philosophy* 2, no. 1 (2014): 117-133

[875] Derrida, *Rogues* p.152: Derrida describes "hyperethics" as that which does not settle for acting according to duty or reason

Chapter 5

Conclusion: Ghosts Demand

How this thesis has progressed so far

This thesis has interrogated some of the textual difficulties and socio-political materialisations that plague incitement to terrorism law making and regulation in the post-9/11-7/7 continuum. The discussion in chapter one was concerned with looking at some often overlooked characteristics of speech itself. I suggested that speech was inherently divergent, heterological and iterable. I then pointed out similarities between fear (or the desire of unconscious) and speech and suggested that online communication technologies are texts in and of themselves that amplify both fear and speech interminably. Speech thus becomes extra-citational, polycentric, extra territorial and iterant. In making this point, I suggested that the iterant nature of speech has proximal links to an "other", an "unconscious" other (*différance*) that is always absent yet always returning or coming back in the multiple ecological contexts (i.e., the visual, aural and audio-visual configurations) within which it occurs. I also made the claim that the heterological nature of speech combined with its magnitude and speed overwhelms[876] and befuddles regulatory determinations. This I observed is what makes speech powerful and phantasmic and is what enables speech to resist frames that seek to contain it. This conceptual observation guided my critique of regulation and law making in the subsequent chapters. Moreover, in introducing the concept of *différance* in this chapter, I also showed how speech regulation tends to disavow or defer forms of speech that do not fit within its pre-calculated monolithic liberal-utilitarian framework. This hypothetical stipulation would underpin much of my discussion and critique in the rest of the thesis.

In chapter two, I scrutinised the laws that attempt to calculably restrict forms of speech that incite terrorism. This analysis focused first on incitement to terrorism provisions such as the Terrorism Act 2000 and the Terrorism Act 2006 and their key components of indirect encouragement, glorification and possession and dissemination. My discussion engaged with the nature of the offences and how they have been interpreted within the UK courts. An early and significant observation in this chapter was that the law in this area contains ambiguities and distortions that seemed to go against conventional criminal law principles such as "causation". For instance, my discussion of glorification and encouragement as crimes

[876] Pew Research Centre Digital life in 2025 (2014) available at: < https://www.pewinternet.org/2014/03/11/digital-life-in-2025/>

revealed that were are not based on observable or identifiable empirical proof but on conjectural inferences like “recklessness”. These conjectural inferences suggested definitional opacity. That is to say, my discussion suggested that incitement to terrorism offences are opaque in the sense that they make it highly probable for the hypothetical citizen to be punished for saying something that a reasonable citizen or a legal adviser could not foreseeably have known or seen to constitute a breach of the law. Although on the one hand opacity is functionally convenient, (in that it reactively acts as a cushion to the incalculable fear and insecurity caused by terrorism), my discussion has shown that on the other hand opacity can also worsen situations by creating more undecidability through its mishmash of incomprehensible laws for example, through the overlaps between glorification and an older criminal law provision such as soliciting to murder which in trying to widen its reach by pre-proscribing the unpredictable generality of terrorism offences end up inescapably exposing the singularity law (exteriorly) to illimitable interpretational conundrums. In any event, the general observation I make in this chapter is that the extensive legalisation/criminalisation of incitement to terrorism laws is highly self-undermining for the reason that the power or force of law spectrally morphs into a paradoxical powerlessness/self-inadequation of legal uncertainty and unpredictability that also signifies an interminable hauntological loss inherent within all contemporary incitement to terrorism laws.

To test how these “opaque” laws were applied, and to determine their efficacy (with regard to delivering their promise of containing speech that incites terrorism), chapter three chronicled the intersection of incitement to terrorism laws with online regulation. Although not expressed in an explicit manner, it seems that in trying to compensate for the heterogeneity of speech, as discussed in chapter one, the laws and policies in this area were driven by a calculable or deterministic fixation on liberal-utilitarian conceptualisations of “ideological speech” as a cause for terrorism. This reasoning seemed to drive Internet regulators such ISPs and the CTIRU to implement vigilant notice and take down practices (that involved the use of AI and automated filtering tools) in an aim to pre-empt the dissemination of terrorist–related speech online. However, despite the regulators’ efforts to take down terrorist speech and to keep it offline, such speech always returned, spectrally, sometimes in an even more concealed way. Moreover, individuals who transmitted the speech at fault could always dis-embed and re-embed from the Internet or manipulate the itinerant heterological texts of speech and computer code/protocol to avoid censorship and detection. This induced an apparent interminable feeling of besiege, inadequacy, fragility or helplessness on the part of the regulators. There was always an overbearing feeling of hauntological anxiety, besiegement, inadequacy or helplessness that occurred especially when the regulators struggled to deal with the repeatability, substitutability and mutations not only of speech but also of technology. Attempts to proscribe the offending extremist speech online then correspondingly became a proscription founded on an interminable apprehension, anxiety and vulnerability.

Chapter four was interested in exploring the connections between human rights considerations and incitement to terrorism laws with particular regard to the fair balancing principles. Central to this discussion was an attempt to navigate the apparent tension between extensive incitement to terrorism legislation under liberal-utilitarian rubrics of human rights particularly in the context of free speech. Other rights in relation to Article 10 speech rights such as the Article 7 right that requires offence to be clearly defined in law with sufficient precision and the Article 14 right from discrimination were also considered. A point of interest was identifying how majority rights are balanced with minority rights under the fair balancing or interpretive principles of the ECtHR. My discussion revealed and highlighted an overarching aporia of subjectivity and subjection within human rights principles. This I argued was down to the liberal-utilitarian logics of law that calculate a means-oriented justice of utility or deterrence. Crucially, however, there were also decisions that intimated an otherwise reading of rights (a sort of rights without rights) wherein the Courts initiated extemporaneous readings of unanticipatable justice that were attuned to the alterity of the other.

My discussion of Article 7 in chapter four was also significant. It addressed the underpinning issue of opacity, i.e., the lack of foreseeability and sufficient precision within current incitement to terrorism legal provisions that runs through chapters two and three. In discussing Article 7, this chapter drew from leading cases from the ECtHR such as *Cantoni v. France* to suggest that the determinants for foreseeability under the Convention can be contradictory in the sense that Article 7 capaciously accommodates for a degree of precision that (yet, at the same time) engenders opacity, vagueness or undecidability within the law.[877] Thus, one's speech can still be legitimately criminalised even in situations where links to actual harm or violence are non-existent or conjectural. One's subjectivity hence always already becomes subtracted, subjugated. The discussion of Article 7 ended by suggesting that the efficacy of Article 7 is undermined due to the fact that incitement to terrorism under International law (and indeed International human rights law) is still considered good law that is necessary and proportionate despite its excesses. In sum, this chapter is critical of the current human rights interpretive principles, their presuppositions of harm and their correspondingly inconsistent application and opaque or undecidable disciplinary logics. However, at the same time, this chapter suggests that if such undecidable human rights interpretive principles are read beyond their calculable liberal-utilitarian rubrics, they could still hold out "otherwise" intimations of unanticipatable justice[878] that embrace the alterity and heterogeneous speech of the other. I draw together and expound on these particular intimations using the notion of "the ghost dance" later in this chapter.

[877] See: Endicott, Law is necessarily vague; Endicott "Interpretation and Indeterminacy"; Endicott, Proportionality and Incommensurability

[878] A similar reading of human rights is developed by de Sousa Santos**:** de Sousa Santos, B. *If god were a human rights activist* (Stanford University Press, 2015)

A re-contextualisation of hauntology

My discussion thus far teased out certain aporias, undecidabilities or vulnerabilities within the law. It has grappled with recurring tension of excess, inadequacy, helplessness and powerlessness that plague incitement to terrorism laws. Put differently, my analysis of incitement to terrorism laws and regulatory practices was haunted with recurring spectral slippages and obfuscations that can be summed up generally in two interrelated points namely: 1) indeterminably wide definitional ambiguities or undecidabilities and interpretive principles pertaining to incitement to terrorism that led to interpretational inconsistences and arbitrariness with regard to how speech is enforced or regulated, and 2); pre-calculated legal and regulatory frameworks and processes that seek to contain, yet still struggle to contain the heterogeneity of speech and the other.

A hauntological impasse?

This thesis has offered the notion of hauntology as a conceptual lens within which I have unpacked the underlying undecidability that haunts the regulation of incitement to terrorism in the post-9/11-7/7 continuum. In using hauntology, I have moved this discussion towards a conclusion that indicates that incitement to terrorism laws are embedded within a conceptual structure that is susceptible to reproducing the very terrors that it seeks to contain. I have also suggested that hauntology can turn the state's very calculating tools of regulation against itself.

Hauntology has functioned as a conceptual tool that articulates the problem of law's intention/motive to contain the uncontainable iterations of speech that return and simply cannot go away. My discussion in chapter two has revealed the extent of this dilemma by showing our inability to discern and distinguish harmful speech from harmful terrorist speech. It has suggested that the law in this area is an open undecidable generality, with no closure no, boundaries, no distinctions. This blurring of distinctions is spectral, phantasmic or hauntological. It is a problem of spectres, a problem of disavowed non-irreducible desires and anxieties that trouble our modern collective consciousness in the post-9/11-7/7 continuum. That is to say, it is a problem of the originary ghosts of fear that recur from the sovereign's exercise of power to foreshadow terror through the notions of pre-crime and predictive policing even in conjectural instances. It is also, all at once, a problem of the interminable and heterological ghosts of the other that befuddle these predictive legal and technological orders of knowledge by undermining their pre-calculated homo-hegemonic and monologic determinacy.

Towards a reconjuring of hauntological logics

Based on my reading of the law and of the regulatory practices concerned with incitement to terrorism, this thesis suggests to a large extent, that we are somewhat transfixed in an undecidable position, or a place of heterological challenges and difficulties. However, being in this undecidable place does not mean that there is no way out, or in, but that there is an opening for us to reinvent, renew, renegotiate and undo our current hauntological logics and the implications of their demands.[879] Hence, although hauntological fear is everywhere, inasmuch as it haunts us everywhere, compromising, inadequating, and confounding us, it still (in a double movement) unfolds possibilities for a way out.

As Derrida elaborates:

> This is not only a problem, but the aporia we face constantly. For me however, the aporia is the condition of walking: if there was no aporia we wouldn't walk, we wouldn't find our way; oath breaking implies aporia. This impossibility to find one's way.[880]

This inability to find one's way, (which is also replicated in the hauntological motif of "a thinking paralysis") follows the arguments of undecidability, opacity, disproportionality and inconsistency which I have laid out over the course of this thesis. It is a hauntological logic that mimics a state of being unhinged, an interruption, and a strange halting, to-and-fro i.e., a failed or hesitant kind of movement.

I want to stress that with undecidability (or the indeterminate) there is always a kind of neutral double affirmation that holds an infinite potential or reserve for justice.[881] That is to say, to be in this neither-no place of undecidability is not necessarily a bad thing. For a neither-nor place is a neutral place, which as Freccero suggests, is a place of self-shattering passivity that rejects the re-enaction of a messianic or homo-hegemonic impulse[882] to act aggressively e.g., through securitisation. It is to enter the place of paused reflection, or of waiting, or weighing, which is also the place of *différance*, i.e., of attending to the other's unfamiliar /unforeseeable ghosts or arrivals with an un-anticipatable concern for justice.[883] The point I am raising here is

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[879]Césaire, A. *Letter to Maurice Thorez 1956 Présence Africaine*, Social Text 103 Vol. 28, No. 2 (Duke University Press 2010)
[880] Derrida, J. Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida, in M. Dooley and R Kearney (eds) *Questioning Ethics: Contemporary Debates in Philosophy*, (London Routledge 1999) p.73
[881] Saghafi, K. *Apparitions--of Derrida's Other* (Fordham Univ Press, 2010) p.120
[882] Freccero, C. (2013). Queer spectrality: Haunting the past. *The Spectralities Reader: Ghosts and Haunting in Contemporary Cultural Theory p.351*
[883] Ibid

that the possibility of an ethics of justice, can only occur when we are undone, in a vulnerable and neutral state of undecidability, Hence, we do not lose anything from interrogating, admitting, and pointing out the autoimmunary and hauntological logics of law and regulation as this thesis has done. Rather, we begin to notice their undergirding inimical limits embedded within a calculated legal/ethical framework, and we start to reroute them by fashioning more ethically responsive readings from beyond their pre-calculated limits.[884]

Reconfiguring Incitement to terrorism laws and regulatory practices

As things stand, incitement to terrorism laws seem for the most part to paint a gloomy picture with regard to freedom of expression and other related human right considerations. And even though one would wish that some of these laws would be repealed, one doubts that such changes will occur given the unavoidable spectral effects of terrorism in the historical present.

What seems to be happening as current legal developments indicate is a push to widen powers through newer hauntological legislation in the form of the Counter-Terrorism and Border Security Act 2019, which still endeavours to contain speech that incites terrorism —– for example through its proscription of: 1) expressions of support for a proscribed organisation;[885] 2) the publication of images[886] and 3); obtaining or viewing material over the internet;[887] and still fails to take into consideration the irreducible heterological divergences of speech both online and offline e.g., by using self-referential hauntological concepts like "reasonable suspicion".

Thus, I remain ambivalent and sceptical about the pros of legislative reform, or repealment for that matter. That is to say, doing away with the legal provisions in this area or repealing them would not at any point absolve incitement to terrorism law of its incommensurable opacities. For law is always concerned with the undecidable, the litigious, the contestable and the adversarial. This is the very inescapable predicament and condition of law, its imperfection, its imprecision its undecidability. There can never be a perfect law,[888] which is another way of saying; there can never be such a thing as a "properly defined" law.

Perhaps then the problem here is not one only and essentially concerned with the content of law and its undecidability (for this is a problem of all law) but also, crucially a problem of

[884] Ramshaw, *Justice as improvisation,* p.115
[885] See section 1 of the Counter-Terrorism and Border Security Act 2019 c.3
[886] Ibid section 2
[887] Ibid section 3
[888] The imperfectability of law can be read as its *pharmakon*. This means that there is always a possibility for law to be rerouted otherwise in an incalculable register that is attuned to the justice of the other. I elaborate on this "rerouting" in the following sections.

interpretation and ethics i.e., —a problem of how we interpret or translate and relate to law's incalculable limits or boundaries in the face/speech of the other.[889] In other words, this is essentially a problem of how the violence/force of law disavows the speech of the other as well as a problem of how the law spectrally calculates and projects crime and terror onto the other.

Can we then, as Freccero asks, in an imperative concern for justice (*a justice that secretly resides and pivots differently, around, and beyond the confines of the force of law*)[890], open up or remain open to "the uncanny and the unknown but somehow strangely familiar, not to determine what is what – to know- but to be demanded of and to respond [?']" [891] Can we give these ghosts' memory a place in the historical present? —Yes. Impossibly yes.

We should not be thrown off by the seeming impossibility and undecidability of hauntological ghosts, and their "failure of certainties".[892] After all, if we are to live with them and their recurring failures, as we already do, we have to yield relationally to their impossible exigencies. Perhaps, this is our only viable option seeing as we are in this neither-nor place, where we are bound to these ghosts and their absolutely unique demands.

The ghost dance

Perhaps, what we should do (with an urgency) is to dance differentially at a distance from the law's boundaries —– listening to, and unsounding the ghosts that it disavows more relationally, attentively and differentially towards justice, in a patient, meticulous, questioning, to-and-fro, off-beat, hesitant, aporetic, ethical register even when on the cusp of terror, —– for there is always an imperceptible "contact, juxtaposition, porosity, osmosis, friction, attraction and repulsion,"[893] i.e., an inevitable intractability to ghosts that requires an anticipation of justice and radical responsiveness (*responsabilité*) in relation to the other.[894] Rather than looking at ways in which the letter of the law could be changed, perhaps a better way of dealing with this quandary is to rethink the ways in which incitement to terrorism laws are interpreted and enforced in the now. For inasmuch as interpretation can oppressive, interpretation can also be otherwise i.e., redemptive or reparative. But the redemptive/reparative (a kind of mourning work that undoes the brutality of violence inherent

[889] I ought to emphasise here that "the other" is a complex heterogeneous identity (or identities) that is disenfranchised, different or deferred (i.e., in *différance*) from prevalent societal and speech norms.
[890] I want to insist following Derrida in *Force of Law* that justice is always yet to come and beyond the confines of the force of law
[891] Freccero, C. *Queer spectrality: Haunting the past* In del Pilar Blanco, M. & Peeren, E.(eds) The Spectralities Reader: Ghosts and Haunting in Contemporary Cultural Theory (2013): p.351
[892] Malabou, C. & Derrida, J. Counterpath *(trans). Wills*, D. (Stanford University Press, 2004) p.28
[893] Nancy, J.L. *The creation of the world, or, globalization* (Suny Press, 2007) p.110
[894] Derrida, J. *The Gift of Death, & Literature in Secret* (University of Chicago Press, 1995) pp.26-27

within law)[895] can only occur if we are attuned to an ethical register of justice that is open to the heterogeneity of the other.

Thus, rather than thinking of terrorism in terms of a pre-emptive urgency to self-protect (especially during crises of terror that disorient, fascinate and trouble us) we could then start to think of it in the terms of an "incomplete"[896] vulnerability, i.e., a vulnerability to a sudden address from elsewhere that we cannot pre-empt,[897] a vulnerability that acknowledges that the questions of terrorism are often incalculably unanswerable (especially as legal truth claims), a spectral vulnerability that uncovers and conjures the ghosts of the other in us, around us, and within us, through a considered responsiveness towards the un-anticipatable. This reconfiguring of the illimitable vulnerabilities or ghosts within law and accepting these problems as un-anticipatable would be in essence an uncovering of law's secret promise, it would be a double affirmation of law's reserve for justice. Hence, this impossibility would uncover the possibility of different ways of addressing current ethical problems that haunt us, as it would tether us irresolvably into an ongoing spectral relation with the heterogeneity and singularity of the other.

In looking at the illimitable ghosts of the other, Derrida looks at these ghosts in terms of an undifferentiated spectral mass i.e., "who are not yet born or who are already dead be they victim of wars political or other kinds of violence, nationalist, racist colonialist sexist or other kinds of exterminations victims of oppressions of capitalist imperialism or any other".[898] Although Derrida's notion of the illimitable is highly illuminating, it is susceptible to certain erasures, particularly in its undifferentiated universal tone. It therefore needs an interruptive-corrective intervention. It requires as Ramshaw has suggested an improvised reading of the (im)possible that no longer dares to speak of "the universal concept of responsibility" but demands on the one hand an attunement,[899] a general answering-for oneself with respect to the general, hence the idea of substitution, and on the other hand, uniqueness, absolute singularity, hence non-substitution, non-repetition, silence, and secrecy.

In light of this, I propose that we embrace another im-possible reading of law (*away from but toward justice*) that emerges from the ethical compass of the ghost dance, a concept I have

[895] For Derrida mourning is a transformative "attempt to ontologize remains *or spirits*, to make them present, in the first place by identifying the bodily remains and by localizing the dead". Derrida, *Specters of Marx*, p.9

[896] Incompleteness here infers a move towards a conviviality that emphasises reconstruction and mitigates delusions of permanence, mastery, perfection and closure: Nyamnjoh, F.B., "Incompleteness: Frontier Africa and the currency of conviviality." *Journal of Asian and African Studies*52, no. 3 (2017): 253-270

[897] Butler. J, Precarious Life: The Powers of Mourning and Violence (Verso, London, 2004) p.29

[898] Derrida, *Specters of Marx* pp.15-16

[899] Or a kind of non-teleological weighing/ listening/ that relates to the other.

purloined here from Spivak.[900] The ghost dance can be described as "an attempt to establish an ethical relation with history in the present".[901] Such a relation entails "a prayer to the haunted, a learning to live at the seam of the past and present, a heterodidactics between life and death".[902] In other words, the ghost dance happens in an impalpable/undecidable void, when we linger in a position of doubt (interstitially, in the fault, between life and death) and free from a desiring imagination so that we can "better understand how to establish the necessary distance".[903] Further, it is important to stress that the performance of the ghost dance only occurs within a subversive freedom – "without subjecting oneself, to the automatic, rotating movement, by remaining as free as possible with regard to the rotation"[904] and a deconstructive mode of faith ("a leap [/*plunge*] of faith into the unforeseeable abyss"[905] or a "self-suspending leap into the other's sea")[906] that can not be confined or imprisoned in the logocentric calculability[907] of time and its determinable horizons.[908] As Cixous observes:

> One cannot do it [*dance*] on purpose or calculate. These things, directions, everything is sent, everything arrives, happens.[909]

Accordingly, the ghost dance is a speculative movement or poise devoid of preliminary positioning and without preconditions, a surrender to the undecidable that thinks beyond the present in the present by conjuring up a counterfactual past-future, or a play of past and future. It is a place of incompleteness, of interminable suspension, of paused assiduous attentiveness. The rationale for the ghost dance is to imagine an unprogrammable movement, akin to a "wandering",[910] beyond homo-hegemonic logocentric assumptions so as to assign

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[900] The Ghost-dance religion involved a dance practice that reunited the living with spirits of the dead, and conjured spirits so as to destroy borders, fight colonialism and bring wellness to indigenous peoples of the Americas: Mooney, J. *The ghost-dance religion and Wounded Knee* (Courier Corporation, 1991); The motif of a ghost dance is also inferred in the work of African and Afro-diasporic writers, most prominently Amos Tutuola and Toni Morrison. Tutuola, A. The Palm-wine Drinkard; And, My Life in the Bush of Ghosts (Grove Press, 1994); Morrison, T. "Beloved. 1987." (Plume 1988)

[901] Spivak, *From Ghostwriting*, p.325

[902] Ibid

[903] Derrida, *Specters of Marx* p.12

[904] Naas, M. Derrida at the Wheel. *Mosaic: A Journal for the Interdisciplinary Study of Literature* (2006): p.60

[905] Edwards, I. Derrida's (Ir) religion: A Theology (of Différance). *Janus Head* 6, no. 1 (2003): 142-153 p.146

[906] Spivak G.C, E. Lyons, L. & Franklin, C. On the Cusp of the Personal and the Impersonal: An Interview with Gayatri Chakravorty Spivak. *Biography* (2004): 207-208. See also Derrida, J. Justice, law and philosophy—an interview with Jacques Derrida. *South African Journal of Philosophy*18, no. 3 (1999) p.280-281

[907] A stretch "toward the horizon of what cannot be seen with ordinary clarity yet." See Gordon, *Ghostly Matters,* p.195

[908] See Caputo, J.D. The Prayers and Tears of Jacques Derrida: Religion without Religion (Indiana University Press 1997) p.63; Derrida, J. *The Gift Of Death* (Chicago: The University of Chicago Press 1995)

[909] Cixous, H. Jacques Derrida as a proteus unbound. *Critical Inquiry* 33, no. 2 (2007): 389-423.

[910] Cervenak, S. J. Wandering: Philosophical performances of racial and sexual freedom (Duke University Press, 2014)

subaltern, silenced (*revenant* as well as *arrivant*)[911] ghosts with new pathways of access, sociality and agency.[912] This unprogrammable movement is a sort of remembering (of forgotten spaces, absences or silences) that does not eschew a colonial melancholia,[913] or mastery but permits and demands of us to mourn (for deliverance is inseparable from death or mortality)[914] and pray, to the haunted, in an alternating register that attends to tensions and forms reciprocal links between the past and the present.[915] In this sense, the ghost dance provides us with the conceptual tools to live more responsibly with the other in times of interminable haunting and undecidability. It calls for a different kind of reading, a hermeneutic injunction that betrays law's interminable frames of subjection and violence —in the post-9/11-7/7 continuum — by insistently clamouring that we keep in touch with the "unadressable" uniqueness of ghosts (*within and without*); that we mourn (complain/grieve) and live unbearably with them, knowing that "what concerns ghosts also concerns us,"[916] and demands "an infinite witness,"[917] response, address and attentiveness from us.

Some actualisations of the ghost dance

A number of cases discussed in this thesis have suggested a transgressive gesturing towards the ghost dance. These cases have suggested the ghost dance is not only that which *will be* or which is *not yet*, but also what is achievable, now, in the living present, in terms of evolutive legal interpretation. In chapter two for example, I looked at cases concerning the regulation of speech that incites terrorism and how they embrace the heterogeneous other in their renegotiations of what constitutes risk or harm. My reading of cases such as *Siddique, Zafar, Samina Hussain Malik,* and *Chambers* echoed the choreology of the ghost dance. In these cases, the judges were context-sensitive and transgressive (in the sense that they moved beyond normative social-cultural-political understandings of speech and harm) and heeded the iterable address, or call, of speech in its incommensurable particularity and difference. Many of these decisions involved a conceptual rerouting of the liberal-utilitarian calculus of harm, deterrence and utility and its predicated means-oriented justice. Rather than focusing on harm and what such legal-juridical calculations and determinations of harm (*could/should*) entail, the courts are more concerned with an ethical repositioning or

[911] Spivak, *From Ghostwriting* p.324
[912] Ibid p.326
[913] Gilroy, P. *Postcolonial melancholia* (Columbia University Press 2004)
[914] For Nancy the limits of existence ought to be thought of together in a manner akin to mourning if we are working towards freedom: Nancy, J.L., *The inoperative community* (University of Minnesota Press, 1991)
[915] *Ghostwriting* p.325
[916] Derrida, J. & Stiegler, B. *Echographies of Television* (Polity 2002) pp.120-121
[917] Ibid

recalibration[918] of justice or responsibility that is responsive to the speech and alterity of the other.

The modes of judicial interpretation in these cases ultimately intimate a ghost-dance-responsiveness towards the un-anticipatable speech of the other. These cases also deconstruct, unsettle and destabilise the over determination of the harm principle and the precalculated monolithic grammar of its liberal utilitarian calculus and in so doing, they whittle away the force of law. Which is to say, the ghost dance does not differentiate. It is able to roam and play around, in, and beyond the indeterminate groundlessness of the law (rather than fixing it) and in so doing it attunes to the unanticipatable speech of the other.

The concept of the ghost dance has also permeated my discussions of human rights law in this thesis. For example, in chapter four, I looked at human rights cases like *R (Laporte) and Sunday Times* where the Court has set out limits to breach the overdetermined liberal-utilitarian calculus of law so as to allow for speech restrictions to be applied in a manner that is attends to the incalculable, the heterogeneous, the unanticipated i.e., the other. Furthermore, my reading of some human rights cases concerning Article 9 and Article 14 reflected spectral symbolic moments where the ECtHR has paid particular attention to the un-anticipatable alterity and the sonic demands or expression of the other. In *DH* for instance, the Court transgresses and repositions normative legal calculations of evidence and determinability i.e., through its reliance on submitted statistical evidence of racism as a problematisation of the state's margin of appreciation. In this sense, the Court undoes law' categorical liberal-utilitarian imperatives of pre-calculated means-oriented justice, and instead ees and responds to the underlying structural and conceptual limitations, contradictions and inabilities of the existing legal-juridico schema to grasp the concerns and the speech of the minoritarian other. The Court also admits that judicial interpretations of human rights are susceptible to privileging an idealised model of speech or *logos* over others. This for me is a symbolic reading that initiates and undulates the ghost dance in a movement that gestures toward the heterogeneous alterity of the other. It is a mode of interpretation that embraces the other's speech hospitably, responsively and conscientiously with sonic pathways of answerable access, agency, relation, and sociality.

Similarly, my reading of *Ivanova* in chapter four also accentuates the ghost dance in the sense that the Court acknowledges the applicant's particularity and singularity of injury i.e., her "feelings of distress helplessness, and emotional suffering" [919] as a result of her Article 9 violations. Thus, the Court foresightedly recognises that a desire for rights limitations should

[918] Lindahl, H. *Fault lines of globalization: Legal order and the politics of a-legality* (Oxford University Press, 2013) p. 233
[919] *Ivanova v. Bulgaria* (Application no. 52435/99) Para 95

not get in the way of relating to the difference and selfhood of the other. In doing so, the Court does not disregard assimilate or reduce the difference of the other. Rather, it allows for human rights to be read more relationally, in a reparative mode, that holds out an incalculable relational justice[920] towards the other.

If read together, *DH, and Ivanova,* (and indeed *Vereinigung Demokratischer Soldaten Osterreichs*) offer a crucial "otherwise" reading of human rights that undoes, unsettles and transgresses univocal hauntological approaches that tend to immure plurivocal understandings of speech. In this regard, they counter-conjure the banoptic disciplinarity of rights by imbuing them with an "attentiveness" to (the on-going heterogeneity of a being-together and) the illimitable iterability and plurivocality of speech. These cases test, question, and interrupt the liberal-utilitarian presuppositions that hold monolithic/homo-hegemonic hauntological frames of "public order and security" together. In this respect, they reorient human rights considerations away from their liberal-utilitarian pre-calculated desires and towards "illiberal"[921] interpretations that expand notions of justice by remaining sensitively open to the alterity of the other (and indeed the other's speech) in all its particular ghostly returns, presences and arrivals.

My readings of these cases suggest that even against the closure of boundaries and opacities that laws reinscribe, even against the hems of the law, judges are interpretively capable of a conjuring a sustained "proximate presence"[922] that suspends and reroutes the existing limits of "anterior" law in order to gesture towards a "roamable ground"[923] that holds incalculable reserves of justice and freedom for the most marginalised and dispossessed in society. These same "roaming" precepts of rerouting boundaries, limits, and reconfiguring what constitutes harm (in a manner that betrays the force of law and stretches towards justice) are also applicable to the "targeted" filtering and blocking practices of ISPs and other regulators of online communication technologies. My discussion of the decision in *Yildirim* for instance outlines certain determinations that can provisionally be useful if we are interested in trying to reconfigure speech regulation and its corresponding human rights considerations online so to speak. *Yildirim* establishes that interferences and collections of data in cyberspace should not be indiscriminate and 2); that they should have proper oversight and procedural safeguards. In doing so, *Yildirim* suspends pre-crime and its deterministic or calculated biopolitical positionings. In other words, it does away with the force of law and its aporetic means-oriented justice (of pre-calculating and weighing threats accruing from

[920] "Law is an element of calculation […] but justice is incalculable, it requires us to calculate with the incalculable": Derrida, *Force of Law*, p.14
[921] Chuh, K. *The Difference Aesthetics Makes: On the Humanities "After Man"* (Duke University Press, 2019) preface xi
[922] Cixous, H. Jacques Derrida as a proteus unbound *Critical Inquiry* 33, no. 2 (2007): p.404; Derrida, J. *The Animal That Therefore I Am (More to Follow)* Critical Inquiry 28 (Winter 2002): pp. 379–80
[923] Cervenak, *Wandering* p.152

incitement to terrorism) and in doing so; it begins to address the heterogeneous alterity of the other in an unanticipatable or incalculable mode of justice from elsewhere.

At the risk of being needlessly repetitive, I want to insist, that the notion of the ghost dance extends itself far beyond the moment of the judicial decision, It occurs in all regulatory and enforcement decisions including those online that involve a relational engagement with the speech of the other i.e., as a communication of "life being lived relationally". As has been suggested, more pragmatically, such a counter-conjuring engagement can only happen with an unprogrammable exercise of unanticipatable justice that eschews the calculability of terms like "terrorism", "glorification" and "encouragement" as well as human rights principles like "proportionality", "living together" and "the margin of appreciation"[924] and instead gives precedence to the alterity and speech of the other.[925]

Admittedly, AI, algorithms and online communication technologies will still present us with undecidable and indeterminable regulatory conundrums. Such conundrums are intertextual and inescapable. They already dissolve into the indeterminate/spectral milieus of speech and terrorism. But the lessons of the ghost dance (i.e., responsiveness, attentiveness, attunement, and roamingness) can also be applied in the context of online speech regulation. And thus, perhaps, if we extemporaneously attend to technology regulation with a singular reflective/ attentive disposition that reads and listens to the interminable questions of heterogeneity beyond the calculative "human"[926] impulse to "render the indeterminate determinate"[927] (i.e., a responsiveness that heeds to the iterable plurivocality of the demands and desires of their "text"/"speech"), *maybe then,* many of the hypervisual ghosts that recurringly haunt technology regulation in the post 9/11 continuum will be assuaged.

Conclusion

Whilst this chapter may be viewed as merely "speculative", it is important.[928] Without speculative imaginations, we are spectrally transfixed (as we have been for the last 18 years

[924] As noted in the introduction, my reluctance to define terrorism or harm is an ethical stance that is guided by the idea that attempts to define any legal term (or even an attempt to defend the rule of law, legal institutions, as well as the integrity, coherence/ stability of legal rules is logocentric), always already engender and sustain the spectral effects and exclusionary violence of liberal-utilitarianism. Thus the ghost dance has to be unprogrammable, un-anticipatable, and improvised i.e., "unrecognisable and beyond all knowledge". Derrida, *Rogues* p.60

[925] Thurschwell, *Specters and scholars*

[926] Wynter, *Unsettling the coloniality of being/power/truth/freedom*

[927] Malabou, C. *Morphing intelligence: from IQ measurement to artificial brains* (Columbia University Press, 2019) p.103

[928] For James, speculative thought is an indispensible way of imagining otherwise in order to overcome systems of oppression: James, C.L.R. Lectures on the black Jacobins: How I wrote the Black Jacobins (14/06/1974) p.74 available at: < https://libcom.org/files/c-l-r-james-lectures-on-the-black-jacobins.pdf >

since 9/11) in a "neutral directionless gleam —– the gaze turned back upon itself and closed in a circle"[929] that constantly rattles us. I am concerned (hauntingly) to see how we might undo this transfixion, but I am even more concerned about how we might counter-conjure it.

The reality (both conceptually and pragmatically) is that nothing else seems to be turning things round. As this thesis has demonstrated, apart from marginalizing minoritarian speech, contemporary legal and enforcement practices that aim to pre-empt harmful speech self-compromise, perhaps because they are based on a framework that privileges an idealised model of speech or humanity (i.e., an overrepresentation of the western ethnoclass of European man as Sylvia Wynter might say)[930] over others. To this end, they regenerate a spectral resurfacing of violence and spectral vulnerabilities within regulation that persists interminably. We therefore need different conceptual imaginations, speculative imaginations that radically/intentionally embrace difference, in order to offer us pathways through which we can reckon with the insistence of the ineffable ghosts of the other in the past and present. For this reason, post-9/11-7/7 hauntological problems of terrorism (writ-large even beyond questions of "incitement") require a kind of counter extra-legal speculation in order to deal with their interminable conceptual difficulties as well as their legal enforcement and regulatory difficulties. As I have suggested, part of this speculation may involve a supplementary exercise of patient-irretrievable reading, roaming, and listening that is attentive to the precedence of the heterogeneous speech and alterity of the other,[931] and not on the closure of liberal-utilitarian self/group interests.

This thesis has shown how this could be done provisionally through the unprogrammable notion of the ghost dance so as "to better understand the past's omnipresence now, in the present"[932] and in the future. Until we dare to imagine this space of radical relationality between law, policy, regulation, and speech is conceptually re-configured, the *unheimlich* ghosts of the other's unspeakable speech will always return to haunt us interminably —–thus, to invoke Hamlet, "the readiness is all".

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[929]Blanchot, M. The Essential Solitude, The Space of Literature (University of Nebraska Press, 1982) p.32

[930] Supra n.867

[931] For an unanticipatable justice to come, those marked as being outside of European modernity must be addressed in counter-conjural modes that betray European modernity i.e., in modes that radically relate to and embrace the contamination of those who always already come from outside of European modernity. This relationship of unanticipatable embrace and justice undoes a post-enlightenment political logic of sovereignty, rights and categorical imperatives and opens out a different potentiality/ sequence of unconditional hospitality or relation to the heterogeneous other. This is the work of the Ghost dance. See: Vázquez, R., Translation as erasure: thoughts on modernity's epistemic violence. *Journal of Historical Sociology* 24, no. 1 (2011): 27-44; Glissant, E. *Caribbean discourse: selected essays* (University of Virginia Press, 1989); Mansfield, N. "Under the black light: Derrida, war, and human rights." Mosaic: A Journal for the Interdisciplinary Study of Literature (2007): 151-164; Derrida, J. Politics of friendship. (Verso, 2005)

[932] Sharpe, C. *Monstrous intimacies: Making post-slavery subjects* (Duke University Press, 2009) p.155

Bibliography

Abbas, Madeline-Sophie. "Producing 'internal suspect bodies': divisive effects of UK counter-terrorism measures on Muslim communities in Leeds and Bradford." *The British journal of sociology* 70, no. 1 (2019): 261-282

Agamben, Giorgio. *State of exception*. (University of Chicago Press, 2005)

Ahdash, Fatima. "The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts." Child and Family Law Quarterly Vol 30, No 4, 2018: 389-414

Ahlert, Christian, Chris Marsden, and Chester Yung. "How 'liberty'disappeared from cyberspace: the mystery shopper tests Internet content self-regulation." *RootSecure. com, www. rootsecure. net/content/downloads/pdf/liberty_ disappeared_from_cyberspace. pdf* (2004).

Ahmed, Shamila. "The 'emotionalization of the "war on terror"': Counter-terrorism, fear, risk, insecurity and helplessness." *Criminology & Criminal Justice* 15, no. 5 (2015): 545-560

Akdeniz, Yaman. *Internet child pornography and the law: national and international responses* (Routledge, 2016)

Alexander, Jeffrey C. Culture trauma, morality and solidarity: The social construction of 'Holocaust' and other mass murders. *Thesis Eleven* (2016)*132*(1)

Alexander, Larry, and Ferzan, Kimberly Kessler. *Crime and culpability: A theory of criminal law* (Cambridge University Press, 2009)

Alexander, Larry, and Kimberly D. Kessler. "Mens rea and inchoate crimes." *J. Crim. L. & Criminology* 87 (1996): 1138

Amoore, Louise. The Politics of Possibility: Risk and Security beyond Probability (Duke University Press, 2013)

Anderson, David. Histories of the hanged: The dirty war in Kenya and the end of empire (WW Norton & Company, 2005)

Anderson, David. "Shielding the Compass: How to Fight Terrorism Without Defeating the Law'(2013)." *EHRLR* 3: 233-246

Anderson, Nicole. Derrida: ethics under erasure (Bloomsbury Publishing, 2012)

Aradau, Claudia, and Rens Van Munster. Governing terrorism and the (non-) politics of risk. (Syddansk Universitet, 2005)

Arendt, Hannah. "Hannah Arendt: From an Interview. *The New York Review of Books* 25, (1978) no.16

Arendt, Hannah. Crises of the Republic (New York: Harcourt Brace Jovanovich, 1972)

Aristotle, Politics (Cambridge, Mass: Leob Classical Library 1932)

Armborst Andreas. "Countering Terrorism and Violent Extremism: The Security–Prevention Complex In eds B. Goold and L. Lazarus Security and Human Rights (Hart Bloomsbury Publishing, 2019)

Ashworth, Andrew, and Lucia Zedner. "Prevention and criminalization: justifications and limits." New Criminal Law Review: In International and Interdisciplinary Journal 15, no. 4 (2012): 542-571

Ashworth, Andrew, and Lucia Zedner. Preventive justice (Oxford University Press 2014)

Ashworth, Andrew. Principles of Criminal Law, 4th edn, (Oxford University Press, 2003)

Atiles-Osoria, José M. "The criminalisation of anti-colonial struggle in Puerto Rico. *Counter-Terrorism and State Political Violence* (Routledge 2012) pp.156-177

Aycock, Alan. "Derrida/Fort-da: deconstructing play." *Postmodern Culture* 3, 1993

Badiou, Alain. Ethics: An Essay on the Understanding of Evil (Verso 2012)

Baker, C. E. "Autonomy and hate speech." In *Hare and Weinstein, Extreme Speech and democracy* (OUP 2009) pp.146-147

Bakunin, Michail. "Letters to a Frenchman on the Present Crisis." *Bakunin on anarchism* (1870): 183-224.

Balkin, Jack M. "Media access: a question of design." *Geo. Wash. L. Rev.* 76 (2007): 933

Banaji, Mahzarin R., and Roy Bhaskar. "Implicit stereotypes and memory: The bounded rationality of social beliefs." *Memory, brain, and belief* (2000): 139-175.

Barak, Aharon. "Proportionality and principled balancing." Law & Ethics of Human Rights 4, no. 1 (2010): 1-16

Barak, Aharon. Proportionality: constitutional rights and their limitations (Cambridge University Press, 2012)

Barendt, Eric. "Threats to freedom of speech in the United Kingdom." *UNSWLJ* 28 (2005): 895

Barendt, Eric. "What Is the Harm of Hate Speech?." Ethical Theory and Moral Practice (2019)

Barendt, Eric. *Freedom of speech* (Oxford University Press, 2005)

Barnes, Richard, Alissa Cooper, Olaf Kolkman, Dave Thaler, and Erik Nordmark. *Technical Considerations for Internet Service Blocking and Filtering* No. RFC 7754. 2016 available at: < https://tools.ietf.org/id/draft-iab-filtering-considerations-03.html >

Barzilai-Nahon, Karine. "Gatekeeping: A critical review." *Annual Review of Information Science and Technology* 43, no. 1 (2009): 1-79.

Başak Ertür, Law of Denial, *Law and Critique* 30, no 1(2019): 1-20

Baudrillard, Jean. Poster, Mark (ed.) Selected writings (1988)

Baxi, Upendra. The future of human rights (Oxford University Press 2002)

Baxter, Kimberly. "The Enlightenment's Post-9/11 Legacy." In Civility, Nonviolent Resistance, and the New Struggle for Social Justice (Brill Rodopi, 2019) pp. 142-162

Baym, Nancy K., and danah boyd. "Socially mediated publicness: An introduction." *Journal of broadcasting & electronic media* 56, no. 3 (2012): 320-329

Beck, Ulrich, Anthony Giddens, and Scott Lash. *Reflexive modernization: Politics, tradition and aesthetics in the modern social order*. (Stanford University Press, 1994)

Beck, Ulrich, Risk society: Towards a new modernity. Vol. 17 (Sage, 1992)

Beck, Ulrich. World at Risk (Polity 2009)

Belavusau, Uladzislau. Dernier Cri from Stasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-Lideikiene v. Lithuania), A." Eur. Pub. L. 16 (2010): 373

Belavusau, Uladzislau. Freedom of speech: Importing European and US constitutional models in transitional democracies. (Routledge, London 2013)

Benjamin, Ruha. Race after technology: Abolitionist tools for the new jim code (John Wiley & Sons, 2019)

Benjamin, Walter. 1921. The Critique of Violence. " *Archive for Social Science and Social Policy* 47 (1920): 809-832.

Bennigton, Geoffrey. Jacques Derrida (University of Chicago press, 1993)

Benvenisti, Eyal. "Margin of appreciation, consensus, and universal standards." *NYUJ Int'l L. & Pol.* 31 (1998): 844.

Berkowitz, Peter. Virtue and the Making of Modern Liberalism (Princeton University Press, 1999)

Bernal, Paul. Fakebook: why Facebook makes the fake news problem inevitable NILQ 69 Vol. 4(2018): 513-30

Bhabha, H. "Foreword: Remembering Fanon." Frantz Fanon Black Skin, White Masks, trans. (London: Pluto Press 1986)

Bhabha, Homi. *The location of culture* (Routledge, 2012)

Bigo, Didier, and Anastassia Tsoukala, eds. *Terror, insecurity and liberty: Illiberal practices of liberal regimes after 9/11* (Routledge, 2008)

Bigo, Didier. "Security, exception, ban and surveillance." In *Theorizing Surveillance*, (Willan, 2006) pp. 60-82

Bigo, Didier. *Illiberal practices of liberal regimes: The (in) security games* (Editions L'Harmattan, 2006)

Birnhack, Michael D., and Niva Elkin-Koren. "The invisible handshake: The reemergence of the state in the digital environment." *Va. JL & Tech.* 8 (2003): 1

Black, Donald. "The geometry of terrorism." *Sociological Theory* 22, no. 1 (2004): 14-25

Black, Julia. "Decentring regulation: Understanding the role of regulation and self-regulation in a "post-regulatory" world." *Current legal problems* 54, no. 1 (2001): 103-146

Blanchot, Maurice. The Essential Solitude, The Space of Literature (University of Nebraska Press, 1982)

Blumenberg, Hans. The legitimacy of the modern age (Mit Press, 1985)

Bogues, Anthony. Black heretics, black prophets: Radical political intellectuals (Routledge, 2015)

Bourdieu, Pierre. *Language and symbolic power* (Polity Press, 2016)

Bourke, Joanna. *Fear: A cultural history* (Counterpoint Press, 2006)

boyd, danah. "The power of fear in networked publics." *SXSW, Austin, Texas* (2012)

Boyle, Kevin. "Hate speech--the United States versus the rest of the world." Me. L. Rev. 53 (2001): 487.

Bronitt, Simon, and James Stellios. "Sedition, security and human rights: Unbalanced law reform in the war on terror." *Melb. UL Rev.* 30 (2006): 923.

Bronitt, Simon, and James Stellios. "Sedition, security and human rights: Unbalanced law reform in the war on terror." *Melb. UL Rev.* 30 (2006): 923.

Brown, Ian, and Douwe Korff. Terrorism and the proportionality of Internet surveillance. *European Journal of Criminology* 6, no. 2 (2009): 119-134

Brown, Ian. "Beware self-regulation." *Index on Censorship* 39, no. 1 (2010): 98-106

Brown, Wendy. Walled states, waning sovereignty (MIT Press, 2017)

Browne, Simone. "Race and surveillance." Handbook on Surveillance Studies (Routledge 2012): 72-79.

Browne, Simone. Dark matters: On the surveillance of blackness (Duke University Press, 2015)

Butler Judith, Gender Trouble (Routledge 1999)

Butler, Judith. Excitable Speech: A politics of the performative (Psychology Press, 1997)

Butler, Judith. Frames of war: When is life grievable? (Verso Books, 2016)

Butler, Judith. Precarious Life: The Powers of Mourning and Violence (Verso, 2004)

Byrne, Edmund F. "The Post-9/11 State Of Emergency: Reality versus Rhetoric." Social Philosophy Today 19 (2003): 193-215

Cahill, Michael T. "Defining Inchoate Crime: An Incomplete Attempt." *Ohio St. J. Crim. L.* 9 (2011): 751.

Cain, William E. "Deconstruction: An Assessment." (1984): 811-820.

Caputo, John D. The Prayers and Tears of Jacques Derrida: Religion without Religion (Indiana University Press 1997) p.63

Carne, Greg. "Brigitte and the French Connection: Security Carte Blanche or A La Carte." (2004): 573

Carozza, Paolo G. "Subsidiarity as a structural principle of international human rights law. *American Journal of International Law* 97, no. 1 (2003): 38-79.

Castells, Manuel. The Power of Identity, vol.2 of The Information Age: Economy Society and Culture (Blackwell Publishers, Oxford, 1997)

Cervenak, Sarah Jane. Wandering: Philosophical performances of racial and sexual freedom (Duke University Press, 2014)

Césaire, Aimé. Letter to Maurice Thorez 1956 Présence Africaine, Social Text 103 Vol. 28, No. 2 (Duke University Press 2010)

Chebel d'Appollonia, Ariane. *Frontiers of fear: Immigration and insecurity in the United States and Europe* (Cornell University Press, 2012)

Choudhury, Tufyal, and Fenwick, Helen "The impact of counter-terrorism measures on Muslim communities." *International Review of Law, Computers & Technology* 25, no. 3 (2011): 151-181.

Choudhury, Tufyal. "The Terrorism Act 2006: Discouraging terrorism." in *Extreme Speech and Democracy* (Oxford University Press 2009) p.463-87

Chowdhury, Kanishka. *Human Rights Discourse in the Post-9/11 Age*. (Springer, 2019)

Chow, Rey. *Not Like a Native Speaker: On Languaging as a Postcolonial Experience* (Columbia University Press, 2014)

Chuh, Kandice. The Difference Aesthetics Makes: On the Humanities "After Man" (Duke University Press, 2019)

Cixous, Hélène. "Jacques Derrida as a proteus unbound." *Critical Inquiry* 33, no. 2 (2007): 389-423

Cixous, Hélène. *Zero's Neighbour: Sam Beckett*. (Polity Press: Cambridge 2010)

Cohen-Almagor, Raphael. Freedom of expression, internet responsibility, and business ethics: The Yahoo! saga and its implications. Journal of business ethics 106, no. 3 (2012): 353-365

Cohen, Stanley. Folk Devils and Moral Panics: The Creation of the Mods and Rockers (Routledge 1972) Collier, David, Fernando Daniel Hidalgo, and Andra Olivia Maciuceanu. "Essentially contested concepts: Debates and applications." Journal of political ideologies 11, no. 3 (2006): 211-246

Cornell, Drucilla. "Post-structuralism, the ethical relation, and the law." Cardozo L. Rev. 9 (1987): 1587

Cornell, Drucilla. "Time, deconstruction, and the challenge to legal positivism: the call for judicial responsibility." Yale JL & Human. 2 (1990): 267

Cotterrell, Roger. Law, culture and society: Legal ideas in the mirror of social theory (Routledge 2016)

Cowen, Deborah and Gilbert, Emily. *Fear and the familial* In the US War on Terror. In: Pain, Rachel and Smith, Susan (eds) Fear: Critical Geopolitics and Everyday Life (Aldershot: Ashgate 2008) pp. 49–58

Crawford, Kate, and Tarleton Gillespie. "What is a flag for? Social media reporting tools and the vocabulary of complaint." *New Media & Society* 18, no. 3 (2016): 410-428.

Crenshaw, Kimberle. "Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics." *U. Chi. Legal F.* (1989): 139.

Crenshaw, Martha. "The causes of terrorism." *Comparative politics* 13, no. 4 (1981): 379-399

Crenshaw, Martha. "Terrorism research: The record." International Interactions 40, no. 4 (2014): 556-567

Cromartie, Alan. *Sir Matthew Hale, 1609-1676: law, religion and natural philosophy*. (Cambridge University Press, 1995)

Crook, John R. "Multiple UCMJ Proceedings Involving Offenses Against Civilians in Iraq." The American Journal of International Law 101, no. 2 (2007): 494

Curran, Vivian Grosswald. "Deconstruction, structuralism, antisemitism and the law." *BCL Rev.* 36 (1994): 1

da Silva, Denise Ferreira. "1 (life)÷ 0 (blackness)=∞−∞ or∞/∞: On Matter Beyond the Equation of Value." Re-visiones 7 (2017)

Davies, Margaret "Derrida and law: legitimate fictions." In (ed) Legrand, P. Derrida and Law pp. 71-95 (Routledge, 2017)

Davis, A Y., and Dylan Rodriguez. "The challenge of prison abolition: A conversation." Social Justice 27, no. 3 (81 (2000): 212-218

Dawes, James R. "Language, Violence, and Human Rights Law." *Yale JL & Human.* 11 (1999): 215.

de la Roche, Roberta Senechal. "Collective violence as social control." In *Sociological Forum*, vol. 11, no. 1, pp. 97-128 (Kluwer Academic Publishers-Plenum Publishers, 1996)

de Londras, Fiona. "Can Counter-Terrorist Internment Ever Be Legitimate." Hum. Rts. Q. 33 (2011): 593

de Londras, Fiona, and Fergal F. Davis. "Controlling the executive in times of terrorism: Competing perspectives on effective oversight mechanisms." *Oxford Journal of Legal Studies* 30, no. 1 (2010): 19-47

de Londras, Fiona, and Josephine Doody, eds. The impact, legitimacy and effectiveness of EU counter-Terrorism (Routledge, 2015)

de Londras, Fiona, and Kanstantsin Dzehtsiarou. "Managing Judicial Innovation in the European Court of Human Rights." *Human Rights Law Review* 15, no. 3 (2015): 523-547

de Londras, Fiona. "Politicisation, Law and Rights in the Transnational Counter-Terrorism Space: Indications from the Regulation of Foreign Terrorist Fighters." European Review of International Studies 5, no. 3 (2018): 115-138

De Saussure, Ferdinand. "Course in General Linguistics (Open Court 1986)

de Sousa Santos, Boaventura. *If god were a human rights activist* (Stanford University Press, 2015)

De Ville, Jacques. "Derrida, the conditional, and the unconditional" Stellenbosch Law Review, Stellenbosch Regstydskrif 18, no. 2 (2007): 255-287

Deleuze, G. *Kant's critical philosophy: The doctrine of the faculties*. A&C Black, 2008

Deleuze, Gilles, and Félix Guattari. A thousand plateaus.1980. (trans) Brian Massumi, (Minneapolis*: University of Minnesota Press* 1987)

Deleuze, Gilles. *Difference and repetition* (Columbia University Press, 1994)

Derrida J, Limited inc. Vol. 10 (Glyph 1977)

Derrida Jacques. Dissemination (Athlone Press, London, 1981)

Derrida Jacques. *Politics of Friendship* (Verso, 2005)

Derrida, J. Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida, in M. Dooley and R Kearney (eds) *Questioning Ethics: Contemporary Debates in Philosophy*, (London Routledge 1999)

Derrida, Jacques and Habermas, Jurgen. Giovanna Borradori (ed) Philosophy in a Time of Terror: Dialogues with and Jacques Derrida (University of Chicago Press, London, 2003)

Derrida, Jacques, and Avital Ronell. The law of genre. *Critical inquiry* 7, no. 1 (1980): 55-81

Derrida, Jacques, and Bernard Stiegler. Echographies of Television (Polity 2002)

Derrida, Jacques. "Declarations of independence." *New Political Science* 7, no. 1 (1986): 7-15.

Derrida, Jacques. "Force of Law: The Mystical Foundation of Authority. In eds. Drucilla Cornell, Michael Rosenfield and David G. Carlson." (1992).

Derrida, Jacques. Archive Fever: A Freudian Impression (The University of Chicago Press, 1996)

Derrida, Jacques. Justice, law and philosophy—an interview with Jacques Derrida. *South African Journal of Philosophy*18, no. 3 (1999)

Derrida, Jacques. Limited Inc. (Northwestern University Press, 1988)

Derrida, Jacques. Monolingualism of the Other, or, the Prosthesis of Origin (Stanford University Press, 1998)

Derrida, Jacques. Of grammatology, (trans) Gayatri Chakravorty Spivak (Baltimore John Hopkins University Press, 1976)

Derrida, Jacques. *On cosmopolitanism and forgiveness* (Routledge, 2003)

Derrida, Jacques. *Paper machine*. (Stanford University Press, 2005)

Derrida, Jacques. *Positions* (Continuum 2004)

Derrida, Jacques. *Resistances of psychoanalysis* (Stanford University Press 1998)

Derrida, Jacques. Rogues: Two essays on Reason (Stanford University Press 2005)

Derrida, Jacques. Signature event context. 1972 (trans) Samuel Weber and Jeffrey Mehlman (Glyph I, 1977)

Derrida, Jacques. Spectres of Marx (New York: Routledge 1994)

Derrida, Jacques. The Animal That Therefore I Am (More to Follow) (trans) David Wills, Critical Inquiry 28 (Winter 2002): pp. 379–80

Derrida, Jacques. The beast and the sovereign, Vol I (University of Chicago Press 2009)

Derrida, Jacques. *The Death Penalty* Vol ii (The University of Chicago Press 2017)

Derrida, Jacques. The Gift of Death, & Literature in Secret (University of Chicago Press, 2017)

Descartes, René. Meditations on First Philosophy (Cambridge University Press, 1996)

DiMaggio, Paul, and Walter W. Powell. "The iron cage revisited: Collective rationality and institutional isomorphism in organizational fields" *American sociological review* 48, no. 2 (1983): 147-160

Dister, John E. "Kant's Regulative Ideas and the 'Objectivity' of Reason." In Proceedings of the Third International Kant Congress, pp. 262-269. Springer, Dordrecht, 1972

Donohue, Laura, K. "Terrorist speech and the future of free expression." *Cardozo L. Rev.* 27 (2005): 233

Dothan, Shai. "Judicial Tactics in the European Court of Human Rights." Chi. J. Int'l L. 12 (2011): 115

Douglas, Roger 'The Ambiguity of Sedition: The Trials of William Fardon Burns' (2004) 9 Australian

Douglas, Roger. "The ambiguity of sedition: the trials of William Fardon Burns." *Austl. J. Legal Hist.* 9 (2005): 227

Douzinas, C. The End of Human Rights: Critical Legal Thought at the Turn of the Century (Hart, 2000)

Douzinas, Costas. Human rights and empire: the political philosophy of cosmopolitanism (Routledge-Cavendish, 2007)

Duarte, Natasha, Emma Llanso, and Anna Loup. "Mixed Messages? The Limits of Automated Social Media Content Analysis (*FAT* 2018)

Duffy, Helen, and Kate Pitcher. "Inciting Terrorism? Crimes of Expression and the Limits of the Law." In eds B. Goold and L. Lazarus Security and Human Rights (Hart Bloomsbury Publishing, 2018)

Dworkin, R. Taking Rights Seriously (London Duckworth 1977)

Edwards, Arthur R. "The moderator as an emerging democratic intermediary: The role of the moderator in Internet discussions about public issues." *Information Polity* 7, no. 1 (2002): 3-20.

Edwards, Ian. "Derrida's (Ir) religion: A Theology (of Différance)." *Janus Head* 6, no. 1 (2003): 142-153

Edwards, Phil. Counter-terrorism and counter-law: An archetypal critique Legal Studies 38, no. 2 (2018): 279–97

Eisenstadt, Oona. "The problem of the promise: Derrida on Levinas on the cities of refuge." CrossCurrents (2003): 474-482

Ekaratne, S. Chehani. "Redundant Restriction: The UK's Offense of Glorifying Terrorism." *Harv. Hum. Rts. J.* 23 (2010): 205

El-Enany, Nadine. "'Innocence Charged with Guilt': The Criminalisation of Protest from Peterloo to Millbank". In *Riot, Unrest and Protest on the Global Stage*, pp. 72-97 (Palgrave Macmillan, London, 2014)

Elkins, Caroline. "Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice." The Journal of Imperial and Commonwealth History 39, no. 5 (2011): 731-748

Ellison, Ralph. Invisible Man. 1952 (New *York: Vintage,* 1995)

Endicott, Timothy "Interpretation and Indeterminacy: Comments on Andrei Marmor's Philosophy of Law." Jerusalem Review of Legal Studies 10, no. 1 (2014)

Endicott, Timothy. "Law is necessarily vague." *Legal theory* 7, no. 4 (2001): 379-385

Endicott, Timothy. *Proportionality and Incommensurability* in Huscroft G, Miller BW and Webber, G (eds). Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press, 2014)

Eubanks, Virginia. Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (St. Martin's Press, 2018)

Fanon, F. "Algeria unveiled" In Decolonization, Routledge, 2004) pp. 60-73

Fanon, F. Black Skin, White masks (New York 1952)

Farrell, Henry, and Abraham L. Newman. *Of Privacy and Power: The Transatlantic Struggle Over Freedom and Security* (Princeton University Press, 2019)

Farrior, Stephanie. "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech. *Berkeley J. Int'l L.* 14 (1996): 1

Ferzan, Kimberly Kessler. "Inchoate Crimes at the Prevention/Punishment Divide." *San Diego L. Rev.* 48 (2011): 1273

Fidler, David P. "Countering Islamic State exploitation of the internet." Digital and Cyberspace Policy Program, June 2015 (2015)

Fitzpatrick, Peter Is Law Cosmopolitan? in de Vries, U and Francot, L. Law's Environment: Critical Legal Perspectives (Eleven International Publishing, 2011)

Fitzpatrick, Peter. *Modernism and the Grounds of Law* (Cambridge University Press, 2001)

Fitzpatrick, Peter. The revolutionary past: decolonizing law and human rights." *Metodo: International Studies in Phenomenology and Philosophy* 2, no. 1 (2014): 117-133

Foucault, Michel, Discipline and Punish: The Birth of the Prison, (London: Penguin, 1991)

Foucault, Michel. Archaeology of Knowledge (Pantheon Books, New York 1972)

Foucault, Michel. Power/Knowledge: Selected Interviews and Other Writings 1972–1977 (Colin Gordon, 1980)

Foucault, Michel. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, (New York, Pantheon Books, 1980)

Foucault, Michel. Security, territory, population; lectures at the College de France, 1977-78 (London: Palgrave Macmillan 2007)

Foucault, Michel. The Archaeology of Knowledge (New York: Pantheon Books 1972)

Franklin, Seb. Control: Digitality as cultural logic. (MIT Press, 2015)

Freccero, Carla. "Queer spectrality: Haunting the past." *The Spectralities Reader: Ghosts and Haunting in Contemporary Cultural Theory* (2013): 335-359

Freud, Sigmund. *Case Histories II* (Penguin Freud Library Vol. 9, 1988)

Freud, Sigmund. The Uncanny" (Imago, Bd. V., 1919)

Freud, Sigmund. Totem And Taboo (1913): Some Points of Agreement between the Mental Lives of Savages and neurotics (Routledge, 2013)

Frosio, Giancarlo, and Sunimal Mendis. "Monitoring and Filtering: European Reform or Global Trend?." The Oxford Handbook of Online Intermediary Liability (Oxford University 2019)

Füredi, Frank. *Invitation to terror: The expanding empire of the unknown* (Continuum Intl Pub Group, 2007)

Füredi, Frank. *Precautionary culture and the rise of possibilistic risk assessment*. Erasmus L. Rev.2 (2009): 197

Galloway, A.R. *Protocol: How control exists after decentralization* (MIT press, 2004)

Gearty, Conor. Liberty & Security (Polity Press 2013)

Gearty, Conor 'State surveillance in an age of security', in F Davis, N McGarrity, G Williams (eds), Surveillance, Counterterrorism and Comparative Constitutionalism (Routledge, 2013)

Gearty, Conor. Terrorism and human rights. Government and Opposition 42, no. 3 (2007): 340-362

Geddis, Andrew. Free Speech Martyrs or Unreasonable Threats to Social Peace?: Insulting Expression and Section 5 of the Public Order Act 1986. *Public law* 4 (2004): 853-874

Giddens, Anthony. Risk and responsibility. *The modern law review* 62, no. 1 (1999): 1-10

Gillies, Lorna E. "Getting the balance right: human rights in residual jurisdiction rules of English courts for cross-border torts via social media." In Mangan D and Gillies, LE. (eds)The Legal Challenges of Social Media (Edward Elgar Publishing, 2017)

Gilroy, Paul. Lecture I. Suffering and Infrahumanity Lecture II. Humanities and a New Humanism." (*Tanner Lectures* 2014)

Gilroy, Paul. Postcolonial melancholia (Columbia University Press 2004)

Glissant, Édouard "Poetics of Relation (trans) Betsy Wong (Ann Arbor: University of Michigan Press, 1997)

Glissant, Edouard. *Caribbean discourse: selected essays*. (University of Virginia Press, 1989)

Goldberg, Jesse A. "James Baldwin and the Anti-Black Force of Law: On Excessive Violence and Exceeding Violence." Public Culture 31, no. 3 (2019): 521-538

Golder, Ben "Beyond redemption? Problematising the critique of human rights in contemporary international legal thought." London Review of International Law 2, no. 1 (2014): 77-114

Goldsmith, Andrew, and Russell Brewer. "Digital drift and the criminal interaction order." *Theoretical Criminology* 19, no. 1 (2015): 112-130

Goodall, Kay. Incitement to religious hatred: all talk and no substance? *The Modern Law Review* 70, no. 1 (2007): 89-113

Goode, E. and Ben-Yehuda, N. Moral Panics: The Social Construction of Deviance (John Wiley & Sons, 2010)

Goodrich, Peter. "Legal Enigmas—Antonio de Nebrija, The Da Vinci Code and the Emendation of Law." *Oxford Journal of Legal Studies* 30, no. 1 (2010): 71-99

Goold, Benjamin J., and Liora Lazarus, (eds) Security and human rights (Bloomsbury Publishing, 2019)

Goold, Benjamin J., Liora Lazarus, and Gabriel Swiney. "Public Protection, Proportionality, and the Search for Balance." Ministry of Justice Research Series 10, no. 07 (2007)

Gordon, Avery F. *Ghostly matters: Haunting and the sociological imagination* (University of Minnesota Press, 2008)

Green, Jonathan and Nicholas J. Karolides. The Encyclopedia of Censorship (Facts On File Inc, 2005)

Gregory, Derek. "The black flag: Guantánamo Bay and the space of exception." Geografiska Annaler: Series B, Human Geography 88, no. 4 (2006): 405-427

Grewal, Inderpal. Saving the Security State: Exceptional Citizens in Twenty-First-Century America. (Duke University Press, 2017)

Grosz, Elizabeth. The time of violence: Deconstruction and value. Journal for Cultural Research 2, no. 2-3 (1998): 190-205.

Gunkel, David J. Hacking Cyberspace (Westview Press 2001)

Habermas, Jürgen. On the pragmatics of communication (Polity, 2003)

Haggerty, Kevin D., and Richard V. Ericson. "The surveillant assemblage." *The British journal of sociology* 51, no. 4 (2000): 605-622

Haggerty, Kevin D., Dean Wilson, and Gavin JD Smith. Theorizing surveillance in crime control." *Theoretical Criminology* 15, no. 3 (2011): 231-237

Hägglund, M. "The necessity of discrimination: Disjoining Derrida and Levinas." diacritics 34, no. 1 (2004): 40-71

Hall, Stuart and Back, Les. "At home and not at home: Stuart Hall in conversation with Les Back." *Cultural Studies* 23, no. 4 (2009): 658-687.

Hall, Stuart, Chas Critcher, Tony Jefferson, John Clarke, and Brian Roberts. *Policing the crisis: Mugging, the state and law and order* (Hong Kong: Macmillan Press Ltd, 1982)

Hall, Stuart, On Postmodernism and Articulation: An Interview with Stuart Hall. Journal of Communication Inquiry, 10 (1986) 45-60

Hampsher-Monk, Iain. *The impact of the French Revolution: texts from Britain in the 1790s*. Vol. 2. (Cambridge University Press, 2005)

Harcourt, Bernard E. "The collapse of the harm principle." J. Crim. L. & Criminology 90 (1999): 109

Harcourt, Bernard E. Against prediction: Profiling, policing, and punishing in an actuarial age (University of Chicago Press, 2008)

Hare, Ivan and James, Weinstein (eds) *Extreme speech and democracy* (Oxford University Press, 2010)

Hart, Herbert LA. Law, Liberty and Morality (Stanford University Press 1963)

Hart, Herbert LA. "The concept of law. (Clarendon law series 1961)

Hartman, Saidiya. "Venus in two acts." *Small Axe: A Caribbean Journal of Criticism* 12, no. 2 (2008): 1-14

Hartman, Saidiya. *Scenes of subjection: Terror, slavery, and self-making in nineteenth-century America* (Oxford University Press, 1997)

Hayles, N. Katherine. "Traumas of code." *Critical Inquiry* 33, no. 1 (2006): 136-157

Heath-Kelly, Charlotte. "Counter-terrorism and the counterfactual: Producing the 'radicalisation' discourse and the UK Prevent strategy. *The British journal of politics and international relations* 15, no. 3 (2013): 394-415

Hegel, Georg Wilhelm Fredrich. *Hegel: Elements of the philosophy of right* (Cambridge University Press, 1991)

Heidegger, Martin. *The question concerning technology* (New York: Harper & Row, 1977)

Heinze, Eric. "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age, and Obesity." *Extreme speech and democracy* (2009): 265-285.

Heinze, Eric. "Viewpoint absolutism and hate speech." The Modern Law Review 69, no. 4 (2006): 543-582

Heinze, Eric. Hate Speech and Democratic Citizenship (Oxford University Press, 2016)

Hiruncharoenvate, Chaya, Zhiyuan Lin, and Eric Gilbert. "Algorithmically Bypassing Censorship on Sina Weibo with Nondeterministic Homophone Substitutions (*ICWSM* 2015)

Hiruncharoenvate, Chaya. Understanding and circumventing censorship on Chinese social media. PhD diss., (Georgia Institute of Technology, 2017)

Hobbes, Thomas. Leviathan.1651. (Harmondsworth: Penguin 1968)

Holland, Sharon Patricia. *Introduction: Raising the Dead* in del Pilar Blanco, M. & Peeren, E. (eds) The Spectralities Reader: Ghosts and Haunting in *Contemporary Cultural Theory. Bloomsbury, London* (2013) p.362-*370*

Holquist, Michael. Corrupt originals: The paradox of censorship. *Publications of the Modern Language Association of America* (1994): 14-25

hooks, bell. *Teaching to transgress* (Routledge, 2014)

Horder, Jeremy “Crimes of Ulterior Intent,” in Simester A.P. and Smith A.T.H. (eds.), Harm and Culpability (Oxford: Oxford University Press, 1996), pp. 153–168

Horder, Jeremy. Ashworth's Principles of Criminal Law (Oxford University Press, 2016)

Horn, Eva. Logics of political secrecy *Theory, Culture & Society* 28, no. 7-8 (2011): 103-122.

Humphreys, Stephen. "Legalizing Lawlessness: On Giorgio Agamben's State of Exception." *European Journal of International Law* 17, no. 3 (2006): 677-687

Hunt, Adrian. Criminal prohibitions on direct and indirect encouragement of terrorism. Criminal Law Review (2007): 441

Huysmans, Jef. *The politics of insecurity: Fear, migration and asylum in the EU* (Routledge, 2006)

Jahn, Beate. "Barbarian thoughts: imperialism in the philosophy of John Stuart Mill." *Review of International Studies* 31, no. 3 (2005): 599-618

Jain, Anil K., M. Narasimha Murty, and Patrick J. Flynn. "Data clustering: a review." *ACM computing surveys* (CSUR) 31, no. 3 (1999): 264-323

Johns, Fleur. *"From Planning to Prototypes: New Ways of Seeing Like a State."* The Modern Law Review (2019) 82(5) MLR 833–863

Joque, Justin. *Deconstruction Machines: Writing in the Age of Cyberwar* (University of Minnesota Press, 2018)

Kain, Philip J. "Nietzsche, eternal recurrence, and the horror of existence." *Journal of Nietzsche Studies* (2007): 49-63

Kalulé, Peter. "On the Undecidability of Legal and Technological Regulation." Law and Critique 30, no. 2 (2019): 137-158

Kant, Immanuel. "On the use of teleological principles in philosophy (1788) (Cambridge University Press 2007)

Kapur, Ratna. Gender, Alterity and Human Rights: Freedom in a Fishbowl (Edward Elgar Publishing, 2018)

Kapur, Ratna. Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006). *Sydney Law Review* 28: 665

Kennedy, Duncan. "The critique of rights in critical legal studies." *Left legalism/left critique* 178 (2002): 216

Kleinlein, Thomas. "The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution." International & Comparative Law Quarterly 68, no. 1 (2019): 91-110

Koppelman, Andrew. "Veil of Ignorance: Tunnel Constructivism in Free Speech Theory." *Nw. UL Rev.* 107 (2012): 647

Kostakopoulou, Dora. "How to do things with security post 9/11." Oxford Journal of Legal Studies 28, no. 2 (2008): 317-342

Kraakman, Reinier H. "Gatekeepers: the anatomy of a third-party enforcement strategy." *Journal of Law, Economics, & Organization* 2, no. 1 (1986): 53-104

Kreimer, Seth F. "Censorship by proxy: the first amendment, Internet intermediaries, and the problem of the weakest link." *U. Pa. L. Rev.* 155 (2006): 11

Kristeva, Julia. *The Kristeva Reader* (Oxford Basil Blackwell 1986)

Kuczerawy, Aleksandra. "Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative." *Computer Law & Security Review* 31, no. 1 (2015): 46-56

Kundnani, Arun. The Muslims are coming!: Islamophobia, extremism, and the domestic war on terror (Verso Books, 2014)

Kuran, Timur. Ethnic norms and their transformation through reputational cascades. *The Journal of Legal Studies* 27, no. S2 (1998): 623-659

Laidlaw, Emily B. "A framework for identifying Internet information gatekeepers." *International Review of Law, Computers & Technology* 24, no. 3 (2010): 263-276.

Laidlaw, Emily. "Internet gatekeepers, human rights and corporate social responsibilities." PhD thesis, (The London School of Economics and Political Science 2012)

Land, Molly. "Toward an international law of the internet." Harv. Int'l LJ 54 (2013): 393

Landgraf, Edgar. *Improvisation as Art: Conceptual Challenges, Historical Perspectives*. (Bloomsbury Publishing, 2011)

Lazarus, Liora, Christopher McCrudden, and Nigel Bowles, Reasoning rights: comparative judicial engagement (Hart, 2014)

Legg, Andrew The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (Oxford University Press 2012)

Lessig, Lawrence. *Remix: Making art and commerce thrive in the hybrid economy* (Penguin, 2008)

Levine, Michael, G. *Writing through repression: literature, censorship, psychoanalysis*. (John Hopkins University Press, 1994)

Lindahl, Hans. *Fault lines of globalization: Legal order and the politics of a-legality* (Oxford University Press, 2013)

Loader, Ian. "Ice cream and incarceration: On appetites for security and punishment." Punishment & Society 11, no. 2 (2009): 241-257

Loevy, Karin. *Emergencies in public law: The legal politics of containment* (Cambridge University Press, 2016)

Losurdo, Domenico. *Liberalism: A counter-history* (Verso Books, 2014)

Lyon, David. "Everyday surveillance: Personal data and social classifications." *Information, Communication & Society* 5, no. 2 (2002): 242-257.

Lyon, David. "Surveillance, Snowden, and big data: Capacities, consequences, critique." *Big Data & Society* 1, no. 2 (2014): 2053951714541861

Macdonald, Stuart. "Prosecuting suspected terrorists: precursor crimes, intercept evidence and the priority of security." In Critical Perspectives on Counter-terrorism, pp. 146-165 (Routledge, 2014)

Machiavelli, Niccolo. *The Prince* (Penguin, 1961)

MacKinnon, Rebecca. *Consent of the networked: The worldwide struggle for Internet freedom*. (Basic Books, 2013)

Magnuson, William. "The responsibility to protect and the decline of sovereignty: free speech protection under international law." *Vand. J. Transnat'l L.* 43 (2010): 255.

Malabou, Catherine and Jacques Derrida. "Counterpath." *(trans) David Wills* (Stanford University Press, 2004)

Malabou, Catherine. Morphing intelligence: from IQ measurement to artificial brains (Columbia University Press, 2019)

Malik, Maleiha. Extreme speech and liberalism In *Ivan Hare, and James Weinstein* (eds) Extreme speech and democracy (OUP, 2009) pp.96-120

Mansfield, Nick. "Under the black light: Derrida, war, and human rights." Mosaic: A Journal for the Interdisciplinary Study of Literature (2007): 151-164.

Marks, Susan. *Human rights in disastrous times.* In Crawford, James and Koskenniemi, Martti, (eds) *The Cambridge Companion to International Law* (Cambridge University Press 2012) pp. 309-326

Marsden, Christopher T. *Internet co-regulation: European law, regulatory governance and legitimacy in cyberspace* (Cambridge University Press, 2011)

Massumi, Brian. The politics of everyday fear (University of Minnesota Press, 1993)

Mayer-Schönberger, Viktor. Delete: The virtue of forgetting in the digital age (Princeton University Press, 2011)

Mbembe, Achille and Mitsch, R.H. "Life, sovereignty, and terror in the fiction of Amos Tutuola." *Research in African Literatures* 34, no. 4 (2003): 1-26

Mbembe, Achille. Necropolitics. In *Foucault in an Age of Terror* (Palgrave Macmillan, London, 2008)

McIntyre, T. J., and Colin Scott "Internet Filtering: Rhetoric, Legitimacy, Accountability." *Regulating technologies: Legal futures, regulatory frames and technological fixes* (2008): 109

McKittrick, Katherine. Demonic grounds: Black women and the cartographies of struggle (U of Minnesota Press, 2006)

Meyda, Yegenoglu. Colonial Fantasies: Towards a Feminist Reading of Orientalism (Cambridge: Cambridge University Press, 1998)

Mignolo, Walter D. "Introduction: Coloniality of power and de-colonial thinking." *Cultural studies* 21, no. 2-3 (2007): 155-167

Mill John Stuart, Considerations on Representative Government (Parker, son, and Bourn, 1861)

Mill, John Stuart. *On Liberty*, 1859 (Broadview Press, 1999)

Miller, J. Hillis. "Derrida's Destinerrance." *MLN* 121, no. 4 (2006): 893-910.

Monaghan, Nicola. Criminal law: directions (OUP, 2016)

Mooney, James. The ghost-dance religion and Wounded Knee (Courier Corporation, 1991)

Morrison, Toni. "Beloved. 1987." (Plume, 1988)

Mörth, Ulrika. Soft law in governance and regulation: an interdisciplinary analysis (Edward Elgar Publishing, 2004)

Moten, Fred. *In the Break: The Aesthetics of the Black Radical Tradition*. (University of Minnesota Press, 2003)

Motha, Stewart. Archiving Sovereignty: Law, History, Violence (University of Michigan Press, 2018)

Mouffe, Chantal. "Introduction: For an agonistic pluralism (Verso 1993)

Mowbray, Alastair. "Subsidiarity and the European Convention on Human Rights." Human Rights Law Review 15, no. 2 (2015): 313-341

Murray, Andrew D. "Mapping the rule of law for the internet." In Mangan D and Gillies, LE. (eds)The Legal Challenges of Social Media (Edward Elgar Publishing, 2017)

Murray, Andrew D. Internet Regulation in *Handbook on the Politics of Regulation* Levi-Faur, David (ed) (Edward Elgar Publishing, 2011) p.277

Murray, Daragh. "Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights." *Netherlands Quarterly of Human Rights* 27, no. 3 (2009): 331-360

Myers, Joshua The Order of Disciplinarily, the Terms of Silence *Critical Ethnic Studies* Vol. 4, No. 1 (Spring 2018), pp. 107-129

Mythen, Gabe, and Sandra Walklate. "Pre-crime, regulation, and counter-terrorism: interrogating anticipatory risk: Gabe Mythen and Sandra Walklate explore the extent to which risk is being utilised more intensively in the development of crime control policies." *Criminal Justice Matters* 81, no. 1 (2010): 34-36

Naas, Michael. "Derrida at the Wheel." *Mosaic: A Journal for the Interdisciplinary Study of Literature* (2006): 59-68

Nakamura, Lisa, and Peter Chow-White, eds *Race after the Internet*. (Routledge, 2013)

Nancy, Jean-Luc. *The creation of the world, or, globalization* (Suny Press, 2007)

Nancy, Jean-Luc. *The inoperative community* (University of Minnesota Press, 1991)

Nguyen, N. Suspect communities: Anti-Muslim racism and the domestic war on terror. (U of Minnesota Press, 2019)

Nietzsche, Friedrich. *Twilight of the Idols*, in *The Portable Nietzsche,* (trans) Walter Kaufmann (Viking Press, 1954)

Noble, Safiya Umoja. *Algorithms of oppression: How search engines reinforce racism* (nyu Press, 2018)

Norris, Chrisopher. "Deconstruction: Theory and Practice (New York, Methuen 1982)

Nusbaum Howard C. The Breakdown of Civic Virtues and the Problem of Hate Speech: Is There Wisdom in Freedom of Speech?. In: Sternberg R., Nusbaum H., Glück J. (eds) Applying Wisdom to Contemporary World Problems. (Palgrave Macmillan, 2019)

Nussbaum, Martha C. *The new religious intolerance* (Harvard University Press, 2012)

Nyamnjoh, Francis B., "Incompleteness: Frontier Africa and the currency of conviviality." *Journal of Asian and African Studies*52, no. 3 (2017): 253-270

O'Neil, Cathy. *Weapons of math destruction: How big data increases inequality and threatens democracy* (Broadway Books, 2017)

Oloka-Onyango, Joseph. "Expunging the Ghost of Ex Parte Matovu: Challenges Facing the Ugandan Judiciary in the 1995 Constitution. *Makerere Journal of Law* (1996): 141-50

Oyěwùmí, Oyèrónkẹ́. The invention of women: Making an African sense of western gender discourses (U of Minnesota Press, 1997)

Pasquale, Frank. "Beyond innovation and competition: The need for qualified transparency in internet intermediaries." Nw. UL Rev. 104 (2010): 105

Perugini, Nicola, and Neve Gordon. *The human right to dominate* (Oxford University Press, 2015)

Pickerill, Jenny. "Radical politics on the net." *Parliamentary Affairs* 59, no. 2 (2006): 266-282

Plato, Gorgias. Phaedrus & letters VII & VIII (trans) Hamilton, W. (Harmondsworth Penguin 1973)

Pohjonen, Matti, and Sahana Udupa. "Extreme speech online: An anthropological critique of hate speech debates." *International Journal of Communication* 11 (2017): 19.

Pollock, Griselda. (ed) *Visual politics of psychoanalysis: Art in post-traumatic cultures*. (IB Tauris, 2013)

Post, Robert. 'Hate Speech' In Hare, I, and Weinstein, J, (eds.), *Extreme Speech and Democracy* (Oxford University Press 2009)

Prendergast, David. "Recklessness Without the Risk." *Criminal Law and Philosophy* (2019): 1-20

Puar, Jasbir K. and Rai, Amit. Monster, terrorist, fag: The war on terrorism and the production of docile patriots." *Social Text*20 (2002) no. 3: 117-148

Puar, Jasbir K. Terrorist Assemblages: homonationalism in queer times (Durham: Duke University Press, 2007)

Quijano, Anibal. "Coloniality of power and Eurocentrism in Latin America." *International Sociology* 15, no. 2 (2000): 215-232

Ramshaw, Sara. *Justice as improvisation: The law of the extempore* (Routledge, 2013)

Rancière, Jacques. *Disagreement: Politics and philosophy* (University of Minnesota Press, 1999)

Rancière, Jacques. *Disagreement: Politics and philosophy* (University of Minnesota Press, 1999)

Rawls, John. The idea of an overlapping consensus. *Oxford J.* Legal Stud. 7 (1987): 1-25

Raz, J. The morality of freedom (Clarendon Press, 1986)

Raz, Joseph. Free expression and personal identification. *Oxford J. Legal Studies* 11 (1991): 303

Razack, Sherene. A Site/Sight We Cannot Bear: The Racial/Spatial Politics of Banning the Muslim Woman's Niqab.*Canadian Journal of Women and the Law* 30, no. 1 (2018): 169-189

Razack, Sherene. "Geopolitics, culture clash, and gender after September 11." Social Justice 32, no. 4 (2005): 11

Razack, Sherene. Casting out: The eviction of Muslims from Western law and politics (University of Toronto Press, 2008)

Riley, J. "J S mill's doctrine of freedom of expression." Utilitas 17, no. 2 (2005): 147-179

Ronell, Avital. "The Walking Switchboard." *SubStance* 19, no. 1 (1990): 75-94

Ronell, Avital. Finitude's Score: *Essays for the End of the Millennium*. (University of Nebraska Press, 1994)

Rose, Nikolas. "The politics of life itself." Theory, culture & society 18, no. 6 (2001): 1-30.\

Rousseau, Jean-Jacques, *The social contract: And, the first and second discourses* (Yale University Press, 2002)

Rowbottom, Jacob. "Crime and communication: do legal controls leave enough space for freedom of expression?." In Mangan D and Gillies, LE. (eds)The Legal Challenges of Social Media (Edward Elgar Publishing, 2017)

Roy, Arundhati. Capitalism: A ghost story (Haymarket Books, 2014)

Saghafi, Kas. *Apparitions--of Derrida's Other* (Fordham Univ Press, 2010)

Saghafi, Kas. "*Calculus*" in (eds) Oliver, Kelly and Straub, Stephanie Deconstructing the Death Penalty: Derrida's Seminars and the New Abolitionism, (Fordham University Press, 2018): 139-155

Said, Edward. "Islam through Western eyes." The Nation 26 (1980): 14-18

Said, Edward. *Covering Islam: How the media and the experts determine how we see the rest of the world* (Random House 1997)

Said, Edward. Orientalism (Penguin Books 2001)

Saleh-Hanna, Viviane. Black Feminist Hauntology. Rememory the Ghosts of Abolition?. *Champ pénal/Penal field*12 (2015)

Salgado, Richard P. "Fourth Amendment Search and the Power of the Hash." *Harv. L. Rev. F.* 119 (2005): 38

Saul, Ben, Defining Terrorism: A Conceptual Minefield (Oxford University Press, 2017)

Saul, Ben. "Speaking of terror: criminalising incitement to violence." UNSWLJ 28 (2005): 868

Saul, Ben. Defining terrorism in international law (Oxford University Press, 2010)

Schmitt, Carl. The Concept of the Political (University of Chicago Press)

Schmitt, Carl. The Nomos of the Earth: The International Law of the Jus Publicum Europaeum (Telos Press Publishing 2006)

Sedgwick, Eve Kosofsky. Epistemology of the closet (University of California Press 1990)

Sharpe, Christina. Monstrous intimacies: Making post-slavery subjects (Duke University Press, 2009)

Sigmund, Freud, Bonaparte Marie, Freud Anna, Kris Ernst, and Mosbacher Eric. "Project for a scientific psychology." *The Origins of Psychoanalysis, (trans) Eric Mosbacher and James Strachey, New York, Basic Books* (1954): 337-445

Skrimshire, Stefan. *Politics of fear, practices of hope* (Continuum International Publishing 2008)

Slevin, James. The Internet and Society, (Cambridge: Polity Press, 2000)

Soyinka, Wole. Collected Plays, Vol. 1. *I [A Dance of the Forests, The Swamp Dwellers, The* (Oxford University Press 1973)

Spillers, Hortense J. "" All the Things You Could Be by Now If Sigmund Freud's Wife Was Your Mother": Psychoanalysis and Race." Critical Inquiry 22, no. 4 (1996): 710-734

Spivak, Gayatri Chakravorty, Laura E. Lyons, and Cynthia Franklin. On the Cusp of the Personal and the Impersonal: An Interview with Gayatri Chakravorty Spivak. *Biography* (2004): 203-221

Spivak, Gayatri Chakravorty. ‘Ghostwriting’ In (eds.) del Pilar Blanco, María, and Esther Peeren *The Spectralities Reader: Ghosts and Haunting in Contemporary Cultural Theory* (Bloomsbury Publishing, 2013): 317-34.

Spivak, Gayatri Chakravorty. A critique of postcolonial reason (Harvard university press, 1999)

Spivak, Gayatri Chakravorty. An aesthetic education in the era of globalization (Harvard University Press, 2012)

Spivak, Gayatri Chakravorty. *Outside in the teaching machine: The politics of translation* (Routledge, 1993)

Spivak, Gayatri Chakravorty. "Terror: A speech after 9-11." boundary 2 31, no. 2 (2004): 81-111.

Stalla-Bourdillon, Sophie. Sometimes One Is Not Enough-Securing Freedom of Expression, Encouraging Private Regulation, or Subsidizing Internet Intermediaries or All Three at the Same Time: The Dilemma of Internet Intermediaries' Liability. *J. Int'l Com. L. & Tech.* 7 (2012): 154

Stalla-Bourdillon, Sophie. The flip side of ISP’s liability regimes: The ambiguous protection of fundamental rights and liberties in private digital spaces. *Computer Law & Security Review* 26, no. 5 (2010): 492-501

Steeves, Valerie. "Theorizing Privacy in a Liberal Democracy: Canadian Jurisprudence, Anti-Terrorism, and Social Memory After 9/11." *Theoretical Inquiries in Law* 20, no. 1 (2019): 323-341

Steger, Manfred B. *The rise of the global imaginary: Political ideologies from the French revolution to the global war on terror*. (Oxford University Press, 2008)

Steinmetz, Kevin F. *Hacked: A radical approach to hacker culture and crime* (NYU Press, 2016)

Stephen, James, Fitzjames, Sir, Digest of the Criminal Law, 9th ed., Art. 114

Stone, Geoffrey R. *Perilous times: free speech in wartime from the Sedition Act of 1798 to the war on terrorism* (WW Norton & Company, 2004)

Stone, Richard. *Textbook on civil liberties and human rights* (Oxford University Press, 2014)

Stoycheff, Elizabeth. Under surveillance: Examining Facebook’s spiral of silence effects in the wake of NSA internet monitoring." *Journalism & Mass Communication Quarterly* 93, no. 2 (2016): 296-311

Sunstein, Cass R. "Why they hate us: The role of social dynamics." *Harv. JL & Pub. Pol'y* 25 (2001): 429.

Sunstein, Cass R. Free Markets and Social Justice; Paradoxes of the Regulatory State (Oxford University Press, 1997)

Sunstein, Cass R. Terrorism and probability neglect. *Journal of Risk and Uncertainty* 26, no. 2-3 (2003): 121-136

Swan, Sean. *Official Irish Republicanism, 1962 to 1972* (Lulu. com, 2007)

Thurschwell, Adam. "Specters and scholars: Derrida and the tragedy of political thought." German Law Journal 6, no. 1 (2005): 87-99

Tickell, Alex. "Excavating Histories of Terror: Thugs, Sovereignty, and the Colonial Sublime." *Terror and the Postcolonial* (2010): 177-202

Timmermann, Wibke Kristin. Incitement in international criminal law. *International Review of the Red Cross* 88, no. 864 (2006): 823-852

Trabucchi, Eugenia. "Rape Warfare and International Humanitarian Law." Human Architecture: Journal of the Sociology of Self-Knowledge 6, no. 4 (2008): 5

Traylor, John Mylan. Shedding Light on the Going Dark Problem and the Encryption Debate. U. Mich. JL Reform 50 (2016): 489

Trotter, Sarah. 'Living Together', 'Learning Together', and 'Swimming Together': *Osmanoğlu and Kocabaş v Switzerland (2017)* and the Construction of Collective Life, *Human Rights Law Review*, Volume 18, no 1 (2018): 157–169

Tsakyrakis, Stavros. "Proportionality: An assault on human rights?." International Journal of Constitutional Law 7, no. 3 (2009): 468-493

Tutuola, Amos. *The Palm-wine Drinkard; And, My Life in the Bush of Ghosts* (Grove Press, 1994)

Urbina, Francisco J. "A critique of proportionality." Am. J. Juris. 57 (2012): 49

Ussyk, Patricia. On Liberty and its Limits: Civilisation and Barbarism (University of York, 2011)

Vázquez, Rolando. "Translation as erasure: thoughts on modernity's epistemic violence." *Journal of Historical Sociology* 24, no. 1 (2011): 27-44

Villaronga, Eduard Fosch, Peter Kieseberg, and Tiffany Li. "Humans forget, machines remember: Artificial intelligence and the right to be forgotten." Computer Law & Security Review 34, no. 2 (2018): 304-313

Virilio, Paul, and Bertrand Richard. The administration of fear (Semiotext[e], 2012)

Visconsi, Elliott. "The Invention of Criminal Blasphemy: Rex v. Taylor (1676)." *Representations* 103, no. 1 (2008): 30-52

Vismann, Cornelia. "Jurisprudence: a transfer science." *Law and Critique* 10, no. 3 (1999): 279-286

Vismann, Cornelia. Files Law and Media Technology (Stanford University Press, 2008)

wa Thiong'o, Ngugi. A grain of wheat. Vol.2 (Penguin, 2012)

Walcott, Rinaldo. "Freedom Now Suite: Black Feminist Turns of Voice." Small Axe: A Caribbean Journal of Criticism 22, no. 3 (57) (2018): 151-159

Walden, Ian."Accessing data in the Cloud: The long arm of the Law Enforcement Agent." In Privacy and Security for Cloud Computing (Springer, London, 2013) pp. 45-71

Waldron, Jeremy. "Security and liberty: The image of balance." Journal of Political Philosophy 11, no. 2 (2003): 191-210

Webber, Grégoire C. The negotiable constitution: On the limitation of rights (Cambridge University Press, 2009)

Weber, Elisabeth. "Deconstruction is justice." In *Derrida and Law*, pp. 97-102 (Routledge, 2017)

Weheliye, Alexander G. Habeas viscus: Racializing assemblages, biopolitics, and black feminist theories of the human (Duke University Press, 2014)

Weimann, Gabriel. "Cyberterrorism: The sum of all fears?." *Studies in Conflict & Terrorism* 28, no. 2 (2005): 129-149

Weinberg, Leonard, Ami Pedahzur, and Sivan Hirsch-Hoefler. "The challenges of conceptualizing terrorism." Terrorism and Policical Violence 16, no. 4 (2004): 777-794

Weissbrodt, David, and Muria Kruger. "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights." American journal of international law 97, no. 4 (2003): 901-922

Winter, Steven L. "Indeterminacy and incommensurability in constitutional law." Calif. L. Rev. 78 (1990): 1441

Wolff, Jonathan. "Mill, indecency and the liberty principle." Utilitas 10, no. 1 (1998): 1-16

Wynter, Sylvia. "Unsettling the coloniality of being/power/truth/freedom: Towards the human, after man, its overrepresentation--An argument." *CR: The new centennial review* 3, no. 3 (2003): 257-337

Wynter, Sylvia. Towards the Sociogenic Principle: Fanon, The Puzzle of Conscious Experience, of "Identity" and What it's Like to be "Black" *National Identities and Sociopolitical Changes in Latin America* (1999): 30-66

Yeung, Karen. "'Hypernudge': Big Data as a mode of regulation by design." Information, Communication & Society 20, no. 1 (2017): 118-136

Young, Iris Marion. The logic of masculinist protection: Reflections on the current security state." Signs: journal of women in culture and society 29, no.1 (2003): 1-25

Young, Iris Marion. "Communication and the other: Beyond deliberative democracy." Democracy and difference: Contesting the boundaries of the political 31 (1996): 120-135

Young, Joseph K. "Measuring terrorism." Terrorism and Political Violence 31, no. 2 (2019): 323-345

Yourow, Howard Charles. The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (Kluwer Law 1996)

Zedner, Lucia. "Pre-crime and post-criminology?." *Theoretical criminology* 11, no. 2 (2007): 261-281

Zittrain, Jonathan. "Internet points of control." In *The Emergent Global Information Policy Regime*, pp. 203-227 (Palgrave Macmillan, London, 2004)

Žižek, Slavoj. "Against human rights." *Wronging Rights?: Philosophical Challenges to Human Rights* (2005): 149-67

Online sources

Alam, Aftab. *'Sedition' is a colonial punishment in free India,* The Tribune (08/24/16) available at: < http://www.tribuneindia.com/news/comment/-sedition-is-a-colonial-punishment-in-free-india/285005.html>

Anderson D, The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006' (2013): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228552/9780108511769.pdf>

Arthur, Charles. Twitter to introduce Photo DNA system to block child abuse images, The Guardian (22/07/2013) available at: <https://www.theguardian.com/technology/2013/jul/22/twitter-photodna-child-abuse >

Bickert, Monika, and Brian Fishman. "Hard Questions: How We Counter Terrorism." Facebook Newsroom 15 (2017): available at: < https://newsroom.fb.com/news/2017/06/how-we-counter-terrorism/>

Bowcott, Owen. Mau Mau rebellion victims claim parliament was misled over torture (The Guardian 23/05/2016) available at:<https://www.theguardian.com/world/2016/may/23/mau-mau-rebellion-kenyan-victims-compensation-claim >

Cole, Samantha. AI-Assisted Fake Porn Is Here and We're All Fucked (Motherboard, 11/12/2017) available at: < https://www.vice.com/en_us/article/gydydm/gal-gadot-fake-ai-porn>

Cook, T.A Message to Our Customers, APPLE (16/ 02/2016) available at: <http://www.apple.com/customer-letter/ >

Critchley, Simon. "Being and Time: 'Being-in-the-world'" The Guardian (06/06/ 2009) available at :<http://www.guardian.co.uk/commentisfree/belief/2009/jun/22/heidegger-religion-philosophy?intcmp=239 >

Crompton, Paul. Grand Theft Auto: ISIS? Militants reveal video game (Al Arabiya News, 20/09/14) available at< http://english.alarabiya.net/en/variety/2014/09/20/Grand-Theft-Auto-ISIS-Militants-reveal-video-game.html >

Cruickshank, Paul. A View from the CT Foxhole: An Interview with Brian Fishman, Counterterrorism Policy Manager, Facebook (Combating Terrorism Centre 09/17 vol 10 issue 8) available at : <

<https://ctc.usma.edu/a-view-from-the-ct-foxhole-an-interview-with-brian-fishman-counterterrorism-policy-manager-facebook/>

David Wood, *Interview with Yubraj Aryal: Derrida and Deconstruction* available at :< <http://www.writing.upenn.edu/library/Aryal-Huamanities_2008_text.pdf>

Dormehl, Luke. Algorithms Are Great and All, But They Can Also Ruin Lives, Wired (19/11/2014) available at: <https://www.wired.com/2014/11/algorithms-great-can-also-ruin-lives/>

Duarte, Natasha, Emma Llanso, and Anna Loup. "Mixed Messages? The Limits of Automated Social Media Content Analysis." Centre for Democracy and *Technology* (2017) available at: https://cdt.org/files/2017/11/2017-11-13-Mixed-Messages-Paper.pdf

Engstrom, Evan, and Nick Feamster. "The Limits of Filtering: A Look at the Functionality and Shortcomings of Content Detection Tools." *Engine, March* (2017) available at : < https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/58d058712994ca536bbfa47a/1490049138881/FilteringPaperWebsite.pdf >

European Commission, Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online Brussels, (12/ 9/ 2018), available at:

European Digital Rights Initiative "The Slide from “Self-Regulation” to Corporate Censorship." (2011) p.4 available at : <https://edri.org/wp-content/uploads/2010/01/selfregualation_paper_20110925_web.pdf >

Facebook’s community standards available at : <https://www.facebook.com/communitystandards/introduction>

Freeman, Andrea. Milk a Symbol of Neo-Nazi Hate, The conversation (31/08/ 2017) available at : https://theconversation.com/milk-a-symbol-of-neo-nazi-hate-83292

Gardham, Duncan. 'Lyrical Terrorist' Samina Malik cleared on appeal (The Telegraph, 17/06/2008) available at: < https://www.telegraph.co.uk/news/uknews/2145506/Lyrical-Terrorist-Samina-Malik-cleared-on-appeal.html >

Gerards, Janneke. "The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination." (2017) available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875230>

Graham, Chris. *Facebook hands Celeste Liddle a third ban, defends naked woman on bike with dildo*. (Newmatilda.com, 2016) available at :< https://newmatilda.com/2016/03/15/celeste-liddle-banned-again-naked-woman-bike-dildo/ >

Grierson, Jamie. Watchdog likens May's Internet fines threat to Chinese censorship. The Guardian (03/07/17) available at: <https://www.theguardian.com/politics/2017/jul/03/watchdog-likens-mays-internet-fines-threat-to-chinese-censorship >

Harcourt, Bernard E. Muslim Profiles Post-9/11: Is Racial Profiling an Effective Counter-Terrorist Measure and Does It Violate the Right to be Free from Discrimination? (Law & Economics Working Papers, University of Chicago 2006) available at: <https://chicagounbound.uchicago.edu/law_and_economics/329/>

Harrison, Michael. Logocentrism: The Chicago school of media theory, available at: <https://lucian.uchicago.edu/blogs/mediatheory/keywords/logocentrism/>

Harvard, Sarah A. The Misunderstood Beauty of Allahu Akbar, Splinter Online, available at; <https://splinternews.com/the-misunderstood-beauty-of-allahu-akbar-1820116428 >

Home Office, Report of the enquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of events on the 9th August, 1971 Cmnd. 4823, XXXII.1011, Vol 32, available at: <https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1971-060814?accountid=13375 >

HM Government, Revised Prevent Duty Guidance: for England and Wales: Guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism, available at: < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf >

Home Office, *Report Online material promoting extremism or terrorism*, available at: < www.gov.uk/report-terrorism>

Hope, Christopher. "David Cameron: We will 'drain the swamp' which allows Muslim extremists to flourish". The Telegraph (03/06/ 2013) available at: < http://www.telegraph.co.uk/news/politics/10097006/David-Cameron-We-will-drain-the-swamp-which-allows-Muslim-extremists-to-flourish.html >

Hope Christopher and McCann Kate. Google, Facebook and Twitter told to take down terror content within two hours or face fines. The Telegraph (19/09/19) available at: < https://www.telegraph.co.uk/news/2017/09/19/google-facebook-twitter-told-take-terror-content-within-two/ >

Impero's anti-terrorism, extremism and radicalisation keyword library, as part of Impero Education Pro see <https://www.imperosoftware.com/zh-tw/resources/videos/imperos-anti-terrorism-extremism-and-radicalisation-keyword-libraries-explained/>

Iqbal, Nosheen. Stansted 15: 'We are not terrorists, no lives were at risk. We have no regrets', The Guardian (16/12/2018) available at: < https://www.theguardian.com/world/2018/dec/16/migrants-deportation-stansted-actvists>

IWF Annual Report, 2016, available at: < https://annualreport.iwf.org.uk/2016/ >

IWF, image Hash List available at: <https://www.iwf.org.uk/our-services/hash-list> accessed 05/06/18

James, CLR. Lectures on the black Jacobins: How I wrote the Black Jacobins (14/06/1974) p.74, available at: <https://libcom.org/files/c-l-r-james-lectures-on-the-black-jacobins.pdf>

Kaba, Mariame Towards the Horizon of Abolition: A Conversation with Mariame Kaba ”*Interview by John Duda* 9/11/ 2017: available at < thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba>

Letter from Lawyers' Committee for Civil Rights Under Law to Facebook's Content Policy, Product Policy, and External Relations Teams, (08/06/18) Available at: <https://assets.documentcloud.org/documents/4910674/Letter-From-LCCRUL-to-Facebook.pdf>

Leroy v. France, September 2002 judgment of the Pau Court of Appeal available at <:http://cyberlaw.org.uk/2008/12/13/leroy-v-france-application-no-3610903-chamber-judgment-of-02102008/>

Lifton, Robert Jay. "American apocalypse *How "superpower syndrome" is ravaging the world. The Nation* 277, no. 21 (2003): 11-17Available at: <https://www.thenation.com/article/american-apocalypse/ >

May, Theresa, Speech: A Stronger Britain, Built On Our Values (Home Office 23 March 2015) available at: <https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values>

May, Theresa. Home Secretary: We must work together to defeat terrorism18 June 2015 (Transcript of the speech, exactly as it was delivered) Available at:< https://www.gov.uk/government/speeches/home-secretary-we-must-work-together-to-defeat-terrorism >

Muggah, Robert. Europe's terror threat is real. But its cities are much safer than you think. World Economic Forum (08/06/17), available at: < https://www.weforum.org/agenda/2017/06/europes-terror-threat-is-real-but-our-cities-are-much-safer-than-you-think/>

Murray, Andrew D. "Mapping the rule of law for the internet." (2017): 13-36 available at : < http://eprints.lse.ac.uk/66214/>

NPCC, Counter Terrorism Policing urging public to ACT against online extremism, available at: < https://news.npcc.police.uk/releases/counter-terrorism-police-urge-public-to-act-against-online-extremism>

Ofcom, Statement: Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation (10/12/2008) available at: < https://www.ofcom.org.uk/__data/assets/pdf_file/0019/46144/statement.pdf >

Oloka-Onyango, Joseph Ghosts and the law: An inaugural lecture Makerere University (12/11/2015) available at: < https://news.mak.ac.ug/sites/default/files/downloads/Makerere-Prof-Oloka-Onyango-Inaugural-Professorial-Lecture-12thNov2015.pdf >

Perez, Sarah. Facebook, Microsoft, Twitter and YouTube collaborate to remove terrorist content from their services (12/05/2016) Available at: < https://techcrunch.com/2016/12/05/facebook-microsoft-twitter-and-youtube-collaborate-to-remove-terrorist-content-from-their-services/?guccounter=1/>

Perkins, Anne. UK to remain on high terror alert for at least two years sources say, The guardian 27/03/2018 available at: <https://www.theguardian.com/uk-news/2018/mar/27/uk-remain-high-terror-alert-two-years-whitehall-sources-say >

Pew Research Centre Digital life in 2025 (2014) available at: <https://www.pewinternet.org/2014/03/11/digital-life-in-2025/>

Prevent duty guidance for specified authorities in England and Wales on the duty in the Counter-Terrorism and Security Act 2015 to have due regard to the need to prevent people from being drawn into terrorism. available at:< http://www.legislation.gov.uk/ukdsi/2015/9780111133309/pdfs/ukdsiod_9780111133309_en.pdf >

Quach, Katyanna. FYI: There's now an AI app that generates convincing fake smut vids using celebs' faces (The Register, 25/01/2018) available at:< https://www.theregister.co.uk/2018/01/25/ai_fake_skin_flicks/ >

Rosen, David. "Rape as an Instrument of Total War." (Los Angeles Times 2006) available at: <https://www.sfwar.org/pdf/StateViol/MIL_Altnet_04_08.pdf >

Richardson, Hannah. Software to spot extremism among pupils BBC (04/06/2015) available at: <http://www.bbc.co.uk/news/education-32996327 > and Impero, countering radicalisation in schools (22/06/2015) available at: < https://www.imperosoftware.co.uk/countering-radicalisation-in-schools/>

Sabir, Rizwaan. UK's misguided terror laws: Criminalising the innocent: Increasing jail sentences for viewing terror content does not counter terrorism; it terrorises the innocent (Aljazeera.com 08/10/2017) available at: <https://www.aljazeera.com/indepth/opinion/uk-misguided-terror-laws-criminalising-innocent-171007103005102.html>

Sauvé Jean-Marc. Subsidiarity: a two-sided coin? Seminar organised by the European Court of Human Rights (30/01/2015) available at <:https://www.echr.coe.int/Documents/Speech_20150130_Seminar_JMSauv%C3%A9_ENG.pdf >

September 2002 judgment of the Pau Court of Appeal, Application No. 36109/03, available at: < http://cyberlaw.org.uk/2008/12/13/leroy-v-france-application-no-3610903-chamber-judgment-of-02102008/

Smith, Laura. Messaging app Telegram Centrepiece of IS Social Media Strategy (BBC News, 05/06/17) available at: < https://www.bbc.co.uk/news/technology-39743252> accessed 02/05/19

Smith, Oliver. Facebook apologises for its censorship – and censors more people, The Memo 13/09/2016 available at: http://www.thememo.com/2016/09/13/facebook-censorship-shaun-king-terror-of-war-vietnam-norway-apologises-for-its-censorship-and-censors-more-people/

Spillers, Hortense. J., *Or Else*…CONVERGENCE / POLITICS / VOL. 1 NO. 3-4 available at: <https://alinejournal.com/convergence/or-else/>

Spinks, Rosie. UK police still have no proof of the drone attack that grounded 1,000 Gatwick flights (Quartz 23/30/2018) available at:< https://qz.com/1511667/the-gatwick-drone-incident-is-still-a-mystery-to-british-police/>

The Open University Press release: "Pupils left puzzled by the term "British values" 14/09/2016 available at: <http://www3.open.ac.uk/MEDIA/fullstory.aspx?id=30560>

Weale, Sally. London university tells students their emails may be monitored The Guardian (20/01/2017) available at: < https://www.theguardian.com/uk-news/2017/jan/20/university-warns-students-emails-may-be-monitored-kings-college-london-prevent >

Webber, Frances. Apologists for terrorism: dissent and the limits of free expression Institute of Race Relations (29/01/2015) available at: < http://www.irr.org.uk/news/apologists-for-terrorism-dissent-and-the-limits-of-free-expression/ >

Zeng, Meg Jing. 2018. From# MeToo to# RiceBunny: How social media users are campaigning in China. *The Conversation* 5: <https://theconversation.com/from-metoo-to-ricebunny-how-social-media-users-are-campaigning-in-china-90860 >

Zetter, Kim. Magistrate orders Apple to help FBI hack San Bernardino shooter's phone The Wired (16/ 02/2016) available at: < https://www.wired.com/2016/02/magistrate-orders-apple-to-help-fbi-hack-phone-of-san-bernardino-shooter/ >

A note on online sources: *Unless otherwise stated, all web links in this thesis were last accessed on 13 June 2019. Although listed in the footnotes of the thesis, some links to websites may not be listed here in the bibliography, as they are not the centre of academic study or analysis.*

Cases cited

A and Others v. Secretary of State for the Home Department [2004] UKHL 56

Abdul and others v DPP [2011] EWHC 247 (Admin)

AG v. British Sky Broadcasting Ltd [2016] EWCA Civ 658

Attorney General's References No's 85, 86 and 87 of 2007 (Younes Tsouli and Others) [2008] 2 Cr. App. R. (S.) 45

Austin and Others v. UK [2012] ECHR 459, 15th March 2012

Bank Mellat v. HM Treasury [2013] UKSC 39

Bowman v. Secular Society Ltd [1917] AC 406

Cantoni v. France (45/1995/551/637)

Cartier International AG v. British Sky Broadcasting Ltd [2016] EWCA Civ 658

Case of Eweida and others v. The United Kingdom [2013] ECHR 37

Case of Handyside v. The United Kingdom Application no. 5493/72, Judgment 7 December 1976

Case of Karner v. Austria (2003) 38 EHRR 528, 40016/98

Case relating to certain aspects of the laws on the use of languages in education in Belgium. 23 July 1968 *Belgian Linguistic case (No. 2)* (1968) 1 EHRR 252

Chassagnou *and Others v. France* [GC], nos. 25088/94, 28331/95

Chorherr v. Austria Application No. 13308/87 (1994) 17 E.H.R.R. 358

D.H. and Others v. the Czech Republic (2008) 47 E.H.R.R. 3 (Application No.57325/00)

Delbos and Others v. France Application no. 60819/00 [2004] *16 September 2004*

Delfi As v. Estonia (Application No.64569/09)

Dramatico Entertainment v. British Sky Broadcasting Ltd [2012] EWHC 268 (Ch)

EMI Records Ltd & Others v. British Sky Broadcasting Ltd & Others [2013] EWHC 379 (Ch)

Féret v. Belgium Application No 15615/07 (2009)

Gillan and Quinton v. United Kingdom Application no. 4158/05 (2010)

Gough v United Kingdom (2015) 61 E.H.R.R. 8

Grayned v. City of Rockford 408 US 104 (1972)

Handyside v. the United Kingdom (5493/72) [1976] ECHR 5 (7 December 1976)

Jean-Marie Le Pen v. France Application No. 18788/09 (2010)

Jorgic v. Germany (Application no. 74613/01) 2007

Kimathi and Others v. Foreign & Commonwealth Office [2018] EWHC 2066

La Ligue contre le racism et l'antisemitism v. Yahoo! Inc, Order of TGI Paris of 20 Nov. 2000

Lautsi & others v. Italy [2011] ECHR 2412

Lawless v. Ireland (No 3): ECHR 1 Jul 1961

Leroy v. France Application no. 36109/03

LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten (Case C-557/07) [2009] ECR I-1227

Masterson and another v. Holden [1986] 1 W.L.R. 1017

Morton-*Norwich Products Inc v. Customs and Excise Commisioners* [1974] A.C. 133

Mutua and others v. The Foreign And Commonwealth Office [2012] EWHC 2678 (QB)

Nix v. Germany Application no. 35285/16

Okçuoğlu v. Turkey Application no. 23536/94, [1999] ECHR 42

Olsson v. Sweden, Application no. 00010465/83

Otto-Preminger-Institut v. Austria Application no. 13470/87) [1994] ECHR 26

R (on the application of Begum) v. Denbigh High School Governors [2006] UKHL 15

R (On the application of Salman Butt) v. The Secretary of State for the Home Department [2019] EWCA Civ 256

R v. Abu Hamza [2006] EWCA Crim 2918

R v. Aldred (1909) 22 Cox C.C. 1

R v. Ali (Humza)[2018] 1 W.L.R. 6105

R v. Brown (*Terence Roy*) [2012] 2 Cr. App. R. (S.) 10

R v. Burns(1886) 16 Cox C.C. 355

R v. Choudary (Anjem) and R v. Rahman (Mohammed Mizanur [2018] 1 W.L.R. 695

R v. Collins (1839) 9 C& P 456

R v. Cunningham [1957] 2 QB 396

R v. El Faisal [2004] EWCA Crim 456

R v. Faraz [2012] EWCA Crim 2820

R v. Furhana Ahmed [2018] EWCA Crim 133

R v. G [2003] UKHL 50

R v. G; R v. J [2009] UKHL 13

R v. Gul [2014] 1 All ER 463

R v. K [2008] EWCA Crim 185

R v. Khyam (Omar) [2008] EWCA Crim 1612

R v. Lusha (Krenar) [2010] EWCA Crim 1761

R v. Misra and Srivastava [2004] EWCA Crim 2375

R v. Mizanur Rahman [2008] EWCA Crim 2290

R v. Most(1881) 7 Q.B.D. 244

R v. Omar Altimini [2008] EWCA Crim 2829

R v. Rowe [2007] EWCA Crim 635

R v. Samina Hussain Malik [2008] EWCA Crim

R v. Secretary of State for the Home Department, Ex parte Simms [2000] 2 AC 115

R v. Sultan Mohammed [2010] EWCA Crim 227

R v. Taylor (1676) 3 Keb 607; 84 ER 906

R v. Umran Javed and others [2007] EWCA Crim 2692

R v. Zafar and others [2008] EWCA Crim 184

Radio France and others v. France Application no. 53984/00 (2004)

S.A.S. v. France [2014] ECHR 695

Salov v. Ukraine (2007) 45 E.H.R.R. 51 Application No.65518/01 6 September 2005

Siddique (Mohammed Atif) v. HM Advocate [2010] HCJAC 7

Soulas and others v France Application no. 15948/03 (2008)

Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245

The Cyprus Case (*Greece v. the United Kingdom*) (1958-59) 2 Yearbook of the European Convention on Human Rights, 172-197.

The Observer and the Guardian v. United Kingdom (1992) 14 E.H.R.R. 153

The Prosecutor v. Akayesu 1998 (no. ICTR-96-4-T)

Twentieth Century Fox Film Corp & others v. British Telecommunications Plc [2011] EWHC 1981(Ch)

United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948)

Upmann v. Forester (1883) L.R. 24 Ch. D. 231 Ch D

Vajnai v. Hungary (application no. 33629/06)

Vallianatos and others v. Greece (Application Nos. 29381/09 and 32684/09)

Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria Application No. 15153/89(1995) 20 E.H.R.R. 56

Yildirim v. Turkey (Application no 3111/10) Judgment Strasbourg

Zana v. Turkey(1999) 27 E.H.R.R. 667

Legislation cited

Directive of the European Parliament and of the Council amending Directive 2010/13/EU

EU Directive 2000/31/EC

EU Directive 2004/48/EC

EU Directive 2017/541 of the European Parliament

Police and Criminal Evidence Act 1984

Counter-Terrorism and Border Security Act 2019

The Copyright, Designs and Patents Act 1988

The Counter-Terrorism and Security Act 2015

The European Convention of Human Rights

The Human Rights Act 1998

The Malicious Communications Act 1988

The Prevention of Terrorism Act 1974

The Public Order Act 1986

The Terrorism Act 2000

United Nations Security Resolution 1624 (2005)

Other legal and policy documents cited

AVMS: Definitions, hate speech and terrorism, accessibility and protection of minors - Presidency compromise proposals available at: <http://www.statewatch.org/news/2017/apr/eu-council-AVMS-terrorism-hate-speech-6597-17.pdf>

CONTEST: The United Kingdom's strategy for Countering Terrorism: (HM Government June 2018 available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf >

European Commission, Communication from the Commission to the European parliament, the Council, the European Economic and Social committee and the committee of the regions: Tackling Illegal Content Online Towards an enhanced responsibility of online platforms available at:< https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF >

European Commission, Press Release A Europe that Protects: Commission reinforces EU response to illegal content online (03/2018) available at: <http://europa.eu/rapid/press-release_IP-18-1169_en.htm >

European Digital Rights, Joint Comments to the Dialogue on Notice and Take Down of illegal content July 2010 available at: < https://edri.org/files/090710_dialogue_NTD_illegal_content_EuroISPA-EDRI.pdf >

First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) available at: <http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0702/COM_COM(2003)0702_EN.pdf >

Hansard HC Vol.442 Col 1437

Hansard HL Vol. 677 Col. 551

Metropolitan Police, Report extremist and terrorist material online 4/15/2016 available at: <http://news.met.police.uk/news/report-extremist-and-terrorist-material-online-160089 >

Parliament Select Committee on Home Affairs Police briefing note (5/10/05) available at :< http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91010.htm>

Report of the Official Account of the Bombings in London on 7th July 2007, HC 1087 (2005-6), 13

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, 17th session, 16/05/2011, A/HRC/17/27 available at: < https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>

The House of Commons Home Affairs Select committee, Hate crime: abuse, hate and extremism online, Fourteenth Report of Session 2016–17 (25/04/2017)

UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (17 April 2013) UN Doc A/HRC/23/40, 58–60

Appendix

Ethics clearance letter

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c/o Professor Julia Hornle
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25th July 2017

To Whom It May Concern:

Re: QMREC2037a - Counter terrorism regulation in the post-9/11 continuum.

I can confirm that Michael Peter Kalule has completed a Research Ethics Questionnaire with regard to the above research.

The result of which was the conclusion that his proposed work does not present any ethical concerns; is extremely low risk; and thus does not require the scrutiny of the full Research Ethics Committee.

Yours faithfully

Mr Jack Biddle – Research Approvals Advisor

Interview Transcript A: with a former Facebook Content moderator

(22/11/2017)

Me (M): So I am interviewing you because you said you worked at Facebook, right?

Mod: I was not working for Facebook I was a content moderator but I was using Facebook policies in order to decide whether content needed to be removed or not.

M: OK, so where you one of the people removing the content or where you one of the people who were deciding if content should be removed or not?

Mod: Yes I was but I was basing my decisions on the policies so if there's something that is clear we would remove but if there is something that isn't we don't take that decision we ask Facebook employees because they are the ones who make the policies and they are the ones who implement them. We have all the policies and we take a decision based on the policies.

M: What is the difference between you and an algorithm.

Mod: I guess an algorithm is a computer it is systematic. I do not know much about algorithms but I know that they are not able to see the background when making decisions whereas we as humans can see this and we are more sensitive to it.

M: So you would be more sensitive to the contextual issues say with regard to a post?

Mod: I guess so but it's hard. Because for example if we have a picture with say nudity, whether it is an algorithm or us; the decision is the same because either way we don't allow nudity on Facebook. But if it is hate speech, then its going to be different because, for hate speech you can have words that are hateful and based on our understanding of the context we would not remove them but it may be different for an algorithm. It depends on what you are working on.

M: So in your role as a moderator, which kinds of content did you get to look at, you mentioned hate speech and nudity but which other kinds of content did you look at?

Mod: It was very diverse. We were doing nudity, pornography not really? It depends on the market really. I mean the French market. The Spanish one mainly was concerned with pornography and nudity. Whilst we the French one had more hate speech. We also looked at posts related to suicide so if we saw an account with people trying to harm themselves we would have procedures for that.

M: So you talked about escalation. I find this very interesting. When you escalate do you get to talk to the person at Facebook who is going to look at the content after you have looked at it?

Mod: In cases of escalation we ask the question to a Facebook employee and the employee gets back to us with an answer. It's not necessarily through a manager. I also prefer not to go in too many details on that because there isn't one particular way to do it.

M: What are some of the interpretational challenges you faced whilst looking at content. Did you come to things with a kind of bias?

Mod: Bias

M: Yes did you come to certain decisions with opinions like; O, 'this is immoral'?

Mod: Well, we needed to put this on the side. Because we all have different opinions and if we, we worked based on our opinions there would be no consistency. Of course sometimes we really want to remove certain things but we have to let go. Our job is to follow the policy so we do that. And if we strongly feel that something is different we ask the Facebook employees and see what next to do because nothing is perfect you know?

M: Are you trying to say that there are certain things in the policy that you were not satisfied with or you thought were insufficient?

Mod: Its just you know that everyday, new challenges, new scenarios come up and maybe something that has never happened before will come up and in these situations there is no policy about it. But in general they have thought about the policies and it is hard to disagree with them. So at the start you get training and after this you may still disagree with some of them but it doesn't matter. You apply them anyway. Because there are people working on these policies. I am sure there are lawyers, so you do not want to go against these policies.

M: So your background isn't law is it?

Mod: Yes it is. I studied law but I didn't do anything related to the Internet.

M: Right, because I was going to ask, did you find anything in the policy that you thought was going beyond the law? Was the policy in your opinion flexible enough to work within legal principles?

Mod: As I said, I do not know much about Internet law, I am not sure; I don't know all the procedures.

M: I did have an interview with the UK Facebook Policy manager a few weeks ago and he told me that it depends on the country sometimes but at the same time, he said that they were mainly driven by US law because they are primarily a US company. It seems to me that generally this is something they determine based on whatever situation is thrown at them.

Mod: I need to clarify here that we were not doing legal removals. We were doing removals based on the policy of the company that is Facebook. So we were applying the company's global policy. I know that in certain circumstances Facebook may take different decisions per county. But we were not working based on countries we focused more on the global policy. It is different. So I am sure that they have policies that are different per country but for the type of content I was working on it was the same for everyone because it was global. I think for other issues like privacy defamation etc. they make take such decisions on a country-to-country basis. Even then still, a Facebook employee and not a content moderator would make such a decision.

M: That's clear. What kinds of training do you undergo as a content moderator is it just a basic study of the user policy or does it go beyond that?

Mod: It is basic but it is through. For the first three weeks, a lot of people come through because, well, they need to hire people. So, you have someone who trains you and they would have a power point presentation. They would then go through the slides and would explain to you what the policy is and give relevant examples. And at the end, you would work on test scenarios and apply what you will have learnt. At the end they do a kind of auditing to make sure that you have understood the policies well. I think this was a good thing because they were hiring a lot of people and in such situations auditing is a good thing. The training was well done. You know they are hiring people from everywhere people from every background and from different languages. And they have to explain things like hate speech nudity and all those other things to them.

M: Let's dig into hate speech for a while. Obviously there are different kinds of hate speech, right?

Mod: yes.

M: Could you go through some of the kinds of hate speech you dealt with?

Mod: Much of what was going through the French Market. So obviously there were situations like you know during terrorist incidents… then there would be lots of hate speech against those people. There was also hate speech directed to Jewish people you know making jokes about them but not funny jokes, racist jokes. There was a lot of hate against immigrants, a lot of hate against Muslims. These were the main cases.

M: So in your opinion was this mainly politically motivated hate or was it ideological?

Mod: Politically driven? Hmm I think people just don't realise that what they write online has a huge impact because it is not just like you say something and we forget about it. I mean it is written down and a lot of people see it. Most of the cases were political I guess because they occurred during the period of French elections so, most people I guess became racist towards Arabs. A lot of people voted for Marie Le Pen and they would express themselves boldly in this manner. So if it was political I guess it would be directed towards Arabs. But the hate towards Jewish people, I don't think it is political (you know) it is more historical because they always refer to awful jokes about the gas chamber etc.

M: But the political is always historical also, because I mean in France, if you talk about the Arab question you are always going to have to talk about the French empire.

Mod: Yes true.

M: Anyway you said something about people not being aware of what they post and not being aware that what they post can have an impact on whoever reads it. Do you honestly believe that posting something online has an impact on readers?

Mod: I feel that sometimes it does. I don't have any friends on Facebook who post hateful content. So, I never see such content myself. But I feel that if you have this type of speech then all your friends on Facebook must be similar to you and because you all have it around you every time you feel safe and encouraged to post such content yourself .It happens when there is a terrorist attack so you see things like: "O again an Arab, so typical lets kill them all!" .I feel that because people see that its written somewhere else, they think its fine for them to rewrite or share it. And some people know this and still do it. So they will say somehwere in their post: "I am probably going to get kicked off Facebook for 24 hours but who cares" you know? ! Maybe, sometimes people just don't realise that they are insulting people, they don't realise the impact this may have.

M: This is something I am struggling with in my thesis at the moment because I have to have a stand and I am not so sure I am a minority person myself and people have said hateful insultful things to me But do you know sometimes I don't care if they say such things as long as I can say something back? Sometimes I think maybe we are too obsessed with regulating content. But, you seem to say that actually there is a point in regulating because if we don't regulate then people feel encouraged. It sort of becomes normalised.

Mod: I think sometimes yes it goes too far but sometimes it doesn't It depends on the situation. … Well, unless you mention a particular category of people. I don't know I think there's a lack of education too. I hope I am being clear.

M: Yes

Mod: I think policies and regulation are important because if you did not have any if someone sees that something is acceptable they are going to do it and they are going to probably say something worse. Sometimes it feels that people are testing the Facebook policies. They reach certain limits (in between free speech and hate speech) and they know that it's very hard for us to decide in these situations whether it's a removal or not. But if we didn't do anything then there would be horrible things.

M: Hmm I am trying to think now outside Facebook. I know that in the US they have wider speech freedoms so people say hateful speech and in France and Germany they have tighter speech laws. So you cannot win one way or the other? It seems to me that hateful people will always have a voice.

Mod: I am not sure. Don't you think that there's more hate in the US. ? I do not think that we are as racist as people in the US. You know the white supremacists and all? We don't really have those types of things here in France … but we probably do in Germany.

M: Maybe not in France but in Germany you know they have the neo-Nazi...

Mod: That's true that's true. But I think that people in America can be more easily brain washed? So if you are child and you don't have an opinion on things and then you read such hateful content it might influence you differently in a way it wouldn't if you hadn't read it. (I think hearing my self speak; I would say I am more for removal). I feel that in America its either completely restricted, or they don't do anything about it. And I like to think that it's good to have a balance between the two. I think here in Europe we have that. I know that Germany is trying now to remove hate speech on platforms within 24 hours.

M: Do you think that's feasible? Do you think that's possible?

Mod: From the way Facebook was dealing with it I think it is feasible. Because you know as content moderators we worked both day shifts and night shifts. So there would be people from 9 to 6 and then people from 7 to 6. The only problem would be maybe the amount of content they would be required to take down. But I think I also read an article where Facebook were against applying this law claiming that it should be the courts that are responsible for deciding on something like this and not Facebook. But if Facebook really had to, I am sure that they would because they have the people and resources to do it.

M: Obviously you were dealing with very clear standards but to me it seems that being a content moderator you are a kind of 'pseudo-judge' would you say so, because you have to make these

difficult decisions and in a way, you are directing the ways in which speech should work within a society/public sphere?

Mod: But I don't feel that I was a 'judge' because I was not the one making the policy

M: But you are interpreting a sort of law or a procedure a way of doing things?

Mod: Interpretation not really, because everything would be clearly written down and like I said if there was a new scenario we would ask someone from Facebook, so, we did not have the freedom to say Right I think like this so … It's a good question. Sometimes yes it would seem like we would make these decisions but like I said in the end we would not be applying our own opinions.

M: So, the people who ultimately make these decisions are your managers? Or the people at Facebook you escalate these issues to?

Mod: Like I said. We had this document/tool in which we would ask questions about the issue from some one at Facebook and then they would get back to us with the relevant information. It was not a direct physical contact it was only all written. So we would raise a question and they would get back to us.

M: Could you give me an example of a scenario where more information would have been sent back to you?

Mod: One where the policy was not clear?

M: Yes.

Mod: Sometimes we have to make big decisions but it is always based on the policy.

M: I guess it's a very human thing and we all make mistakes.

Mod: Yes, we all make mistakes.

M: Ah you were talking about the news. So apparently Facebook was criticised for taking down content in the context of the Rohingya massacre. There was an opinion that Facebook should have left the content because in taking them down they were denying a minority group representation especially in a politically charged situation.

Mod: Is it Facebook that changed its decision or is it the newspaper that said that Facebook should have done it differently?

M: Facebook did not change its decision but the newspaper said that Facebook should have acted differently, so Facebook was in this very difficult situation. I talked to the Facebook manager about this. He said they do get some decisions wrong and they have to apologise to the parties involved. But I guess it's very hard.

Mod: Well it is but like I said if we have a question that is hard we ask a Facebook employee and then they have to answer these questions and its hard for them because new situations crop up and these can be really tough questions. I am sure for them it is difficult because they need to take so many countries and cultures into consideration, what is acceptable and what is not acceptable etc. And I am sure that it is very difficult for them.

M: I mean even words, just words, if used by different people can change the meaning of a whole sentence you know?

Mod: Right, that is why Facebook is very complicated because there's a lot of thought around context. So for one post, for every single post there is a comments section. So how do you interpret what all these people are saying? You know sometimes things are not said directly and so they could be talking about people without exactly talking about them thus, it may not be hate speech, or not. Other times it is very straight forward e.g. "I hate Muslims and I want to kill them etc.", so it is difficult, you may not want to restrict freedom of speech … but this is one of these situations

M: And I guess it is even more complicated with terrorist speech. I know you did not do anything much with terrorist speech but you could talk about it? What are your opinions on the challenges of regulating terrorist speech?

Mod: Well again sometimes, it is very obvious, and easy to tell e.g., when someone says "go bomb this place etc." but other times it can be difficult because we may not have the knowledge of what may be considered as terrorism and what can not be. For countries in a dictatorship, who decides what a terrorist organisation is, for example? Facebook are basing their knowledge on this off very different sources. And these vary from country to country. At the same time they do not want to restrict speech. So, it is very complicated.

M: In my research, I use a theoretical lens, which I call a hauntology. This is basically the idea of a haunting. Like ghosts, so I imagine how this affects the way we think about things like regulation

Mod: By hauntology do you mean? … Haunting thoughts, haunting, how people think?

M: Yes, generally about how we think and regulate terrorism…about how things come and go, about how things are shared online, on Twitter on the news etc.

Mod: Oh that sounds like a TV show I am watching right now! Do you know mind hunter?

M: No?

Mod: Well its about two guys that work for the FBI who interview criminals so that they know how they think so that they can prevent them from committing future crimes because if you know how they think and how they act then you can prevent them… so it makes me think of that

M: ha-ha yes. I should watch it!

Mod: So, why not. Why should we not look after how people think or act? What is wrong in that? But I guess in the Internet it is complex because how can you know the behaviour how would you be able to predict crime. You would maybe need a lot of engineers to think of tools to do that…

M: I mean I could have mentioned this before but academics like Russell Brewer have questioned whether or not looking at something can cause crime. In some cases yes, but in others no. So, it is very hard to draw a consistent causative link between crime online and offline.

Mod: Maybe, it does not happen for each case but for the cases in which it happens it could be very helpful. It doesn't harm to look into it because, a lot of people search say how to make a bomb online so making such information online is a big factor.

M: But do you honestly think that a terrorist would go onto Google and search how to make a bomb or would they not take measures say use tor browsers to evade law enforcement?

Mod: I am not sure it depends on the person, but yes, if you are a proper terrorist then you may take measures to evade Google because they would know. But it seems that since the terrorism attacks started things are escalating and people are getting ideas from the Internet but also from the news. We haven't always had this. Things changed after that truck attack in Nice. Of course they would get their information from elsewhere too, but I feel that the Internet really helps and there are so many things that are accessible and there are so many things that make it hard for such companies to be proactive about. For instance they, (the terrorists) would put such content on say online drives Google drives but they would use multiple accounts so its not easy to know if it's the same person. They can easily create different accounts and they are actually tech savvy from what I've heard. So I think the Internet helps them.

M: So in my interview with the UK policy manager he said that terrorist/ hate speech cannot be prevented but he was of the view that Facebook and other platforms are improving, that they are

using more algorithms, employing more content moderators etc. But … do you think that we are fighting a losing battle; are you hopeful?

Mod: Well I am hopeful it is my job. It's my job but I am hopeful because you really get to help people. Sometimes people are experiencing things like sextortion you know, when people get with someone and they pretend to be a nice girl and they get them to do a sex tape and they ask for money. So we can intervene in these situations and tell them basic things like how to reach the police basic issues of safety. I think of children too who are small and easily influenced and harmed online. I also think that as content moderators we are removing a lot of content I don't have the numbers but we are doing well. So I think its good what we are doing. I kind of feel that I am the police. I don't feel like I am a judge but I feel like I am the police. But we don't really investigate … so, it is very important that we are here because if we were not here, no one would be using Facebook. It would be unsafe and you wouldn't want to go on there anyway. We make the online experience better.

M: I like to think that you are a good cop.

Mod: Yes, and I think we are winning as well. Because now we have algorithms that scan images like neo-Nazi flags etc. That's what it is.

M: Thanks a lot. We shall stop here.

Interview transcript B: with M an ACEU police official in Cybercrime

(25/10/2017)

P *(Me the interviewer)*: What is your position within the organisation you work for and what organisation is this?

M *(the interviewee)*: I work at the ACEU National Police; the ACEU police are a single organisation since 2012. It is one ACEU national police now, but before we used to have different forms of organisation or areas of jurisdiction like for instance the metropolitan police in the UK, but its all one organisation now.

P: So, could you paint a picture of what happens when the ACEU police are faced with a scenario of having to regulate something of a terrorist or extremist nature online?

M: Well, there is an official legal regulation, which is currently under review, but it is not out until god knows whenever politics decides. And there is another 'not completely law-based' (I would have said legal: however law-based is more accurate) framework that we use. For the official legal part, we have a notice and takedown procedure, which is rather convoluted, I will explain to you why. Back when the internet came to the ACEU, the would be providers made a lot of noise and argued heavily to the legislators that as a mere conduit they could not be responsible and criminally liable for whatever happened on their networks unless they were aware of it. It gets really complicated…

So, in order to ensure co-operation the ACEU public prosecutor informs these parties the ISP'S that they are hosting radical extremist content and that this content in the public prosecutors opinion is illegal. Now the way this works this not a warrant or an order; he cannot currently order them to take it down. So in the law they have a criminal liability exclusion clause[933] which states that as long as they are unaware they cannot be: a) held responsible/complicit for the crime and b) as long as they do not continue abetting the crime after being informed that it exists they can never be criminally liable. Thus, in practice, the public prosecutor sends usually an email or a fax (or one is sent on behalf of) to the ISP telling them of where they saw the content, on whatever domain, the nature of the content and asking them to take it down or else face prosecution. The problem with this is that the procedure of it was never codified in the code of criminal procedure so all the private ISPs did it in their own way, so out of frustration, the ISPs at some point wrote a code of conduct which the police and prosecutors would follow when requesting a Takedown. The thing is all the rules we work with were invented by the private sector, which is weird.

[933] An Article of the (ACEU) criminal code

The next problem is that you now have a public prosecutor and an ISP who together censor this content because essentially a take down request is censorship. But there is never any judge involved since it is not in the code of criminal procedure there is no complaint procedure either. Now as a third party you may complain to the private party on the one hand and they may not listen to you and on the other hand if you complain to the public prosecutor you risk prosecution (note: this is assuming the poster of the (allegedly) illegal content ID remains unknown) so guess who wins.

P: The public prosecutor?

M: Yes, that is rather clear; not many people complain [in the context of terrorist content]. With regard to the kinds of content deemed illegal, there has been a lot of it especially with a lot of Islamic, hate speech, solicitation for *(hesitates)* becoming a soldier for a Jihadist cause elsewhere etcetera etcetera. However, it is important to note that in ACEU some public prosecutors are rather forward in their decisions with the kinds of content they deem illegal. So more and more people have started complaining saying things like: hey, I wrote a piece about the Koran it is not necessarily critical… but that doesn't mean that it is 'Jihadi' or whatever so why are you taking it down. There have also been complaints from journalists and reporters saying: "hey I can't do my job because if I publish this criticising ACEU government policy it will get removed" and journalists do not like their pieces removed. So there has been a sort of counter/lobby to change the law.

As things stand legally, in the ACEU parliament there is currently a computer crime iii law, (a bill) under advisement which has new provisions one of which aims to do away with the peculiar old construction of criminal exclusion of liability clause to allow for a proper criminal code procedure[934] and an opportunity to complain to an independent judge as the European Court demands.

Now, what we have found is that due to the …amount of work involved with getting a public prosecutor to look at the content and send a message to the ISPs, combined with the amount of terrorist related things that the police tend to find, -"it takes up too much capacity and effort" —— mind you, I do not agree with this but this is the position of the ACEU police and public prosecutors.

P: Why do you say you strongly disagree with it? Are there any ways you think it could be more effective or…?

M: I think that the amount of capacity involved should not be the ultimate deciding factor in deciding whether or not we should make the rules more lax. Crime prevention and crime fighting just always will take up a lot of people and resources. We basically should stop whining about this. The police are whining and the public prosecution is whining and we always want it more efficient but I have

[934] The proposal is found under an Article of the ACEU code of criminal procedure

found that in my more than X years of experience with the ACEU police as a legal advisor, I have found that whenever the law constricts them (the police or Public prosecutor) some within the organisation will bring up the efficiency argument. I spend a lot of hours behind my desk writing papers not doing 'actual' police (or legal) work. Police work is about putting in such hard work, like writing these papers so if you are not a street cop, sitting behind a desk and doing paperwork is part and parcel of the job and if you don't like it you should find another job. This is my personal opinion; the opinion of the ACEU police is rather different. The thing is, legal safeguards do not exist to bother the police. Well, legal safeguards exist to protect the public from say, censorship and other things. If the rules take up to much capacity perhaps it is time to increase funding instead of reducing rules.

Now with this out of the way, lets look at the non-law based part. We have a unit now that is specifically tasked to find radical extremist jihadist content, content for solicitation of jihadist fighters abroad for the caliphate etcetera. Now what this unit does is scour the Internet for these things as long as they appearing to be aimed at harming ACEU society.

P: Just to clarify is this informal body also part of the ACEU police?

M: This is a group, a unit of police people working for the police under the direction of the police yes. But let me be absolutely clear, they for this specific part of the job] are not operating under the code of criminal procedure or any such law. And so they might be legal questions about it if you ask. What they do is the following…

P: What is the name of this unit, if I may ask?

M: I'd have to look up that for you but its one of those abbreviations that governments are fond of; remind me after the interview.

Now what they do is they find content, which is, lets say objectionable -I cant say illegal [because that would require a judicial decision]- what they think is objectionable and then they look at the ISPs in question and their EULA's or policies (of any social media and hosting sites I am not mentioning names) and all of these user policies usually reserve the right to remove content or temporarily or permanently ban the user or whatever…. There is a range of penalties in these policies. So, what this unit does is that they say to the ISP or company in question: we are not ordering you or anything we are not asking you or anything we are pointing it out to you that this content is objectionable to your own user policy and then they leave it be. The idea obviously being that this ISP or company looks at the content and decides on its own merits whether or not to take it down. From a private law point of view, this is obviously not an issue because there is an agreement between this service and the third party users and technically, anybody in the world, any

person, including the ACEU police can inform the company that something is amiss and in accordance with this user policy the company can take it down.

The thing is, the ACEU police are not just any citizen, they are an official/officials of the state and they are prompting this removal. Now there are people saying [just to emphasise: not necessarily my position – just opposing voices] that they should not leave this decision (of removal) to private companies who are not usually even based in the ACEU, as they would not be able to rightly assess the kinds of content aimed at harming ACEU society.

Moreover, these companies are a non-body a non-judge but they are now judge, jury and executioners of the content. Well, one could say that it is fair for any one including the ACEU police to point out that this content is a violation and the rest is up to the company; they are simply prompting them. I'll leave you to form your own opinion on this …

Now, lastly if the content is truly and fully more than objectionable thus criminal and not taken down because of the user licence the ACEU Police may get the foreign authorities to execute an order. Obviously, most companies for what you might call good reasons will say 'this is apparently illegal' and proceed to remove without any orders or warrants. This will reduce paperwork and the ACEU police rejoices.

P: Would you say then that the ACEU Police exerts a shadow of control a kind of coercion in this matter?

M: No. Well no, I advised them on this thus, in doing this, [I don't sit at their desk when they make the calls, so should is the maximum I can state] they should make it explicitly clear that they have no legal basis, no warrant, and no power. But it still, it is still the ACEU Police asking them. The mere fact that they, that is, the police present themselves as a government official changes things, if you made the same request or complaint as a regular citizen, it would be different. Make of that what you will, but it is not illegal.

P: You have given me a very legal answer but I can read… get, where you are coming from

M: It is efficient. It is very efficient but is it right? This is the question I'm still not quite sure how to answer myself. So what I do is, I try to make sure is that the police stay within the legal boundaries. I couldn't stop this even if I wanted to so the maximum I could do is to make sure that [this stays] within the legal boundaries. It was going to happen.

P: Yes, it was going to happen anyway. So, in my research I have devised this framework where I look at contemporary terrorist regulation and indeed terrorism through the lens of hauntology i.e., haunting. Thus for example, I view terrorist content as a ghost a spectre, a spook that haunts the

legal and socio-political imaginary. Would you say that this hauntology of terrorism, with its mutations and regulatory phantoms is generally present in the ACEU?

M: I am really not the person to talk to for the average ACEU opinion on this nonetheless, yes. I really think that the spectre of terrorism is a problem in the ACEU. The definition of what terrorism actually is as its being used in society right now has nothing to do with the definition of terrorism as proscribed in the law or even ten years ago. For me, terrorism is strictly (I am doing this by [memory] so I may falter here and there)… its directed forceful action aimed to instil fear or damage with the ultimate intent to overthrow legitimate government for whatever reason or ideal; it could be a theocracy with Muslim intent, the communists, the Francoists -I don't really give a damn…

If you see how terrorism is used in the common language, and I am not speaking of legally trained people, a lot of things get called terrorism that I'd disagree with. So even where one may say that "Islam is the best religion and all people should convert" this may already border on what some people may call a jihadist or terrorist-related statement –– and I am just saying that they are expressing a religious opinion. I live in a small town with very strict protestant people and I hear them say the same things but nobody is bothered.

Now, we have these groups of immigrants that are obviously non–European lets describe them like that and they tend to have an 'outside-culture' very much opposed to what the ACEU are accustomed to. Especially the men between the ages of say 16 and 26, they cause issues, and sometimes true issues, but now this is called 'street-terrorism' *(we both laugh)* this is bullshit. Well, they act together and may cause threats, and yes they are sometimes violent and yes they are rude but they have absolutely nothing to do with overthrowing the ACEU government, they are just being pains in the *** *(we both laugh)* like any number of males between the ages of 16 and 26!

P: Oh yes, and what about "ACEU males", does the same happen?

M: Then, you get this weird thing where if its an originally ACEU guy, the chances of somebody calling him a street terrorist are noticeably lower in my personal opinion than if its someone who looks as if they may have a connection to Islam. And I am not saying that this is completely unjustified, but it does tend to indicate some form of bias which is very hard to exclude but should be excluded as much as possible when dealing with the public as a police officer. There are groups that are responsible for a larger part of criminality (or terrorist acts) for a much larger extent as say percentages of the population in general would indicate and for this reason you could say that from a strict numbers point of view these groups are [over-averagely] responsible for such crimes in ACEU.

However, this is likely to lead to false positives and tunnel vision and stigma etcetera. And so even if it is true (which it is) it should never be a reason for singling out these groups. You should always check against other factors objectively to determine whether or not this 'hunch' is right and based on facts. Especially where terrorism is involved, you see that many people in the ACEU public and also the ACEU police and ACEU prosecution *(hesitates)* seem to be a little less strict about how much of that objectivity they need to do. I am being very careful in my wording because I do not want to paint a picture of an extremely biased racist or ethnnicist ACEU police because this does not exist [in my experience!]. But there are issues with the whole societal zeitgeist.

P: Oh, I can relate to this. Here in the UK, you find that there is legislation now that obliges public authorities like say, schools to have a duty of care to prevent children and vulnerable from being radicalised.

M: Yes, they are actually starting to push this in schools here too but that's a very recent development.

P: And so, there is a kind of *(hesitates)…* one would say, an unconscious bias, —I think?

M: Well it's not unconscious. Its not a personal bias now, it is a system bias and system biases are always bad. They may feel less a bias as they become part of systems and habits and procedures etc, – so there's no actual 'decision' about a single thing anymore. A personal bias can be solved by having another person look at it, but a system bias is much harder to solve.

P: Yes …

M: And I have always fought against system biases as a legally trained person. Even though I do have great respect for the hunches of detectives, or their gut feeling -they are more often than not right- but then still they need to do some form of objective analysis before they act.

P: Just a follow up question similar to what you've just said I just want clarity, would you say then that the police or this informal body you were talking about?

M *(interjects)*: It is not an informal body as such it is a unit, a sub-sub-sub department of the ACEU police of about maybe 20 or so police officers who were just given this task.

P: OK, I will call it the department for our purposes, would you say that, that this department experiences these same problems of objective judgement and reasoning?

M: The way I interpret it, and they probably will not look at me kindly for saying so, they wash their hands of this responsibility in that regard. They are merely pointing to user transgressions of user

policies of online services. Differently put: they explicitly refrain from making a judgement themselves and leave it to another entity.

P: Right!

M: So, we (as the police) don't decide anything, we point it out to the company and then they place the responsibility for this judgement as a matter of completely in the hands of that company. In my opinion, if an ACEU police official asks anybody it is their responsibility to make that judgement that judgement of objectivity. I don't go asking you whether I should shoot a running suspect either. And well one might say but guns are different but no; they are not different at all!
It's the exact same method but now there is a gun involved and it's all of a sudden different. No its not. It's a matter of correct reasoning and that's what I struggle with. I see the effectiveness. I see the point of pointing out specific harm but I think its part of a bigger move by the government of shifting more responsibilities into the hands of private persons and companies, a move, which I am against. We have a government for a reason. And one of these reasons is to assume responsibility and make and take decisions. But now, we are pushing them back to the private. I am not sure what this situation is like in the UK, but you might also ask is not the government absconding from its public duties? Why should a foreign-based company do our enforcement for us or even have an opinion on whether or not… there is a lot of room for nasty stuff right there. Officials have to be fully responsible for whatever happens within their roles for this particular problem and solution. That is my opinion and this opinion will go against the grain of many ACEU policemen and the public prosecution.

P: OK. Would you say that the process of regulating extremist or terrorist content is very different from something like the regulation of illegal child sexual images?

M: No, it carries the same emotional and moral stigma or bias that reduces the [perceived] responsibility to reason objectively. They are both very socially and emotionally laden concepts.

P: Wouldn't you say though for something like child sexualised images or child pornography we have got clearer, agreed upon international standards?

M: No [in hindsight I probably should have said: yes, but….], because what is considered a sexual act differs from jurisdiction, from country to country and the age of consent for sex is different (not wildly different though, a woman of 40 years in consent is not an issue in most places) In Germany the legal age of consent is 16, but there are countries where the legal age of consent is 21. So, there is rather a large difference. In ACEU we have had this whole discussion about virtual child porn where there is no actual child involved no actual child harmed but just images computer-processed images that look real enough. Now is this objectionable or not? Some may say it is morally objectionable but is it a legal issue? Some will say well law is moral and one shouldn't look

at children at all in a sexualised manner following this line of reasoning One could say that those who look at these images are deviants (and may harm children later) and need to be punished! [To make it clear, virtual crime pornography is forbidden in ACEU. Any depiction of sexual acts or content seemingly involving persons under the age of consent is forbidden.]

P: I have a few questions left; I am going to move back briefly into human rights, which we have flirted with. So if an individual posted something deemed objectionable and it was taken down how would they get redress, would they do this through the company...or?

M: We will split this answer. Under current Notice and Take down procedure they have no redress and I am in no doubt that this would lead to a conviction by the European Court of Human rights [should someone pursue it, but they wont….for obvious reasons] because censorship without a justifiable reason is wrong at least that's what this Court systematically says [and they deem judicial review a subcondiction for jurifiably].

So, current law is not right. But, now like I said, there is a law being debated in parliament that changes this,[935] allowing an infringed third party to complain to a judge. This does not mean however that the judge is involved in the process of take down and this could be problematic. An ACEU minister has said that they still prefer to use the voluntary method of take down where no judge looks at the content before it is taken down. Thus, the improvement would be that one would complain to a judge to have it [the content] reinstated. Whether this is good enough for the European Courts Human rights standards, one could have different opinions on it….

Obviously, if an individual has a dispute with a company on this issue they could go to a private law judge in a civil court and bring a claim against the company for damages and/or to reinstate the content. Now with the other procedure, which I call Notice and Take Action instead of Notice and Take Down, where the action would be informing the private company of the objectionable content, as the ACEU government is not liable/addressable as they are not the acting party. So, any legal protection in dependent upon the companies policies and ' home law'.

P: So there are some legal protective gaps?

M: Well, it does not feel like a comprehensive system to me as a lawyer! I am sensing this is not a satisfactory answer?

P: well, No. Whatever I have done in these past two and a half years of my research shows that, I mean, I keep learning that most things about Internet regulation are unsatisfactory.

[935] Ibid

M: Yes they are very unsatisfactory

P: This is one of the reasons I think about it through this conceptual framework of hauntology, of ghosts of phantoms…. I think it sort of explains the unexplainable it explains why we have all these grey areas and gaps.

M: Yes, it's partly a ghost, in the sense that it is something scary, that we cannot explain how it works. All European countries have this. There is some apprehension. I am not sure you should call it fear, but apprehension, yes, and the other thing is in general, law moves slower than technological developments. So, the police try and do what is societally acceptable [I meant: necessarily] even though the legal basis is a bit; *…(hesitates)…*

P: Fragile?

M: Yes fragile! That is correct, and sometimes this works out well in my professional opinion and sometimes, the result is a little less … satisfactory *(we both laugh)*

P: OK, finally, what are your closing thoughts Do you think that there is hope? Do you think regulation could be improved and if it could be improved what are some recommendations that we could think of?

M: Right. I think that any content taken down, and this is a personal opinion, should be through a judge not a public prosecutor and not a police officer why? Because they [judges] are legally trained and independent.

P: So they the judges can do the whole objectivity-proportionality-balancing thing better?

M: Yes they can do these things better. Traditionally, these kinds of decisions are made by judges and so I think that it's odd that for other crimes we insist on this and yet for terrorism this is something completely different

P: But based on the size and information overload of the Internet would you say that this would be a pragmatic move having judges make these decisions?

M: Obviously, as a long term police lawyer there are some situations where the law is tight and pragmatism has to take over but I also know that there are people in the public prosecution or the police that will take things one or two or three steps further than they should. Once you leave strict legality, drawing a boundary wherever else, becomes a very hard thing. It becomes increasingly hard to say well this is the right side of right and this is the wrong side of right. So I prefer for myself for society and for certainty for the police that there are judges and that there is more

objective criteria that the judges apply this is also taking into consideration the fact that in civil law countries the judges only interpret law and do not make law.

P: So, the problem in your view is not law per se, its legal interpretation execution?

M: It is interpretation. The amount of interpretation required currently, and the people doing the interpretation is not up to the same standards as we have for many other things. This is not anybody's fault. The problem is; Law is slow. It is a condensation of the societal average and some problems are not at the centre of society they are at the edge currently. I think for this particular issue law is too slow. One big legal issue remains obviously, the transnational differences. And so, what we, ACEU citizens, might deem objectionable or illegal and what the Germans deem objectionable and what the Hungarians deem objectionable are different. It gets even weirder if you go beyond Europe say China and South America or even average officially Islamic countries, which may be less inclined to address or co-operate on certain issues, because their societal issues are different and because they may have differences on how they view extremism. I do not know how to solve this…

We need more research on this topic to make some issues clear and cut away some wrong reasoning.

So what else is needed? You now go beyond the purview of law. I think that child pornography and terrorism ought to be looked at as any other form of serious crime, but they are not because they are emotionally and societally laden concepts. As long as society itself does not normalise its response to it, neither will the authorities, because the authorities are not immune from societal opinions and fears. This should happen but I do not know how change it. There is an issue here, but I haven't got the expertise. That's it.

P: Thanks for the interview.

Interview transcript C: with Karim Palant Facebook Policy Manager, UK

(23/10/17)

Me (the interviewer 'M' hereinafter): What is your general view about terrorism and terrorism content?

K (**Karim Palant the interviewee, 'K' hereinafter)**: So, the opening for any comment that you'll get from Facebook is really that terrorism and terrorism content has no place on Facebook. That includes the fact that anybody who is involved with a terrorist organisation or who is a member of a terrorist organisation will not be allowed on our platform and that is very clear.

M: So your understanding of who a terrorist is based on the kind of organisation they belong to?

K: No, no, I think predominantly, there are various global attempts to define what global terrorist organisations are and obviously, any one who is a member of pretty much those internationally accepted organisations definitely falls within the brackets. But then we have content. If such content praises or glorifies terrorist content without condemnation, or without it being for the purposes of a news report or so on, then we would remove that content. But on an individual level, you are either conceptually committing a terrorist act by planning a terrorist act or being a member of a terrorist organisation.

M: Could you paint a picture of what happens if I say posted extremist or terrorist content?

K: First all extremism and terrorism are separate.

M: Do you separate them?

K: Yes absolutely. So, extremist content does not have a definition. Terrorism has an element of advocating for violence, which does give you a distinction at least even if it is not a legally internationally accepted definition. There is a qualitative distinction between violent content (i.e., advocating for violence and being part of an organisation that commits violence) and merely very extreme views left or right on the political spectrum. And so, we do draw this distinction. For known terrorist organisations that are reasonably recognised as such, we are building a bank of known terrorist propaganda that goes into what is known as a hash-sharing database that is then blocked from being uploaded, reviewed at that point and removed before its posted the content. Other content, we identify largely due to reports to us these are then reviewed by a human being judged against our community standards our community standards are publicly set out.

So, to answer your question, you as an individual, if you posted terrorist content, because you do not belong to a known terrorist group that posts known terrorist propaganda, such content would be reported to us by a range of means, in most cases, another individual another platform user would click on the report button. The report would then come to us, and then a human being would review it, if it breaks our community standards, the content comes down. If you are an individual that repeatedly posts content, or a group or a page then the group or page will come down as well. But at that point, you as a group or page will have to be repeatedly violating our community standards.

What we also do is we try, and this is not easy, to define hate organisations, that is organisations that define themselves based on the hatred of another group or protected category and protected categories are listed in our community standards.[936] So if you are group that regularly defines itself by its hate of a particular group, and hate is a very difficult thing to justify because…. it is perfectly legitimate to say, actually, I hate this person! But to say that I hate all people who have or belong to this protected category is not fine, in other words, to say that I hate this religion is fine but to say that I hate all people who belong to this religion is probably not fine. If you say I dislike this religion because of X and therefore people who share that view I don't like, it becomes a difficult boundary.

M: So your definitions are mostly based on your community standards?

K: We start from our community standards; we respect local law in whatever jurisdiction. But there will be scenarios where we will not respect local law and we will have disputes with the local legal authorities. Generally speaking, in a country like the UK here you have liberal Democratic norms, an openness of processes and a clear defining of what is illegal and legal we will respect them.

M: What are your thoughts about the current government saying Facebook doesn't do more than it should to regulate?

K: We have had an extensive discussion with the government for the last 6 to 12 months. The government has a duty and a right to insist on action when they see a problem that they feel may well be leading to the radicalisation of young people or their recruitment into terrorist groups –and have real world consequences in terms of the safety of citizens. They have a right to find out what is being done. There is a whole load of detailed points. However, that I feel they lie behind on one of them which is that they want more visibility and more pressure on the companies to build the

[936] We define the term to mean direct and serious attacks on any protected category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease. We work hard to remove hate speech quickly; however there are instances of offensive content, including distasteful humour, that are not hate speech according to our definition. In these cases, we work to apply fair, thoughtful, and scalable policies. This approach allows us to continue defending the principles of freedom of self-expression on which Facebook is founded. Available at: < https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054/ > accessed 06/11/17

tools that we have been open about –I don't know if you saw the blog by Monika Bickert and Brian Fishman? … This is something you certainly should read.[937]

M: Oh, yes I did

K: So, we've been quite open about the kinds of technologies that we are trying to develop, to deal with terrorist content from known terrorist organisations as quickly as possible. Here known terrorist organisations are Al Qaeda or Daesh and so on and they basically try to use our platform in an organised way. Speed is of the essence because they will use it in a highly effective way, to get out that propaganda quickly. And we have talked to the government openly and publicly online about the fact that we are working to develop intelligence-led tools to get ahead of that. By this, I mean that we identify the propaganda very quickly, we bank it into a hash-database very quickly because, and you know it can spread within an hour or two very far.

We have been open about this. A lot of the government's pressure publicly in particular is focused on this process, they want to see more evidence of progress in this area and they want us to talk more openly about this process because the public has a right to know. And I think, to a large degree, that is legitimate pressure and to a large degree we are working with the other companies through the Global Internet Forum to deliver on that transparency side of it as well as the technology sharing side of it. Some of it is about sharing technology e.g. that hash-sharing example and some of is going to be platform specific because of the nature of some platforms, you can not share certain AI tools outside a particular platform because they will not work elsewhere. And some of it is about smaller companies. This is a big area of governmental concern and indeed, there are platforms that are well intentioned but do not necessarily have the capacity to build their systems to prevent them being used by hyper-organised terrorist groups. So, they need this knowledge and technology sharing. It is more about knowledge sharing. So in working with them, we show them how we deal with legal law enforcement requests, how we define our community standards, how we operationalise our notice and takedown system etc., in order to capture those things that we worry about.

M: Would you not say that its tricky territory because the government's definitions or even the legal definitions of terrorism seem to stretch?

K: Absolutely …It would be easier if the government was coming to us with a clear definition what it defined as terrorist content but this is not easy. If the government were to say: 'this is the pile of content you need to take down and I define what is OK and what is not', there would be a problem.

[937] See Bickert, M. & Fishman, B. *Hard Questions: How We Counter Terrorism,* available at*:* < https://newsroom.fb.com/news/2017/06/how-we-counter-terrorism/ > accessed 06/11/2017

What the government is saying is that this accepted definition of terrorist content [where companies have come to a sort of view as to what it is which fits within their community standards (e.g. defining terrorism based on violent organised groups like Daesh and AL Qaeda and this is really clear)] is what companies should be doing something about. I do not think the governments view is that there is loads of content that we are not taking down. They are not trying to stretch the definition. I do not think at the moment that they are being pushy about the definition. The reason why they are not being pushy about the definition is because they know that we would say: hold on a second, if you cannot pass a law that clearly says this-is-what-terrorism content-is don't expect us to do it! And so, we use our community standards. We have kind of had a go at defining what they are and so the government cannot just say that they think that our standards are not right.

M: That is interesting; I thought it was the other way round. Having looked at the ambiguity with regard to the legal definition of terrorism and how it links to things like radicalisation the Prevent strategy, and the notion of British values I thought that the government would be more unyielding?

K: Well look, this is not an easy space. It is not simple for the government to navigate…. It is clear that there is a lot of evidence that says that counter narratives and finding ways to disrupt radicalisation by interventionist measures, it is clear that some of this works. It is also clear that it is very difficult for the government to balance what it deems appropriate to do in this respect, which is one of the reasons why we are independently doing our own thing for the Online Civil Courage initiative[938], — I don't know if you've seen that?

M: No

K: You should look it up, it is run through the institute of strategic dialogue and it's a counter-speech/counter-narrative campaign which we fund independent of the government, I know Google do something similar, because government can only do so much. There's only so far government can go in a way. Government counter-narrative is by definition problematic, the fact that it is coming from the government means that it is going to be undermined. It could be brilliant, but it is still coming from the government. So, we try and support independent counter-narrative work that is not necessarily about British values or anything like that. We work with and support NGOs who come up with good ideas. So on the whole, we will do a range of things from reporting and takedown to developing proactive technologies to counter speech and counter narratives.

M: How would you compare the regulatory process of terrorist content with other kinds of criminal content?

[938] See Facebook's Online Civil Courage Page available at: < https://www.facebook.com/OnlineCivilCourage/ > accessed 06/11/2017

K: I would say that terrorism and child sexual exploitation are probably the most two similar areas. The difference between child sexual exploitation and terrorism is that whilst there is a lot of terrorist content that is clearly just illegal, and just bad, there are then grey areas around the outside. Child sexual exploitation is much clearer it is illegal or its not it's a bit easier than terrorism. This is why we did a hash-database for child sexual exploitation first because it was a lot easier to define. One of the other differences is that for terrorism we will have human review, so we will not automatically rely on the hash-database. With child sexual exploitation we just remove the content.

M: So, how does one review or moderate this content. I can imagine it can be hard if one doesn't speak say, Arabic?

K: Absolutely, we employ native speakers. We have about 4500 right into 7500 human reviewers around the world. And they cover many languages.

M: Is it a team of reviewers or is it individual?

K: The reviewers operate in teams in different locations an individual reviews each piece of content but they've got people they can explain to and the process can be explained to them as necessary. The vast majority of reviews are, Justin Bieber fans reporting the one direction page or, Everton fans reporting the Liverpool page trying to take it down. So, there's a lot of noise, but within this noise there are particular trends that the individual reviewers and teams see and respond to, or bring forward for discussion.

M: What are the pros and cons of using human reviewers as opposed to algorithms or AI tools?

K: Context; so there is not an algorithm that judges context sufficiently at the moment. This means that they (algorithms) can bring up many false positives. And false positives take up a lot of time, because then you are going to have to review the things that you took down. So, it doesn't save you a lot of time when you have false positives. Then there are obviously Human rights and free speech implications to false positives as well. But human review is slower. With an algorithm you can …so one of the things we do with algorithms is that we surface proactively for terrorist to detect accounts terrorist accounts that are behaving like terrorist accounts and after this, we point them out for human review. We don't do it automatically because the human review aspect is an important safeguard.

M: But humans can also be hyper subjective and rash?

K: No, we don't give them a free reign, we don't say, what do you think. There are set out standards (publically set out community standards) that they use. So content is judged independently of any other piece of content against those community standards. Furthermore, there

is detailed training beyond those community standards on issues like interpretation etc. We also try and make sure that native speakers (of a particular language) view particular content so that they can get the nuances and the context right.

M: But things can be politically charged with regard to context; you may find a dominant voice that can overpower or erase some other important voice.

K: Absolutely, we are really conscious of the fact that we are making judgments based on the information and context that we have, that we are aware of. We are aware of the fact that we owe a duty of care to users to try and be as… impartial… and people could argue whether or not impartially is actually possible, whether or not we can be totally devoid of bias and so on. I don't think we claim that we can be impartial. I think what we try and do as much as possible is to rest on existing norms that existing organisations have tried to define so we work with NGO partners in countries around the world who have more expertise in these areas than we do. We have a kind of symbiotic relationship with them to help with correcting and interpreting our policies. For example, we have a process whereby we can ask our NGO partners to become, not trusted flaggers like the Google model. So we don't speed up reports because we don't think that's the right approach. But we do think that if people make certain reports that are biased or reports that they are not critically informed about, there should be a channel where they can talk to our teams who devise these policies and have a sort of two-way conversation. We try to make sure that this team includes as broad a range of organisations, NGOs as we can get going. We are really conscious that its far from perfect but it is an attempt to try and deal with the issue we are talking about which is this ability to define what is acceptable and what is not. The truth is the users of our platform are very vocal… and so where there are really controversial issues about what is and isn't truth what is and isn't extremism in parts of the world where there is a real tension around that like parts of the middle east —where you can have two very sharp and divergent views on these things, we have to tread that line of trying to accommodate, of trying to find a balance. And sometimes, biases can be a good thing, sometimes you can say actually you think this you think this and we are going to find a fudge in the middle that's not great! What is better is to say; 'our bias is these internationally accepted norms and we will judge this by that' … that might be the right approach because it gives you somewhere to stand … but its hard.

M: I can imagine it being harder for you to assess content from groups, from people who may have minority viewpoints especially if such views are internationally disputed?

K: I think to some degree we cannot solve the problems of the world. I can see that there are challenges if there is a minority group involved. Somebody pointed it out to me the other day. Generally, we can be attacked for removing a piece of content and silencing a particular group, at the same time as being attacked for leaving up the same content because it is upsetting or graphic.

Sometimes the same publication or group will do both, at different times, because these are hard judgments and people can hold two contradictory views about what the right thing to do is.

M: So in many ways, these decisions are reflective of the real world we live in?

K: Absolutely. They are very much reflective of the real world and they are not taken lightly. The key thing I had not really covered is that we hire legal experts, terrorist experts and language experts and so on, whose job it is not to make these decisions in an ivory tower, but to absorb all the evidence and to help us make decisions based on certain norms. It is not easy. The thing is, most of the vast majority of content on our platforms has nothing to do with this. It's the edge cases. It is not easy.

M: Let us talk Human Rights. Let us return to our scenario earlier, say, I posted something of a terrorist nature online, my account gets suspended, what happens next in terms of redress?

K: So you get a message…

M: Is the message clear enough to tell me what is going on or is it a general message?

K: I cannot remember actually what it says, I think it will also vary on the circumstances but it will pretty much say your account has been suspended because of repeated violation of community standards…. There is a balance. I cannot see your account suspended for one single violation, unless it is a child sexual exploitation violation

M: I say this because I have a friend who posted something about tube noise. She lives in an area where the night tube was running and she was part of a tube noise protest group, she has posted photos on Facebook

K: Photos of what?

M: Protest photos, photos of her protesting with banners– to do with the Tube noise thing, pretty standard photos in my view, they had nothing to do with race, ideology or anything. I understand that she also posted complaints on the London Mayor's page and her account was suspended.

K: Was it suspended permanently?

M: No, it was suspended for a short while

K: How long?

M: I think a few days?

K: Ok, sometimes, there will be a number of different things. I don't know much about this situation and I don't know if I should comment on it. But the community standards are pretty clear. You can have a look at them and see whether or not she violated the community standards. Without seeing the content she posted, it is hard to judge what it could have been. Sometimes it simply is spammy activity or material. So, it could be that she was posting a lot, very quickly, within a very small space of time and so the system could have flagged that material. It is very hard to say.

M: So what you are trying to say is, sometimes the system makes mistakes? Mistakes are inevitable, no?

K: Well, I think I would say that there are systems in place to avoid the platform from being used in an abusive manner. Some of them around speech, we have a lot of safeguards around e.g. human review. Sometimes, around other parts of the process like spam those safeguards may be less, as these areas may be less core to human rights. So, if someone pointed out that their account was a target of spam that is, being quite spammy, that may impact their account in a different way, the safeguards may be lesser. Now, I have no idea whether the tube protest photos had anything to do with her account being suspended, or if what she had posted on the Mayor of London's page had anything to do with it. It is not my experience that one piece of content could get your account suspended for 24 hours unless it was quite a serious violation. But then again, there is not a hard cast rule about this. This doesn't mean that there was no error about this. Maybe she had had other content in the past?

M: There are also other scenarios from the US like the Black Lives Matter activists (I guess its similar to the Rohingya example you gave) So, a person may say white people have done such and such a thing and if taken out of context, the system may flag it as hateful and it may lead to a suspension.

K: Its very hard. Context matters. And if I am saying that black people did this, the bar in your head and in my head is different because we both live in a western liberal democracy where we are all of a certain kind of outlook. But the bar for saying something is racist is probably individually different, right? So if a black person said that white people have oppressed us for generations, –– that is not racist. That is a statement of historical view, so this is really hard to operationalise and to draw up rules that can apply fairly.

M: I guess it is even harder because different jurisdictions like the US have got different understandings of freedom of expression and what it entails.

K: Yes. My understanding of it is (and I am not really close to the Black Lives Matter scenario) because our teams in the US handle that. But my understanding is that there have been some cases, high profile cases, where we have removed stuff that maybe on reflection was about highlighting particular instances, and then we kind of apologised and put it back up. We have thought long and hard about how we can prevent these situations from reoccurring. But some of this language stuff is a challenge. I do not know so much about, it would be wrong of me to speculate, because I do not have the details. I know that whenever there is a tension like that of the Black Lives Matter, a sort of tension that deals with a massive issue like racial tensions in the US, this presents real challenges that always blow back on us. We are always a bit of a battlefield in these situations. Now, I also know that we took down a lot of the Charlottesville white extremist content, we took a lot of that down, which was again controversial the other way and there was also a lot of debate as to whether that was terrorist content or not … I wouldn't want to be too definitive because I don't know too much about this.

M: It is kind of hard, because language changes and situations cause language to change, the words that are used in one scenario won't necessarily be the same in another.

K: Yes, that is why the training behind the scenes as to how reviewers interpret the community standards is a lot more detailed. During their training, we will talk about how certain words fall under certain categories for certain reasons. And that's why we also have those relationships with the NGOs because they are often on top of these things more than we are

M: Sorry, I forgot to ask, do you also work with law enforcement? I would imagine that you do

K: So, we publish in our transparency report I don't know if you have seen our transparency report online, we publish country by country law enforcement requests for data, data retention and for take down requests. In these three areas we show how many we received and how many we acted upon. We publish these reports every six months for each country. We do have people who work with law enforcement liaison, who are in contact with law enforcement. We are very clear about the grounds on which we will provide any data to law enforcement. We are very much governed by US law on this and so there's a limit on what we can and cant do with foreign law enforcement. Clearly, any individual, any government agency and that includes law enforcement can report anything to us that violates our community standards. In a way this is helping us to police our own standards and we have no objection to this. But if it is not against our community standards, then we will not take it down anyway.

M: Do you think it is naïve for us to think that we can ever get rid of terrorist content online?

K: Online generally? Yes. There is clearly going to be somewhere else online for terrorists to take advantage of, like the dark web etc. It is going to be like a game of cat and mouse trying to stop

these people. But can we continue to improve and reduce the amount of terrorist content online on major platforms that the vast majority of Internet users spend their time on? I think we can, we can get better and better and better at that. Can we completely eliminate it? —you know? …

M: Is this not undermining the very subversive element of terrorism?

K: I am not saying that we could ever be in a situation whereby there will ever be no terrorist content that makes society feel uncomfortable. I think that is an inevitable consequence of freedom of speech and the world at large. So, I do not think we will ever get to that point. But with regard to content form actual terrorist groups, I think we can get somehwere. That said we are a long way from: a) defining norms that everyone shares and b); operationalising our systems such that when we have these norms we can quickly and efficiently remove content that violates these norms no matter who is posting them.

M: If you were to have input from lawyers and the government and counterterrorism experts etc. in this area how do you think you would improve regulation in this area?

K: We are always improving. We are always getting information on what constitutes a terrorist group and what their activities are like. We are always improving our AI, building new ones, we are hiring more people to review content, so there's loads of things we could keep doing but regulation is really hard for the reasons that you said; language changes context changes and so forth…

M: And on the government's policy generally, do you have any views on that do you think countering terrorism is only about the Internet?

K: One of the problems the government has got is that some of the things they are talking about are fundamental problems facing society, and the Internet is just a manifestation of some of them. Therefore, to try and solve them involves taking decisions and acting in a way that no government has succeeded before. Defining extremism defining hate speech in a clear way for example is a challenge. One of the things, say, for smaller platforms would be to have a clear understanding of who terrorist organisations are, of what they are. But even this changes all the time. And governments do not necessarily always agree on who such organisations are and what they are, so how could you speed that up? How could you expect governments to come and internationally agree on these things? That is really hard.

M: It really is, especially in the context of authoritarian governments

K: Yes that's why you never operate on the basis of one government .You would certainly need to have a criteria for believing the government. Its obviously different in a western democracy like the UK where there is oversight. Jurisdictional differences would still emerge though. So, what would

make a difference perhaps is the passing of some international standards to agree upon certain things. This is contentious and I don't think it will ever happen. Far outside the online space it has never happened why is that? It is hard. It is hard. What the Internet is bringing to the fore is areas where governments and societies have difficult judgements to make and they may not necessarily want to have to make them. And the danger may then be that the government and society will say –– well, that's the Internet's challenge! Actually, is it? We try and do our best to mitigate negatives, but we cannot define what terrorism is and terrorism is not – you know, for the world at large

M: Would you then say that regulating the Internet and terrorism is a kind of haunting an evasive spectrality?

K: Interesting. It's not the way I have looked at it, but I can see why you look at it that way. I think that the Internet is bringing in front of society conflicts and problems that have already existed and almost saying, right, you need to deal with it! And that's hard, and scary!

M: So, problems that have always existed such as cross-cultural conflicts or political?

K: Yes, and the thing is there is going to have to be a rebalancing. Because we are used to having people say from minority groups having a voice in different spaces but now there are these digital spaces and this is an uncomfortable process. In some cases, this means new ways of enforcing against extreme views need to be devised and in other cases we will need a different accommodation. These are big questions for society they are not really ones that a platform can solve on their own.

M: Final note, what are your general views on the law and I reiterate you talked of international standards, do you think that this is something possible?

K: I think trying to solve everything is not going to be possible, but establishing quite narrow and specific areas say, e.g., 'in this area or conflict we are all going to agree that this is wrong and this is what terrorist groups do this etc.' This may help, but it may be a long shot.

M: But you see, the UK definition of terrorism expands terrorism to include non-violent content at the same time it carries racial political and ideological elements so it is rather wide.

K: As I said there is not much push and pull between us and the UK government in defining who a terrorist is etc., I think they (the government) focus on those people we know are terrorists and you know are terrorists. They share that kind of view. They focus on those. It is something that we are very wary of because we know that there is a tendency (not necessarily with the UK government but) with governments in general to expand the definition to include those that they feel uncomfortable with. And I think the UK government would acknowledge certainly, that success is

not them seated there going: ‘we are comfortable with everybody who is online.’ If they are not going to be uncomfortable at some point then we have probably gone too far.

M: Thanks ever so much for your time, I think that’s it.