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The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts

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The interaction between family law and counter-terrorism: a critical examination of the radicalisation cases in the family courts

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In recent years a growing number of cases known as the radicalisation cases began to appear in the family courts, dealing with concerns related to extremism, radicalisation and terrorism and their impact on children and families. In this article I argue that the radicalisation cases represent an important legal development since the direct involvement of the family courts in preventing and countering (the involvement of children in) terrorism is unprecedented in the UK. This article subjects the radicalisation cases and the novel interaction between family law and counter-terrorism that they have engendered to careful analysis and critical examination. By factually and legally contextualising the radicalisation cases, the article examines how *this interaction has taken place. The article goes on to critically interrogate* why *the radicalisation cases have appeared in the family courts at this point in time, arguing that the cases are influenced by and in fact reinforce a changing political context and a shifting counter-terrorism and security landscape that is anxious about and that seeks to regulate Muslim cultural difference, Muslim cultural life and political or ideological expressions of Islam. Finally, the article examines some of the worrying* implications *of this interaction between family law and counter-terrorism.*

Introduction

On 26 February 2018, Mark Rowley, the outgoing Assistant Commissioner of the Metropolitan Police, called for the children of 'those convicted of terrorist offences including radicalisers' to be removed from the care of their parents.[1] Although Rowley acknowledged that the family courts and social services have been dealing with safeguarding and child protection concerns arising within the context of terrorism, extremism and radicalisation in recent years, he argued that more could be done to protect children from parents 'who teach their children to hate'.[2] Rowley's controversial comments are the latest in a series of high-profile interjections on the topic of childhood radicalisation and the role that child protection agencies and the family courts can play to prevent it.[3] At the heart of this discussion are the radicalisation cases in the family

* PhD candidate, Department of Law, The London School of Economics and Political Science (LSE).. Some of the issues raised in this paper are elaborated in the author's PhD thesis (in progress) entitled, 'The Family and Counter-Terrorism'. I would like to thank Professors Conor Gearty, Emily Jackson and Peter Ramsay for their dedicated supervision and support and Dr Julie McCandless, Sarah Trotter and Professor Daniel Monk for reading and commenting on earlier drafts of this article. Sincerest thanks also to the anonymous reviewers and the participants and the attendees of the family law stream of the SLS Conference in Dublin in 2017 for their insightful commentary. The article is dedicated to the memory of my former supervisor Helen Reece, who so kindly encouraged me to pursue the idea of a PhD.

[1] F Hamilton, 'Extremists should lose access to their children, says Scotland Yard chief' *The Times* (27 February 2018).

[2] Ibid.

[3] B Johnson, 'The children taught at home about murder and bombings' *The Telegraph* (2 March 2014).

courts which were first reported in the media in August 2015[4] and which continued to appear in the family courts of England and Wales at a steady pace.[5] To deal with this new influx of radicalisation cases formal guidance was issued by Sir James Munby (then President of the Family Division of the High Court) in October 2015, setting out the processes and procedures to be complied with by those engaged with radicalisation cases.[6]

According to the guidance, radicalisation cases are those that involve three main types of allegations or suspicions: 'that children, with their parents or on their own, are planning or attempting or being groomed with a view to travel to parts of Syria controlled by the so-called Islamic State; that children have been or are at risk of being radicalised; or that children have been or at are at risk of being involved in terrorist activities either in this country or abroad'.[7] The radicalisation cases are, in short, concerned with preventing and countering (the involvement of children in) terrorism, extremism and radicalisation.

The radicalisation cases are an important legal development. Although evidence suggests that local authorities may have temporarily cared for children whose parents were detained or arrested under the Prevention of Terrorism Acts during the Northern Irish Troubles,[8] it is important to note that neither the family courts nor the child protection agencies were ever *directly* involved in counter-terrorism in the UK. Therefore, the radicalisation cases represent a novel interaction between otherwise very separate areas of state activity, family law and counter-terrorism, creating hitherto non-existent 'family law versions of counter-terrorism'.[9]

In this article, I seek to subject the radicalisation cases and the interaction between family and counter-terrorism that they have engendered to careful analysis and critical examination. In Part I of the article, I examine *how* this interaction has taken place by factually contextualising the radicalisation cases and situating them within their wider statutory and legal context. In Part II, I critically interrogate *why* the radicalisation cases have appeared in the family courts, taking issue with claims that the radicalisation cases are simply about protecting vulnerable children from obvious or straightforward child protection issues and promoting their welfare. To that end I argue, firstly, that the radicalisation cases are both influenced by and must be understood as being part of a specific social and political context that is apprehensive about and seeks to regulate Muslim cultural difference and Muslim family life. Secondly, I argue that the radicalisation cases and their emergence in the family courts have been enabled by a shifting counter-terrorism and security landscape and a new understanding and construction of the terrorist threat. Finally, in Part III I look at some of the worrying *implications* that arise from this interaction.

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[4] 'Judges considering fate of children as young as two amid radicalisation fears' *The Guardian* (5 August 2015).

[5] N Hall, 'Cafcass responds to a DfE report on safeguarding and radicalisation' (Cafcass Blog, 4 September 2017).

[6] *Radicalisation Cases in the Family Courts*: Guidance issued by Sir James Munby, President of the Family Division, on 8 October 2015.

[7] Ibid, para 1.

[8] P Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press, 1993), 49–51.

[9] C Walker, *Foreign Terrorist Fighters and UK Counterterrorism Law* in D Anderson, *The Terrorism Acts in 2015: Report of the Independent Reviewer in the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (December 2015), 128.

Although the article mainly involves a textual analysis of the radicalisation cases, empirical research methods were also used including Freedom of Information (FOI) requests and interviews with solicitors and barristers and Children and Family Court Advisory and Support Service (Cafcass) employees who have worked on the radicalisation cases.[10]

Part I: The factual and legal landscape

1. Facts and figures

The exact number of the radicalisation cases is unknown. Although there are currently 38 published family cases that deal with radicalisation, it is important to be aware that the published cases represent only 'a fraction of those decided'.[11] The evidence suggests that there are many[12] more unpublished radicalisation cases.[13]

At this point it is important to factually contextualise the radicalisation cases by saying a few words about the sociological make-up of the children and families involved. First, although the children and families involved come from a mix of ethnic backgrounds, they are all Muslim, since the family courts have been almost exclusively concerned with Islamist radicalisation.[14] Secondly, the Muslim families in the radicalisation cases come from a variety of socio-economic backgrounds, involving relatively stable and loving[15] families where the only welfare concern is that of radicalisation.[16] This mix of socio-economic backgrounds and the relative stability of the families involved, sets the radicalisation cases apart from the usual type of care cases involving neglect, domestic violence, substance abuse and a general history of family chaos and instability.[17] Thirdly, although the radicalisation cases feature both girls and boys, gender emerges as an important category since in the eyes of the judges the risks involved 'differ according

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[10] Overall, seven interviews were conducted. My sincerest thanks to the interviewees for their sharing their experiences and thoughts.

[11] M Wheeler, 'Radicalism in the Family Courts' UK Human Rights Blog, 30 October 2015.

[12] In June 2016 Cafcass published a report which showed that between July 2015 and December 2015 there were 54 family cases where radicalisation featured as a concern (Cafcass, *Study of data held by Cafcass in cases featuring radicalisation* (Cafcass, 2016), 7). I sent three FOI requests to Cafcass asking for regular updates on the number of family cases involving radicalisation concerns. Cafcass' responses show that between January 2016 and March 2018, 231 cases have appeared in the family courts featuring radicalisation concerns.

[13] It is not clear why there are so many unpublished radicalisation cases, although the interviewees suggested a number of reasons including the fact that some of the radicalisation cases would have been decided before concurrent criminal proceedings have been brought to an end, or because the information is too sensitive for national security or child protection reasons.

[14] Although far-right extremism and radicalisation concerns have been raised (and dismissed) in two published family law cases, *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1 and *Re V (Children)* [2015] EWHC B28 (Fam), (unreported) 15 December 2015, these have not been categorised as radicalisation cases.

[15] Although 'stable' is, of course a contentious and subjective term, it was used by the solicitors, barristers and Cafcass officers during the interviews to highlight the fact that, generally speaking, the children in the radicalisation cases are well-cared for and are not neglected or (otherwise) abused.

[16] See *London Borough of Tower Hamlets v B* [2015] EWHC 2491 (Fam), [2016] 2 FLR 877, para [5]; *Re X (Children) (No 3)* [2015] EWHC 3651 (Fam), [2017] 1 FLR 172, para [84]; *Re C, D, E (Children) (Radicalisation: Fact Finding)* [2016] EWHC 3087 (Fam), (unreported) 29 January 2016, para [6] and *A Local Authority v HB and Others* [2017] EWHC 1437 (Fam), [2018] 1 FLR 625, para [84].

[17] A Bainham, 'Private and public children law: an under-explored relationship' [2013] CFLQ 138. A list of the usual factors that are found in care proceedings were enumerated in *Re BR (Proof of Facts)* [2015] EWFC 41, (unreported) 11 May 2015.

to gender'.[18] For whilst it is feared that boys travelling to join terrorist groups in Syria might be seriously injured or even die during combat and become 'martyrs',[19] the fear is that girls will become 'Jihadi Brides'[20] and face 'sexual … exploitation'.[21] Fourthly, although the radicalisation cases are concerned with children from a wide age range, it is worth noting that 'young people in the age bracket of 14–18 years' have been considered to be 'particularly vulnerable'[22] and deserving of attention and protection.

2. The legal framework

The radicalisation cases have all been brought to the family courts under the Children Act (CA) 1989. It is true that the emergence of the radicalisation cases in the family courts coincided[23] with the passing of the Counter-Terrorism and Security Act (CTSA) 2015 and the introduction of the 'Prevent duty' which placed the *Prevent* strategy, the preventative strand of the government's official counter-terrorism policy *CONTEST*, on a statutory footing.[24] But whilst the 'Prevent duty' made it a legal obligation for a number of public bodies (including local authorities and schools) to have 'due regard' to the need to prevent terrorism,[25] no *specific* measures were introduced to enable the family courts to deal with children at risk of travelling to Syria, involvement in terrorism and/or radicalisation.[26] The radicalisation cases can, therefore, be divided into three categories based on the type of family law proceedings involved.

Private law radicalisation cases

Radicalisation concerns have been raised in private law proceedings between disputing parents. In fact, the first published family case where radicalisation issues were raised as a concern was a private law case.[27] In private law radicalisation cases, usually regarding the issue of contact, a parent,usually the mother, accuses the other parentof holding extremist beliefs that can radicalise and therefore harm the child(ren) in question. For example, in *Re M (Children)*,[28] the mother alleged, during the course of a dispute between the parents with regards to the level of contact to be afforded to the father, that the father had 'forced his son to watch Jihadist DVDs in order to radicalise

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[18] *London Borough of Tower Hamlets v M and Others* [2015] EWHC 869 (Fam), [2015] 2 FLR 1431, para [4].

[19] M Downs and S Edwards, *Brides and martyrs: protecting children from violent extremism* (Family Law, 2015).

[20] *London Borough of Tower Hamlets v B* [2016] EWHC 1707 (Fam), [2016] 2 FLR 887, para [86].

[21] Ibid, para [20].

[22] *A Local Authority v Y* [2017] EWHC 968 (Fam), [2018] 1 WLR 66, para [1].

[23] M Downs, 'Police Anti-terrorism "Lead" calls for children to be protected from terrorist parents on a par with paedophilia' (UK Human Rights Blog, 1 March 2018).

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

[25] Ibid.

[26] This distinguishes the legal response to the risk of travel to Syria and/or childhood radicalisation from the legal response to other, comparable, child protection concerns such as Female Genital Mutilation and forced marriage, where specific legislative measures were introduced empowering the family courts to make specific protection orders. It is important to note, however, that the government has recently announced its intention to amend its counter-terrorism legislation to make the encouragement of terrorism or the dissemination of terrorist publications in cases involving children a specific terrorist offence, suggesting that childhood radicalisation will be specifically criminalised. See Home Office, *Counter-Terrorism and Border Security Bill 2018: Overarching Fact Sheet* (6 June 2018), 1.

[27] *Re M (Children)* [2013] EWCA Civ 388.

[28] Ibid.

him'.[29] Similarly in *Re A and B (Children: Restrictions on Parental Responsibility: Radicalisation and Extremism)*,[30] the mother made an application for a number of section 8 orders, including a contact order, accusing the father of being a radicalised individual who supported the cause of Islamist terrorist groups such as ISIS.[31]

However, although 'allegations of radicalising by one parent against the other' have been increasingly 'forming part of the separation weaponry'[32] used by disputing parents against each other in private law proceedings, they have in fact proved very difficult to substantiate and have mostly been unsuccessful, failing to reach the requisite evidentiary threshold.[33] Yet this does not seem to have deterred disputing parents from making accusations of radicalisation against each other in private family law proceedings.[34] This suggests that parents and their counsel think that making an accusation of radicalisation is a strategic way of giving an otherwise unremarkable private family law case a higher profile and sense of urgency.[35] It seems that radicalisation is now becoming a contemporary social (if not legal) category of what Helen Reece calls parental 'deviance'.[36]

Wardship radicalisation cases

One of the noticeable aspects of the radicalisation cases has been the frequent use of wardship proceedings.[37] Because the status of ward of court is internationally recognised,[38] wardship is used in cases with an international dimension such as international abduction,[39] Female Genital Mutilation (FGM) and forced marriage.[40] Therefore, wardship has been viewed as being particularly 'apposite'[41] in radicalisation cases involving attempted or likely travel to ISIS-held territory in Syria. Moreover, since care and/or supervision orders for children who are 16 years or older are regarded as having only a limited effect in terms of protecting and safeguarding children who are over the age of 16,[42] the majority of radicalisation cases featuring wardship proceedings involve *older* children.[43]

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[29] Ibid, para [17].

[30] [2016] EWFC 40, [2016] 2 FLR 977.

[31] Ibid.

[32] A Douglas, 'The Needs of Children in Cases Featuring Radicalisation' (Cafcass Blog, 22 November 2016).

[33] *Re M* (n 27 above) and *Re A and B* (n 30 above). The interviewees confirmed that not a single one has reached the evidentiary threshold.

[34] Around a third of the radicalisation cases are private law radicalisation cases: see Hall (n 5).

[35] There is perhaps a parallel here between accusations of radicalisation and accusations of child sexual abuse in private law disputes. The latter has given rise to extensive academic concern and focus. See: EP Benedek and DH Schetky, 'Allegations of sexual abuse in child custody and visitation disputes' in EP Benedek and DH Schetky (eds), *Emerging Issues in Child Psychiatry and the Law* (Brunner/Mazel, 1985).

[36] H Reece, 'Was there, is there and should there be a presumption against deviant parents?' [2017] CFLQ 9, 10–14.

[37] S Edwards, *Protecting schoolgirls from terrorism grooming* [2015] 3 IFL 236, 237–240.

[38] *London Borough of Tower Hamlets v M and Others* (n 18 above), para [9].

[39] *Re Y (Risk of Young Person Travelling to Join IS) (No 2)* [2015] EWHC 2099 (Fam), [2016] 2 FLR 229, para [15].

[40] *Re M (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam), [2016] 1 FLR 1055.

[41] Ibid, para [9].

[42] S Williams, 'Radicalisation: a proportionate response' (28 October 2015) *Family Law Week*.

[43] With the exception of *Re M* (n 40 above).

Public law radicalisation cases

The majority of the radicalisation cases involve public family law proceedings. As will be discussed in more detail below, radicalisation and extremism have been identified by the government, in both counter-terrorism policy and legislation[44] and child welfare policy,[45] as safeguarding and child protection concerns that can engage the safeguarding and child protection duties of local authorities.[46] Although local authorities have reached diverse conclusions regarding the most appropriate safeguarding and child protection response to radicalisation,[47] children at risk of radicalisation have been recognised by the courts as 'children in need'[48] and as such eligible for a range of voluntary and support services under section 17 of the CA 1989.

However, most of the public law radicalisation cases reach the family courts because the local authority in question seeks to protect the child or children by intervening in a *compulsory* manner and applying for care and/ or supervision orders. To date, there has only been one public law radicalisation case involving a parent who has actually *travelled* with their child(ren) to Syria.[49] In the majority of the public law radicalisation cases, local authorities apply for supervision and/or care orders because they either suspect that the parents and/or children have attempted (or are planning) to travel to join terrorist groups in Syria[50] or because they suspect that the parents and/or children hold extremist views that can radicalise the children[51] or (as is often the case) both.

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[44] For example, HM Government, *The Prevent Strategy: A Guide for Local Partners in England. Stopping people becoming or supporting terrorists and violent extremists* (2008), 47 and HM Government, 'Revised Prevent Duty Guidance for England and Wales' (July 2015), paras 34–40.

[45] For example, Department for Children, Schools and Families, *Working Together to Safeguard Children* (DCSF, 2010), chapter 11 and HM Government, *Working Together to Safeguard Children* (2015), chapter 1.

[46] T Stanley and S Guru, 'Childhood Radicalisation Risk: An Emerging Practice Issue' (2015) 27 *Social Work in Action* 353.

[47] T Chisholm and A Coulter, *Safeguarding and radicalisation: Research Report* (DfE, August 2017), 4.

[48] *A v London Borough of Enfield* [2016] EWHC 567 (Admin), [2017] 1 FLR 203, paras [35]–[37].

[49] *Re Y (A Child) (Care Proceedings)* [2016] EWFC 30, [2016] 2 FLR 1074. Although with the return of women and children travelling from ISIS-held territory in Syria, it is likely that the issue of returning families and children will dominate the work of the family courts. See C Barnes, *Radicalisation Cases in the Family Courts: Part 4: Three-year Review* [2018] Fam Law 197, 200.

[50] *Leicester City Council v T* [2016] EWFC 20, [2017] 1 FLR 1585; *A Local Authority v M* [2016] EWHC 1599 (Fam), [2017] 1 FLR 1389; *Re X (Children) and Y (Children) (No 1)* [2015] EWHC 2265 (Fam), [2015] 2 FLR 1487; *Re X (Children) (No 3)* (n 16 above); *Re Y (Children) (No 3)* [2016] EWHC 503 (Fam), [2017] 1 FLR 1103; *HB v A Local Authority (Local Government Association intervening*) [2017] EWHC 524 (Fam), [2017] 1 WLR 4289 and *A Local Authority v HB and Others* (n 16 above).

[51] *London Borough of Tower Hamlets v B* (n 16 above); *London Borough of Tower Hamlets v B* (n 20 above); *Re C, D, E (Children) (Radicalisation: Fact Finding)* (n 16 above); *Re C, D, E (Children) (Radicalisation: Welfare)* [2016] EWHC 3088 (Fam); *Re K (Children)* [2016] EWHC 1606 (Fam); *Lancashire County Council v M and Others* [2016] EWFC 9; *Re C (A Child) (Care Proceedings: Disclosure)* [2016] EWHC 3171 (Fam), [2017] 4 WLR 19; *Re C (A Child) (Application for Public Interest Immunity)* [2017] EWHC 692 (Fam), [2017] 2 FLR 1342; *A Local Authority v M and Others* [2017] EWHC 2851 (Fam), [2018] 2 FLR 875; *Re NAA (A Child: Findings on Death of Parents: Convenient Forum)* [2017] EWFC B76, (unreported) 17 November 2017; *A Local Authority v A Mother and Others* [2017] EWHC 3741 (Fam), [2018] Fam Law 793; and *A Local Authority v A Mother and Others* [2018] EWHC 1841 (Fam).

Part II: Understanding the radicalisation cases

1. Protecting vulnerable children from harm and promoting their welfare? De-constructing the official explanation of the radicalisation cases

In factually and legally situating the radicalisation cases and examining *how* family law and counter-terrorism have interacted through them, it is clear that their importance as a legal development goes beyond their novelty. The radicalisation cases are a factually and legally diverse set of cases that involve a number of family law proceedings. Through them, the concerns, concepts and lexicon of counter-terrorism have infiltrated deeply into family law. They are, therefore, more than the simple and temporary 'foray by family law into the realms of counter-terrorism'[52] that they were initially understood by some academics to be.

The question that presents itself here is the following: *why* have the radicalisation cases emerged in the family courts at this particular point in time ? One way to answer this question would be to point out, as Hayden J does in *London Borough of Tower Hamlets v M and Others*, that the family courts of England and Wales 'are in the vanguard of change in life and society. Where there are changes in medicine or in technology, or cultural change, so often they resonate first within the family'.[53] The idea here seems to be that in the radicalisation cases the family courts are *reacting* to a changing terrorist landscape and a new kind of terrorist threat that, in the words of Hayden J in *Re K*, 'presents a distinctive danger to … children'.[54] Since children (including British children),[55] have been specifically targeted by ISIS for recruitment, have travelled to ISIS-held territory abroad and have participated in terrorist violence at a higher rate than before,[56] it is not surprising that the family courts have understood their role in the radicalisation cases as one of protecting vulnerable children and promoting their welfare.

This judicial explanation of the radicalisation cases, which is shared by the government,[57] is legally accurate. It is of course the case that the state has a legal obligation, under both domestic and international law, to protect children up until the age of 18 from the kinds of harms that might result from joining terrorist organisations abroad and engaging in extremist and/or terrorist activities (even if they themselves choose to join such groups and engage in such activities) and to safeguard and promote their welfare interests.[58] But this obvious legal position should not preclude a more critical interrogation of the radicalisation cases and the reasons behind their recent emergence in the family courts, particularly since protection, welfare and vulnerability are all politically charged concepts that have the potential to facilitate and lend

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[52] Walker (n 9 above), 128.

[53] See n 18 above, para [57].

[54] See n 51 above, para [24].

[55] N Khomami, 'Number of women and children who joined Isis "significantly underestimated"' *The Guardian* (23 July 2018).

[56] C Hamilton, F Colonnese and M Dunaiski, 'Children and Counter-Terrorism' (United Nations Interregional Crime and Justice Research Institute, 2016), 3.

[57] HM Government, 'CONTEST: Annual Report for 2015', Cm 9310 (2016), para 2.36.

[58] Sections 1 and 31 of CA 1989. Preventing children from travelling to Syria also engages the international humanitarian law and international human rights law duties of states. See: R Van Spaendonck, 'To School or to Syria? The Foreign Fighter Phenomenon From a Children's Rights Perspective' (2016) 12 *Utrecht Law Review* 41, 42

considerable legitimacy to 'enhanced state-surveillance practices and interventions'.[59]

Interrogating the language of protection and welfare

'Protectionist discourse'[60] can be very 'politically powerful'.[61] Since 9/11, the apparently benevolent and benign 'language of protection' has been invoked by Western states to justify significant increases in their capacity for intervention and surveillance[62] and to legitimate the securitisation of 'traditionally non-security areas'.[63] Therefore, it is important to pay close attention to the *justificatory* and *legitimating* role that the language of protection plays in the radicalisation cases.

The language of protection pervades the radicalisation cases. Particularly intriguing is its use by the judges as part of their attempt to explain to (the usually frustrated) parents why the state is intervening in their private lives. For example, in *London Borough of Tower Hamlets v B,* the second judgment in a case involving a 16-year-old girl who was apprehended at an airport intending to travel to ISIS-held territory in Syria after becoming 'radicalised' by exposing herself to copious amounts of ISIS propaganda, Hayden J emphasised that neither B nor her parents were 'being "punished"'.[64] Rather, Hayden J explained that the family court had sanctioned B's initial removal from the care of her parents and granted the local authority's application for care orders because 'the State is trying to protect their daughter from the damaging consequences of excessive ISIS propaganda'.[65] In another radicalisation case, *Re Y (Risk of Young Person Travelling to Join IS) (No 2)*, Hayden J tried to reassure the mother contesting the local authority's application to renew a wardship order in relation to her son by reminding her that the family court has 'an essentially protective jurisdiction'.[66]

In a similar vein, the judges have asserted and reaffirmed the applicability and importance of the welfare or 'paramountcy'[67]principle in the radicalisation cases. In *London Borough of Tower Hamlets v M and Others*, one of the earlier radicalisation cases, involving wardship applications with regards to a number of children who were feared to be at an imminent risk of travelling to Syria, Hayden J stressed that 'it is the interests of the individual child that is paramount. This cannot be eclipsed by wider considerations of counter-terrorism policy or operations'.[68]

There is a sense here that the language of protection and welfare is being used to justify and legitimate, rather than objectively *explain*, the radicalisation cases and their emergence in the family courts. By drawing a distinction between punishment and

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[59] V Coppock and M McGovern, '"Dangerous Minds"? Deconstructing Counter-Terrorism Discourse, Radicalisation and the "Psychological Vulnerability" of Muslim Children and Young People in Britain' (2014) 28 Child Soc 242, 252.

[60] Ibid.

[61] Ibid, 242.

[62] IM Young, 'The Logic of Masculinist Protection: Reflections on the Current Security State' in M Friedman (ed), 'Women and Citizenship' (2003) 29 *Journal of Women in Culture and Society* 1, 1–3.

[63] A Richards, 'The problem with "radicalization": the remit of Prevent and the need to refocus on terrorism in the UK' (2011) 87 Int Aff 143, 151.

[64] See n 20 above, para [123].

[65] Ibid.

[66] See n 39 above, para [18].

[67] H Reece, 'The Paramountcy Principle: Consensus or Construct' (1996) 49 Curr Leg Probl 267.

[68] See n 18 above, para [18].

discipline on the one hand and child protection and welfare on the other, the judges seem to be keen to emphasise that they are 'doing' ordinary family law. The problem, however, is that such a dichotomy does not really exist in practice. For as Harry Hendrick has demonstrated, historically speaking 'apparently protective' laws and policies are never simply about the protection of children.[69] Rather, they are usually 'part of' much 'larger' political and social 'agendas'[70] and tend to reinforce more 'disciplinary'[71] policies and practices. Moreover, as Helen Reece has argued, the 'apparent neutrality'[72] of the paramountcy principle, coupled with its infamous 'indeterminacy' and 'elasticity',[73] allows for the pre-determined and prevailing policies and agendas of the state, even when they are unconnected to the actual welfare of children,[74] to be 'smuggled'[75] in and to be judicially constructed as being in the best interests of the child.

This is also true of the radicalisation cases. As noted above, radicalisation and extremism have been treated as safeguarding and child protection concerns. In doing so, the government has aligned the state's duty to protect children and to promote their welfare with its interest in 'preventing' and countering terrorism. And so even if the judges in the radicalisation cases attempt to solely focus on the welfare interests of children, the concerns and priorities of counter-terrorism policy will inevitably determine, or at least 'inform',[76] what is considered to be in the welfare interests of children.

Examining the idea of vulnerability

The language of protection and welfare stems from an understanding of those considered to be at risk of involvement in extremist and/or terrorist activities as *vulnerable* subjects. However, vulnerability is a 'vague and nebulous concept'[77] that, despite appearing 'innocuous',[78] is in fact 'loaded with political, moral and practical implications'.[79] Therefore, the idea of vulnerability, which underpins the radicalisation cases and counter-terrorism policy and discourse more generally[80] is problematic for a number of reasons.

First, as Vicki Coppock and Mark McGovern argue, a 'distinction' must be drawn between the 'inherent vulnerability' of children, which results from their age and

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[69] H Hendrick, *Child Welfare: Historical dimensions, contemporary debates* (The Policy Press, 2003), 34.

[70] Ibid, 33.

[71] Ibid, 144.

[72] See n 67 above, 298.

[73] Ibid, 296.

[74] Ibid.

[75] Ibid, 268.

[76] R Taylor, 'Religion as harm? Radicalisation, extremism and child protection' [2018] CFLQ 41, 53.

[77] K Brown, '"Vulnerability": Handle with Care' (2011) 5 *Journal of Ethics and Social Welfare* 313, 314.

[78] Ibid.

[79] Ibid.

[80] Richards (n 63 above), 151; S Cottee, 'Terrorists Are Not Snowflakes' *Foreign Policy* (27 April 2017); A O'Donnell, 'Contagious ideas: vulnerability, epistemic injustice and counter-terrorism in education' (2016) *Educational Philosophy and Theory* 1. The emphasis on vulnerability is particularly noticeable in the government's latest Prevent strategy, published in June 2018. See HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism*, Cm 9608 (2018).

'biological immaturity,' and the 'structural vulnerability' of children: a socially and politically constructed vulnerability influenced by and reinforcing of specific 'social and political mechanisms'.[81] This 'structural' notion of vulnerability seems to influence the radicalisation cases. For whilst it makes sense for the babies and young children in the radicalisation cases to be referred to as vulnerable individuals in need of protection, its use in relation to teenagers who are 16 years or older is somewhat odd and counter-intuitive.[82] One particularly strange example is *A Local Authority v Y*, the third and final judgment in a case involving three separate judgments dealing with the local authority's wardship application in relation to Y, a teenage boy who was considered to be at risk of travelling to Syria after his two brothers travelled to, fought and eventually died in Syria.[83] The local authority was concerned that Y would be unprotected after turning 18 when wardship automatically falls away. Hayden J approved the local authority's highly unusual application for a bespoke (voluntary) agreement to allow it to continue to intervene in Y's life until Y turns 21 by stating that individuals do 'not become less vulnerable merely by chronological age'.[84]

Secondly, characterising individuals as vulnerable subjects is politically expedient for it renders them 'as appropriate objects of state intervention and surveillance'.[85] By divorcing vulnerability from age, the state has an almost unlimited capacity and an endless opportunity to intervene in and regulate the lives of perennially vulnerable individuals in the name of their protection. Such a conception of vulnerability is, therefore, 'politically motivated'.[86]

Finally, by characterising terrorists and potential terrorists as 'brainwashed'[87] victims, this notion of vulnerability does not take seriously the terrorist or potential terrorist, repugnant as his actions and beliefs are, as a political *agent*.[88] This side-lining of political agency rests on and reinforces a problematic *de-politicisation* of both terrorism (and its causes) and children and childhood. The idea that individuals are 'groom[ed]'[89] into committing acts of terrorism ignores the fact that terrorism is a form of politically motivated violence.[90] Empirical evidence shows that young people who have joined ISIS and other terrorist organisations are not, for the most part, naïve individuals: they are, in fact, active agents, primarily motivated by political and social factors.[91] But characterising them as vulnerable individuals ispolitically convenient,[92] for it obscures

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[81] Coppock and McGovern (n 59 above), 249.

[82] For example, *Re Y (Risk of Young Person Travelling to Join IS) (No 2)* [2015] EWHC 2099 (Fam), [2016] 2 FLR 229; *Re Z* [2015] EWHC 2350 (Fam) and *London Borough of Tower Hamlets v M and Others* (n 18 above).

[83] [2017] EWHC 968 (Fam), [2018] 1 WLR 66.

[84] Ibid, para [9].

[85] Coppock and McGovern (n 59 above), 242.

[86] A Richards, 'Characterising the UK Terrorist Threat: The Problem with Non-violent Ideology as a Focus for Counter-Terrorism and Terrorism as the product of "Vulnerability"' (2012) 3 J Terr Res 17, 24.

[87] S Siecklinck, F Kaulingfreks and M De Winter, 'Neither Villains Nor Victims: Towards an Educational Perspective on Radicalisation' (2015) 63 Brit Journ Edu Stud 329, 335.

[88] Ibid and Cottee (n 80 above).

[89] *Re Y (Risk of Young Person Travelling to Join IS) (No 2)* [2015] EWHC 2099 (Fam), [2016] 2 FLR 229, para [25].

[90] Richards (n 86 above), 24 and Cottee (n 80 above).

[91] Siecklinck et al (n 87 above), 336–337.

[92] C Baker-Beall, C Heath-Kelly and L Jarvis, 'Introduction' in C Baker-Beall, C Heath-Kelly and L Jarvis (eds), *Counter-*

the role that political and social grievances, including the role that the foreign[93] and social policies of Western states play in motivating young people to join terrorist organisations. For example, although Hayden J acknowledged in *Re Y* the fact that Y's uncle was a 'detainee in the Guantanamo Bay Detention Centre'[94] had caused Y to 'feel aggrieved' by a 'sense of injustice',[95] this is not cited as the main reason why Y is susceptible to radicalisation. Instead, Hayden J's focus is on easier and less overtly political factors such as disaffection, confusion and unhappiness.[96]

Moreover, this idea of vulnerability rests on a problematic construction of children and childhood 'innocence'[97] that ignores 'children as political actors'[98] and pathologises their political dissent as a 'risk' to be managed.[99]

2. Ordinary child protection or politicised and securitised constructions of harm?

The discussion above shows that the official narrative of the radicalisation cases and the reasons behind their emergence in the family courts has limited explanatory value. And so the question remains: what are the judges in the radicalisation cases exactly *doing*? Looking closely at the radicalisation cases themselves we find that the judges identify *two* main harms that they claim they are seeking to protect children from: travelling to join ISIS and other terrorist organisations in Syria and radicalisation and extremism.

In the radicalisation cases where the main harm is that of travel to Syria, the question for the court is relatively straightforward: has a child and/or a parent travelled to Syria, have they attempted to travel to Syria or are they likely to attempt to travel to Syria? I say straightforward because if any of these questions are answered in the affirmative, the harms that could arise out of entry into a dangerous 'war-zone,' which include 'inhuman treatment or punishment',[100] 'really serious bodily injury [and] even death',[101] are 'self-evident'.[102] For whereas situations involving 'emotional harm' might be more contentious and difficult to deal with, the same cannot be said of situations such as travelling to ISIS-held territory in Syria, involving as they do a 'palpable risk of physical harm'.[103] Therefore, the travel of children to ISIS-held territory in Syria clearly engages the state's *ordinary* child protection duties: since the children at risk of travelling face harms that are 'at the extreme end' of the child protection 'spectrum',[104] the '[s]tate is

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Radicalisation: Critical Perspectives (Routledge, 2014), 2.

[93] Richards (n 86 above), 24.

[94] *Re Y* (n 82 above), para [3].

[95] Ibid.

[96] Ibid, para [10].

[97] Coppock and McGovern (n 59 above), 246–249.

[98] Ibid, 246.

[99] Ibid.

[100] *Re M* (n 40 above), para [32].

[101] *Re X (Children); Re Y (Children)* (n 50 above), para [70].

[102] Ibid, para [24].

[103] Bainham (n 17 above), 146.

[104] *Re X (Children); Re Y (Children)* (n 50 above), para [70].

properly obligated to protect them'.[105]

However, the fact that some of the harms identified in the radicalisation cases fall within the ordinary remit of the state's child protection duties does not, of itself, explain the radicalisation cases and their emergence in the family courts at this particular point in time. First, whilst concern for the physical and bodily integrity of the children travelling to ISIS-held territory in Syria might explain the sudden upsurge in 2015 of the number of radicalisation cases appearing before the family courts, concerns about radicalisation appeared in the family courts as early as March 2013 in *Re M (Children)*,[106] more than a year before the rise of ISIS and its declaration of a Caliphate in June 2014. In fact, social services have been involved in assessing and investigating safeguarding and child protection concerns pertaining to extremism and radicalisation since at least 2012.[107] Secondly, it is important to remember that the involvement of children in terrorist-related activities is nothing new to the UK. Children and teenagers were directly involved in the conflict in Northern Ireland during the Troubles.[108] Children and teenagers were recruited into paramilitary and terrorist groups,[109] participated in violent riots,[110] were trained in the use of firearms[111] and were charged with and convicted of violent terrorism offences.[112] And yet, as I pointed out earlier, neither the child protection agencies nor the family courts were ever directly involved in countering Northern Irish terrorism.[113]

This is because, as a number of scholars have argued, often what is considered to be harmful to children is never a self-evident or objective reality.[114] Rather, behaviours and practices are *constructed* and 'come to be seen as' harmful to children[115] through a process of 'discovery',[116] social construction and labelling[117] that is political,[118] value-laden and selective.[119] So whilst actual conditions may or may not alter for children,[120] a

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[105] *London Borough of Tower Hamlets v B* (n 16 above), para [5].

[106] See n 27 above.

[107] Stanley and Guru (n 46 above), 355.

[108] M Breen Smyth, *Half the Battle: Understanding the Effects of the 'Troubles' on Children and Young People in Northern Ireland* (Incore, 1998), 39–42; OT Muldoon, *Children of the Troubles: The Impact of Political Violence in Northern Ireland* (2004) 60 *Journal of Social Issues* 453 and H Brocklehurst, 'The Nationalisation and Militarisation of Children in Northern Ireland' in H Brocklehurst, *Children as Political Bodies: Concepts, Cases and Theories* (DPhil thesis, University of Wales, 1999).

[109] E Cairns, *Caught in Crossfire: Children and the Northern Ireland Conflict* (Appletree Press Ltd, 1987), 30.

[110] Ibid, 11.

[111] Brocklehurst (n 108 above).

[112] Cairns (n 109 above), pp 30 and 90.

[113] Although the child protection system and social work were undoubtedly affected by the Troubles, there is no evidence to suggest that the child protection regime or the family courts were in any way directly involved in counter-terrorism efforts. See Smyth (n 108 above), 89–92 and G Kelly and J Pinkerton, 'The Children (Northern Ireland) Order 1995: Prospects for Progress?' in M Hill and J Aldgate (eds), *Child Welfare Services: Developments in Law, Policy, Practice and Research* (Jessica Kingsley Publishers, 1996), 42–46.

[114] A Diduck and F Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (Hart Publishing, 2012), 624.

[115] Ibid.

[116] Hendrick (n 69 above), 159.

[117] R Gelles, 'The Social Construction of Child Abuse' (1975) 45 *American Journal of Orthopsychiatry* 363.

[118] N Parton, *Governing the Family: Child Care, Child Protection and the State* (Macmillan, 1991), pp 4, 6 and 81.

[119] Kaganas and Diduck (n 114 above), 68.

changing political, social and cultural context can lead to the construction and 'discovery'[121] of categories of harm, even if they have, in fact, always existed.[122]

Drawing on this body of scholarship which emphasises the 'politics of child protection',[123] in what follows I claim that the judges in the radicalisation cases are not simply responding to ordinary child protection concerns arising out of the latest manifestation of the terrorist threat. Rather, they are influenced by an increasing unease about and anxieties regarding the place of Islam and Muslims in the UK and the alleged threat posed by Muslim cultural difference and ideological or political Islam to British national identity and values. It is this political and social context that provided the 'conditions of possibility'[124] that made the emergence of the radicalisation cases in the family courts possible.

Travel to Syria: Muslim cultural difference, the Muslim (family) problem and the bodies of Muslim children

The concern for the physical and bodily integrity of children travelling to Syria in the radicalisation cases can be linked to underlying anxieties over the Muslim presence in the UK and its perceived threat to the British way of life. Over the last few decades, and particularly following the 7/7 terrorist attacks in July 2005, the UK has seen the emergence of a perceived 'Muslim problem',[125] manifested in a growing sense of uneasiness about the apparent cultural dissent of the Muslim community from the liberal democratic consensus of mainstream British society.[126] But whilst Britain's Muslim problem has a number of 'fronts' that include terrorism and extremism, immigration and integration, unregulated mosques and Sharia councils, 'hate-preachers' and sexual 'grooming' gangs,[127] the importance of the *private* sphere is particularly noticeable.[128] Recent years have seen an increasing political and legal focus on *domestic* cultural practices associated with Muslim families,[129] such as honour-killings, 'sham', forced, arranged and unregistered marriages, FGM and male circumcision.[130] As a result, the Muslim family has become a highly politicised site of contestation, public scrutiny

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[120] Hendrick (n 69 above), 159.

[121] Ibid.

[122] P Daniel and J Ivatts, *Children and Social Policy* (MacMillan Press, 1998), 204 and Hendrick (n 69 above), 159.

[123] N Parton, *The Politics of Child Protection: Contemporary Developments and Future Directions* (Palgrave Macmillan, 2014).

[124] Parton (n 118 above), 5.

[125] A Kundnani, *The Muslims Are Coming: Islamophobia, Extremism and the Domestic War on Terror* (Verso, 2014), 10 and R Grillo, *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Routledge, 2015), 227.

[126] R Salgado-Pottier, 'A Modern Moral Panic: The Representation of British Bangaldeshi and Pakistani Youth in Relation to Violence and Religion' (2008) 10 *Anthropology Matters* 1, 4.

[127] Grillo (n 125 above), 272.

[128] G Lewis, 'Welcome to the Margins: Diversity, tolerance and policies of exclusion' (2005) 28 Ethn Racial Stud 536; C Worley, '"It's not about race. It's about the community": New Labour and community cohesion' (2005) 25 Crit Soc Policy 483 and I Gedalof, 'Unhomely Homes: Women, Family and Belonging in UK Discourses on Migration and Asylum' (2007) 33 J Ethnic Migr Stu 77; M Enright, 'Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage' (2009) 72 MLR 331, 334; S Ali, 'Governing Multicultural Populations and Family Life' (2014) 65 Br Jo Sociol 82, 87.

[129] Grillo (n 125 above), 4 and N Rashid, *Veiled Threats: Representing the Muslim Woman in Public Policy Discourses* (Policy Press, 2016), pp 108 and 122.

[130] Grillo (n 125 above), pp 59, 72 and 88.

and intervention.[131]

Because Britain's Muslim problem has been understood, to a significant extent, as a *family* problem, family law has been involved in both its construction and regulation. Particularly relevant for our purposes is family law's increasing concern with and efforts to regulate the *bodies* and physical integrity of Muslim children[132] from harmful domestic cultural practices such as forced marriage, FGM and, to a lesser extent, male circumcision. The last few years have witnessed the development of increasingly muscular and interventionist approaches to forced marriage[133] and FGM[134] and male circumcision[135] with the aim of preventing these practices and punishing their perpetrators.

That these recent developments in family law and policy provided the context for the emergence of the radicalisation cases dealing with travel concerns can be seen from the close connections made between the issue of children travelling to ISIS-held territory in Syria and forced marriage in both the radicalisation cases themselves and in official and popular discourse more generally. For example, in *Re Z* the mother applied for the return of Z's passport (which had been confiscated by the police after Z had attempted to travel, on her own, to join ISIS in Syria) in order that Z attend her cousin's wedding. The local authority's application for wardship orders was approved based on what Hayden J saw as the double-risk that Z faced: 'details suggest not only that she may be intending to travel to an ISIS country but also that she may herself be the subject of a planned, arranged or perhaps forced marriage'.[136] Likewise in *Re M* Munby J held that although the use of the wardship jurisdiction has been declining, it was still an 'appropriate remedy' in cases involving children being taken or at risk of being taken 'abroad for the purposes of forced marriage … Female genital mutilation or … where the fear is that a child has been taken abroad to travel to a dangerous war-zone'.[137] In public discourse, the problem of children travelling to join terrorist groups in Syria was also closely connected to the problem of FGM and forced marriage. For example, in his speech on extremism in 2015, David Cameron spoke of the need to tackle the 'Islamist ideology' that impels children 'to run off to Syria' and that has allowed communities to continue to practice the 'brutality of Female Genital Mutilation' and 'the horrors of forced marriage' against their children.[138]

The point here is that travel to Syria was not just understood as a danger to the life and

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[131] Ibid, 57.

[132] C Longman and T Bradley, 'Harmful Cultural Practices: Towards a Research Framework' in C Longman and T Bradley (eds), *Interrogating Harmful Cultural Practices: Gender, Culture and Coercion* (Ashgate, 2015), 39–42.

[133] R Gaffney-Rhys, 'The Criminalisation of Forced Marriage in England and Wales: One Year On' [2015] Fam Law 1378 and M Mazher Idriss, 'Forced Marriage – the need for criminalisation?' (2015) 9 CMLRev 687.

[134] R Gaffney-Rhys, 'From the Offences Against the Person Act 1861 to the Serious Crime Act 2015 – the development of the law relating to female genital mutilation in England and Wales' (2017) 39 J Soc Welfare Reform 417.

[135] P Edge, 'Male Circumcision After the Human Rights Act 1998' (2000) 5 *UK Journal of Civil Liberties* 320. For an excellent discussion on the issue of male circumcision in the English family courts, see S Jivraj and D Herman, 'It is difficult for a white judge to understand': orientalism, racialisation and Christianity in English child welfare cases [2009] CFLQ 283 and S Jivraj, *The Religion of Law: Race, Citizenship and Children's Belonging* (Palgrave Macmillan, 2013), 70.

[136] See n 82 above, para [6].

[137] See n 40 above, para [32].

[138] D Cameron, Former Prime Minister, 'Speech on Extremism' (speech given to Ninestiles School, Birmingham, 20 July 2015).

physical integrity of children. The physical danger to children was itself understood and represented as another manifestation of Britain's Muslim problem. Those travelling to join ISIS in Syria have been depicted as unintegrated individuals who have become alienated from mainstream British life because of their rejection of British values,[139] suggesting that the state's concern with and response to the children and families travelling to join ISIS in Syria was part of a much wider 'moral panic'[140] about Muslim cultural difference in the UK.

It is perhaps this difference in the political and social context that partly explains the discrepancy between the state's reaction to the involvement of children in terrorist violence in Northern Ireland and the situation in the radicalisation cases. Whilst it is certainly the case that some of the official and popular British discourses on the Troubles were culturalist in nature,[141] and drew on a long history of a racialised[142] construction of Irish Catholics as 'significant Other[s]'[143] the nature and extent of the cultural othering of Irish Catholics during the Troubles differed significantly to the cultural othering of Muslims in post 9/11 counter-terrorist discourse.[144] For whereas the Troubles were predominantly understood as a *political* conflict involving *political* acts of violence,[145] Islamist terrorism, as I shall argue below, has been interpreted through a *culturalist* lens and understood as another signifier of Muslim cultural difference.[146] Moreover, despite its history of exclusion in Britain, Catholicism 'still placed Irish people within the Christian traditions of Europe'.[147] The same cannot be said of Islam which has never really been seen as belonging to Europe[148] and which, since 9/11, has been constructed as 'existential' threats to Western culture and civilisation.[149]

Since culture is often perceived as being located, produced and reproduced in the private realm of the home and family,[150] the problematic and 'pathological'[151] Muslim family has come to symbolise the cultural otherness of Britain's Muslim communities. Therefore, the Muslim family (especially its child-rearing practices) has been problematised, intervened in and regulated in ways that the Northern Irish family never

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[139] Ibid.

[140] Salgado-Pottier, n 126 above.

[141] C Cloulter, 'Class, Ethnicity and Political Identity in Northern Ireland' (1994) 4 *Irish Journal or Sociology* 4.

[142] R Moore, 'Race Relations in the Six Counties: Colonialism, Industrialization and Stratification in Ireland' (1972) 14 *Race & Class* 21 and R McVeigh and B Rolston, 'From Good Friday to Good Relations: sectarianism, racism and the Northern Ireland State' (2007) 48 *Race & Class* 1.

[143] MJ Hickman, 'Reconstructing deconstructing "race": British political discourses about the Irish in Britain' (1989) 21 *Ethnic and Racial Studies* 288, 290–291.

[144] Coppock and McGovern (n 59 above), 252 and M Breen Smyth, 'Theorising the "suspect community:" counter-terrorism, security practices and the public imagination' (2014) 7 *Critical Terrorism Studies* 223.

[145] Moore (n 142 above), 27–32 and R Sales, *Women Divided: Gender, religion and politics in Northern Ireland* (Routledge, 1997), 1–3.

[146] J Githens-Mazer and R Lambert, 'Why conventional wisdom on radicalization fails: the persistence of a failed discourse' (2010) 86 Int Aff 889, 890.

[147] B Walter, 'Irishness, gender and place' (1995) 13 *Environment and Planning D: Society and Space* 45.

[148] Ibid. See also T Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003), 161.

[149] Grillo (n 125 above), 271.

[150] Worley (n 128 above) and Rashid (n 129 above), 5.

[151] Rashid (n 129 above), 8.

really was, creating the normative and conceptual space that made the emergence of the radicalisation cases possible.

Radicalisation and extremism

Whilst this differing social and political landscape and the development of the Muslim (family) problem might explain the emergence of radicalisation cases dealing with travel to ISIS-held territory in Syria, it is important to remember that the cases are not confined to the issue of travel alone. For as I claimed earlier, the judges in the radicalisation cases identify two harms from which children must be protected: travel to Syria and radicalisation and extremism.

But whereas the issue of children travelling to join ISIS-held territory in Syria does at least raise some *obvious* child protection concerns, for two reasons the same cannot be said where the harm in question is that of radicalisation and extremism.

First, radicalisation and extremism are terms that come from the counter-terrorism and national security context and are, therefore, entirely alien to the usual workings of family law. Here it is worth noting that the judges in the radicalisation cases do not provide their own definitions of radicalisation and extremism. Instead, they apply the definitions provided by the government in the Prevent strategy, which defines radicalisation as 'the process by which a person comes to support terrorism and forms of extremism leading to terrorism'[152] and extremism as the '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'.[153] By directly applying Prevent's definition of radicalisation and extremism, the judges establish a clear synergy and continuity between what they are doing in the radicalisation cases and the logic and aims of counter-terrorism policy.

Secondly, radicalisation and extremism are relatively *recent* concepts which only entered academic and policy circles after 9/11.[154] They certainly did not exist in the counter-terrorism policy and discourse during the years of the Troubles.[155] They are, therefore, important in terms of explaining the discrepancy between the Northern Irish context and the situation in the radicalisation cases. The point here is that the radicalisation cases are not just responding to a specific new manifestation of terrorism that happens to raise patent child protection concerns. By identifying radicalisation and extremism as a second harm from which children must be protected, the radicalisation cases are influenced by, reflect and reinforce recent changes and shifts in the nature, purpose and remit of UK counter-terrorism policy, practice and discourse. Analysing the ways in which the radicalisation cases approach the concepts of radicalisation and extremism is, therefore, key to understanding the radicalisation cases, their emergence in the family courts and the interaction between family law and counter-terrorism that they have engendered.

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[152] HM Government, 'Prevent Strategy', Cm 8092 (2011), p 108.

[153] Ibid, 107. Note that the government's latest Prevent strategy does not define radicalisation and extremism. See *CONTEST* 2018 (n 80 above).

[154] A Kundnani, 'Radicalisation: the journey of a concept' (2012) 54 *Race & Class* 3, 4 and M Hornqvist and J Flyghed, 'Exclusion or culture? The rise and the ambiguity of the radicalisation debate' (2012) 5 *Critical Studies on Terrorism* 319, 325.

[155] Richards (n 86 above), 144.

i) Constructing radicalisation and extremism as *free-standing* harms: departing from the usual principles of family law

Radicalisation and extremism emerge as important concepts in the radicalisation cases. For even when the main question in a radicalisation case appears to be whether or not a child or a parent has attempted or is likely to attempt to leave the jurisdiction in order to join ISIS abroad, the judges are in fact, for the most part, preoccupied with searching for the existence of radicalisation and extremism. In fact, local authorities unable to provide cogent evidence of radicalisation and extremism often find that they struggle to convince the judge that a child and/or a parent has attempted or is likely to travel to join terrorist groups in Syria. For example, in *Re Y (Children) (No 3)* the parents were accused of attempting to travel with their children to join ISIS in Syria. But the 'absence of any evidence'[156] proving that the parents in both cases had a 'radical Islamist'[157] or extremist 'mind-set'[158] that could 'explain a desire to relocate to Syria',[159] meant that Munby J was unable to find that the parents were attempting to travel to Syria.[160] By contrast, in *Leicester City Council v T*[161] Hayden J granted the local authority's application to remove the children from the care of the mother because he was able to find, based on the available evidence, that the 'mother's intention to cross into Syria was driven by'[162] an extremist 'religious ideology'.[163]

However, radicalisation and extremism are not only relevant insofar as they can help the family courts to determine whether or not a child or a parent has attempted to travel or is likely to travel to ISIS-held territory in Syria. Radicalisation and extremism have, in fact, been treated in an increasing number of radicalisation cases as *free-standing* harms.[164] Since 'the risk,' in an increasing number of radicalisation cases, is no longer 'one of flight'[165] to ISIS-held territory in Syria, the focus of the family courts has gone 'beyond the question of threatened or actual removal from the jurisdiction'.[166] Instead, the family courts have been increasingly pre-occupied with investigating 'what materials the children have been exposed to at home' and whether the parent in question 'supports the cause of the so-called Islamic State',[167] not to determine the likelihood of to travel to Syria but to assess 'the welfare impact of the alleged beliefs and sympathies'[168] on the children. Therefore, in radicalisation cases where 'there is no

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[156] *Re Y (Children) (No 3)* (n 50 above), [93]–[94].

[157] Ibid.

[158] Ibid, para [57].

[159] Ibid.

[160] Ibid, para [62].

[161] See n 50 above.

[162] Ibid, para [15].

[163] Ibid.

[164] F Ahdash, 'Should the law facilitate the removal of children of terrorists and extremists from their care?' (LSE British Politics and Policy, 9 March 2018): http://blogs.lse.ac.uk/politicsandpolicy/should-the-law-facilitate-the-removal-of-the-children-of-convicted-terrorists/ and Taylor (n 76 above), 42.

[165] *London Borough of Tower Hamlets v B* (n 16 above), para [32].

[166] *A Local Authority v HB (Alleged Risk of Radicalisation and Abduction)* (n 16 above), para [122].

[167] Ibid, para [11].

[168] Ibid, para [122].

likely flight risk' to ISIS-held territory to Syria,[169] the focus of the family court is, in the words of Newton J in *A Local Authority v M and Others*, on the following: 'whether and in what circumstances the religiously motivated views of parents are so harmful to their children that the State should intervene to protect the child'.[170]

Consequently, the radicalisation of children as a result of their exposure to extremist political or religious ideologies and beliefs has been identified as a distinct 'new facet of child protection'[171] and an independent 'new type of harm to children that may justify state intervention in family life'.[172] Importantly, the harm to children that is being alleged and contemplated in these cases is from the 'radicalised' or 'extremist' *beliefs* themselves rather than the 'flight risk' that they might lead to.[173] Religious and political beliefs that are deemed to be extremist and that can radicalise children are treated in these radicalisation cases as being *in and of themselves* harmful and dangerous to children.

During the interviews, the solicitors and barristers expressed both surprise and unease at how readily the family judges in the radicalisation cases have accepted allegations of harm based on the radicalisation and extremism and their willingness to assess and even make findings regarding the religious and political beliefs of parents. This is because in assessing whether the religious and political views of parents are extremist in nature and in finding them to be in and of themselves harmful to children, the radicalisation cases have significantly departed from established family law principles.

Although there is a long-established body of family case law where the family courts have limited the traditionally wide discretion given to parents to bring up their children according to their own religious beliefs and doctrines,[174] the way in which the radicalisation cases have approached concerns regarding radicalisation and extremism go beyond the usual restrictions on the responsibility of parents in the religious upbringing and education of their children.[175] For whereas the family courts have in the past restricted the ability of parents to include their children in religious *practices* and have been concerned with the 'secular effects' of certain religious beliefs and practices on the physical and emotional well-being of the children in question,[176] it is rare for the family courts to find that the *religious beliefs* of parents are in and of themselves harmful to children.[177] It is even rarer, and in fact unprecedented, for the family courts to find the *political views* of parents to be harmful to children. For example, in *Re P (Contact:*

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[169] Taylor (n 76 above), 47.

[170] See n 50 above, para [6].

[171] *London Borough of Tower Hamlets v B* (n 20 above), para [51].

[172] *A Local Authority v HB (Alleged Risk of Radicalisation and Abduction)* (n 16 above), para [119].

[173] Taylor (n 76), 47.

[174] See R Ahdar, 'Religion as a Factor in Custody and Access Disputes' (1996) 10 Int J Law Policy Family 177; C Hamilton, *Family, Law and Religion* (Sweet and Maxwell, 2003); A Bradney, *Religion, Rights and Laws* (Leicester University Press, 1993), 46 and R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (OUP, 2010); and R Lee, 'Custody Disputes and Alternative Religions in the Courts of England and Wales' (2008) 23 *Journal of Contemporary Religion* 63.

[175] See Taylor (n 76 above) for a more detailed account of the dangers that some of the radicalisation cases pose to the human rights of parents.

[176] Ahdar (n 174 above), 180; Ahdar and Leigh (n 174 above), 212 and Lee (n 174 above), 67.

[177] Hamilton (n 174 above), 201. The only published case where religious beliefs were found to be harmful and averse to the best interests of the child was *Re B and G (Minors: Custody)* [1985] FLR 134 involving a mother who was a Scientologist.

Supervision),[178] a case from 1996 involving a mother who applied to have the children's contact with their father terminated, accusing the father of being a Nazi sympathiser, holding extreme political views and racist and anti-Semitic attitudes and of taking photographs with his son dressed in Nazi regalia, Wall J dismissed the relevance of these allegations and went as far as stating that a father with these political views cannot be denied access to his children.[179]

Moreover, in the past the family courts have tended to regulate the parental responsibility of parents towards the religious upbringing of their children in cases involving *private* law proceedings. For although family courts can and do intervene to prevent and protect children from quasi-religious or religiously inspired practices which harm children or deny them necessary medical attention,[180] the family courts have historically shown a marked reluctance to compulsorily intervene in families under public law proceedings as a result of concerns about the religious beliefs and practices of parents.[181] The reason for this was most clearly articulated in the dissenting opinion of Baroness Hale in *Re B (A Child) (Care Proceedings)*[182] when she stated that: 'the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs'.[183] The radicalisation cases change this. For in radicalisation cases involving public law proceedings, the judges have not only been willing to assess the religious beliefs of parents but have also been willing to find these beliefs to be in and of themselves harmful to children such that they warrant coercive state intervention.

ii) Beyond terrorist violence: the harm of radicalisation and extremism and the influence of a changing counter-terrorist landscape

Radicalisation and extremism are concepts which represent important shifts in the UK's counter-terrorist landscape. For it is important to remember that radicalisation and extremism only began to be used in academic and policy circles in Europe *after* 9/11, in an attempt to understand the 'root causes' of 'home-grown' Islamist terrorism.[184] To that end, radicalisation was conceptualised as a psychological process[185] that leads (usually young[186]) individuals to support and eventually commit acts of terrorism. Importantly, the radicalisation process was understood as a 'theological'[187] process that

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[178] [1996] 2 FLR 314.

[179] Ibid, para 321.

[180] Hamilton (n 174 above), 144 and Lee (n 174), 67.

[181] Hamilton (n 174 above), 144 and 201 and Mumford (n 174 above), 143.

[182] [2013] UKSC 33, [2013] 1 WLR 1911.

[183] Ibid, para [143].

[184] Kundnani (n 154 above), 5.

[185] Ibid, 17.

[186] The radicalisation process has been associated with young people and children. As a result, Muslim children have been constructed as a focal or target group in the UK's counter-terrorism policy. See: O Lynch, 'British Muslim youth: Radicalisation, terrorism and the construction of the "other"' (2013) 6 *Critical Studies on Terrorism* 241; V Coppock, '"Can You Spot a Terrorist in Your Classroom?": Problematising the Recruitment of Schools to the "War on Terror" in the United Kingdom' (2014) 4 *Global Studies of Childhood* 115 and R Hill, 'Counter-Extremism in British Schools: Ensuring Respect for Parents' Rights over Their Children's Religious Upbringing' (2017) *British Journal of Educational Studies* 1, 4.

[187] Kundnani (n 154 above), 17.

is primarily fuelled by extremism: fundamentalist interpretations of and ideological approaches to Islam which reject and seek to undermine Western liberal democracy.[188] Islamist terrorism was, therefore, distinguished from the 'old' terrorism of nationalist, leftist and anarchist organisations (such as the IRA) and treated as a 'new'[189] kind of terrorism. The 'new' terrorist threat was constructed in both culturalist and ideological terms: Islamist terrorist attacks were not just understood as acts of political violence directed at the institutions of the state,[190] but as symptoms of a much wider 'clash of civilisations'[191] and an ideological attack on Western civilisation, cultural values and way of life.

Despite the dearth of empirical evidence to substantiate the links between terrorism, radicalisation and extremism,[192] the concepts took a strong hold in the UK,[193] most notably in the *Prevent* strategy which seeks to 'prevent' terrorism by tackling the radicalisation process and countering extremist Islamist ideologies.[194] The preoccupation with tackling the ideological causes of Islamist terrorism[195] escalated during the term of the Coalition government, which claimed that the effective countering of terrorism required tackling not just 'violent extremism'[196] but also 'non-violent'[197] extremist ideas which, by actively opposing liberal democratic or 'fundamental British values', create an 'atmosphere conducive to terrorism'.[198] Therefore, a direct link was established between subscribing to extremist Islamist ideologies (even when they are non-violent) and propensity towards terrorist violence.[199] Importantly, however, extremism was seen as being harmful not just because of its role in causing and justifying terrorism. Extremist Islamist ideologies and particularly conservative or fundamentalist forms of Islamic devoutness[200] were increasingly identified by the government as being *in and of themselves* harmful.[201]

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[188] J Githens-Mazer and R Lambert, 'Why conventional wisdom on radicalization fails: the persistence of a failed discourse' (2010) 86 Int Aff 889, 890–892.

[189] M Crenshaw, '"New" vs "old" terrorism: a critical appraisal' in R Coolsaet (ed), *Jihadi terrorism and the radicalisation challenge in Europe* (Ashgate, 2008); Kundnani (n 154 above), 5 and Hornqvist and Flyghed (n 154 above), 324.

[190] C Gearty, *Liberty and Security* (Pluto Press, 2013), 96–100.

[191] S Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, 1996) and Hornqvist and Flyghed (n 154 above), 324–325.

[192] Ibid, 496.

[193] Kundnani (n 154 above), 8–9. See also J Klausen, 'Counter-Terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism' (2009) 35 *Journal of Ethnic and Migration Studies* 403, 403–405.

[194] Githens-Mazer and Lambert (n 188 above), 496.

[195] Kundnani (n 154 above), 8–9. See also J Klausen, 'Counter-Terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism' (2009) 35 *Journal of Ethnic and Migration Studies* 403, 403–405.

[196] Tackling 'violent extremism' had been the focus of the Prevent strategy under the New Labour government. See HM Government, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism*, Cm 7549 (2009).

[197] HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism*, Cm 8123 (July 2011), para 1.127.

[198] Ibid.

[199] A Richards, 'From terrorism to "radicalization" to "extremism": counterterrorism imperative or loss of focus?' (2015) 91 Int Aff 371, 379.

[200] J Holmwood and T O'Toole, *Countering Extremism in British Schools: The Truth About the Birmingham Trojan Horse Affair* (Policy Press, 2018), 55.

[201] See Taskforce on Extremism launched in 2013 ('David Cameron launched anti-terror task force to tackle extremism' *The*

Therefore, illiberal and undemocratic Islamist ideologies and fundamentalist interpretations of Islam were represented as being harmful because they pose an unacceptable ideological challenge to 'fundamental British values'.[202]

With the entry into and dominance of the concepts of radicalisation and extremism in UK counter-terrorism policy and discourse, counter-terrorism has been redefined. As a result of the shift from the language of counter-*terrorism* and violence to the language of counter-*extremism,* ideas and values,[203] the remit and reach of counter-terrorism has significantly expanded.[204] The government's focus was no longer on just countering terrorism by responding to *criminal acts* of terrorist *violence* but on intervening as early as possible in the 'pre-criminal'[205] space of extremist ideologies and beliefs.

The ways in which the judges in the radicalisation cases articulate, or *struggle* to articulate, the harm of radicalisation and extremism reflects the influence of these recent changes in the UK's counter-terrorist landscape on the family courts. As Rachel Taylor has recently argued, there are two main approaches to the harm of radicalisation and extremism in the radicalisation cases.[206] The first approach emphasises the role that radicalisation and extremism play in leading to terrorist violence.[207] The idea that harmful radicalisation involves an active support for and belief in the causes and ideologies promoted by terrorist organisations was made clear in *Re M (Children)*,[208] one of the earlier radicalisation cases to appear before the family courts, which involved private law proceedings initiated by the mother who accused the father of being an 'Islamic fundamentalist' who had attempted to radicalise his children.[209] Whilst acknowledging that radicalisation is a 'vague and non-specific word', Holman J was careful to stress that it cannot simply mean 'that a set of Muslim beliefs and practices is being strongly instilled in these children'.[210] Rather, radicalisation was limited to its role in 'negatively influencing (a child) with radical fundamental thought which is associated with terrorism'[211] and 'indoctrinating' them with ideologies 'involving the possibility of "terrorism"'.[212] This focus on *terrorism* and *terrorist violence* was made even more explicit in *Re K (Children)*,[213] a case involving an application by the local authority to withdraw care proceedings in relation to three children whose parents the local authority feared had espoused extremist views, on the basis that there was insufficient evidence that the children had suffered or were likely to suffer significant harm. In that

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Guardian (26 May 2013)), the CTSA of 2015, the Extremism and Safeguarding Bill of 2015; the Counter-Extremism Strategy of 2015 (HM Government, *Counter-Extremism Strategy*, Cm 9148 (2015) and HM Government, *Sara Khan to lead Commission for Countering Extremism* (24 January 2018)).

[202] Ibid.

[203] Hill (n 186 above), 4.

[204] Richards (n 199 above), 374.

[205] T O'Toole, 'Prevent: from "hearts and minds" to "muscular liberalism"'(*Public Spirit*, November 2015).

[206] Taylor (n 76 above), 51.

[207] Ibid.

[208] [2014] EWHC 667 (Fam).

[209] Ibid, para [23].

[210] Ibid.

[211] Ibid.

[212] Ibid.

[213] See n 51.

case, Hayden J stressed that the harm that the family courts are seeking to prevent in the radicalisation cases is 'the process by which a person comes to support terrorism as opposed to merely extreme religious beliefs'.[214]

Whilst the first approach to radicalisation sees violent radicalisation and extremism as harmful because they 'may play a causative role in turning children to acts of violent extremism and terrorism',[215] Taylor identifies a second approach where 'non-violent radicalisation might be seen as harmful in itself, regardless of whether it is likely to cause future violent acts'.[216] Here Taylor points to *A Local Authority v M and Others*, a case involving a mother who had been detained by Turkish authorities at the border with Syria and accused by the local authority of radicalising her children and attempting to take them to ISIS-held territory in Syria. By finding that the mother had 'exposed her children to a risk of emotional and psychological harm'[217] by 'exposing her children to radical views [regarding] free-mixing, alcohol, homosexuality, democracy, Judaism and more wrongly how and in what way Sharia and the Caliphate should be established across the world',[218] Taylor contends that the implication here is that some religious views 'are so distasteful and antithetical to majority values that to be exposed to them is emotionally and psychologically harmful to children'.[219]

We see, therefore, that the family courts in the radicalisation cases are both influenced by and have reinforced the recent changes in counter-terrorism policy and discourse that I outlined earlier. Radicalisation as a result of exposure to extremist ideologies, beliefs and values is regarded as being harmful to children because of the supposed link between radicalisation and extremism and terrorist violence *and* because such ideologies and beliefs are illiberal and intolerant.

In this second part of the article, I have attempted to gain a better understanding of the radicalisation cases and the reasons behind their emergence in the family courts by de-constructing the official narrative which understands the radicalisation cases as an attempt by the state to protect vulnerable children from suffering harm and promoting their welfare. In focusing on, examining and unpicking the way in which the judges have articulated the harms that they believe the children should be protected from, I have demonstrated the influence of the wider political and security landscape on the emergence of the radicalisation cases in the family courts and, indeed, the contribution of the family courts to this landscape. The judges in the radicalisation cases do not simply respond to ordinary child protection issues and concerns raised by the latest manifestation of the terrorist threat. Rather, the radicalisation cases are influenced by and situated within a wider sense of panic regarding and collective anxiety over the supposed cultural, ideological and security threat posed by regressive, illiberal and politicised interpretations of Islam and approaches to Muslim culture and identity.

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[214] Ibid, para [15].

[215] Taylor (n 76 above), 51.

[216] Ibid.

[217] See n 51, annex.

[218] Ibid, para 70.

[219] Taylor (n 76 above), 49.

Part III: Counter-terrorism and family law: a dangerous interaction

The radicalisation cases and the unprecedented interaction between family law and counter-terrorism that they have engendered have caused academic commentators, from both the fields of family law and counter-terrorism, some concern. From the family law perspective, Taylor has argued that importing radicalisation and extremism, which are highly contested and politicised concepts which lack legal precision,[220] from counter-terrorism policy into the child protection regime and family law more generally is both problematic and dangerous.[221] In applying these concepts and suggesting that non-violent extremism and radicalisation can potentially harm children, Taylor maintains that the family courts risk prioritising counter-terrorism concerns and aims over the welfare of individual children,[222] undermining their neutrality when it comes to parental responsibility for religious upbringing of children[223] and encroaching on human rights and protected religious freedoms.[224] From the counter-terrorism perspective, Clive Walker and Jessie Blackbourn have pointed to the highly stringent conditions that have been imposed on some of the children and parents in the radicalisation cases to argue that the involvement of the family courts in counter-terrorism can lead to 'very Draconian' outcomes that surpass, in their severity, some of the most extreme counter-terrorism measures, including Terrorism Prevention and Investigation Measures (TPIMs).[225]

Yet despite these warnings and misgivings, academic commentators have, generally speaking, been rather confident and even optimistic about the role of the family courts in the radicalisation cases. For example, Taylor suggests that the family courts appropriately differentiate and distinguish between violent and non-violent radicalisation and extremism in the radicalisation cases. Taylor argues that whilst some radicalisation cases treat non-violent radicalisation and extremism as being *potentially* harmful to children, to date 'there is no reported case in which non-violent radicalisation … has been the *sole* ground for findings of significant harm'.[226] To that end, Taylor points to the fact that in the cases where actual findings of harm have been made with regards to accusations of parental radicalisation and extremism, 'the evidence went beyond non-violent ideology into active support for terrorism and extreme depictions of violence'.[227] For example, in *A Local Authority v M and Others*, the mother did not only expose her children to illiberal and intolerant views but had in fact 'actively involved the children in advocating violence'.[228] The mother had attempted to travel with her children to ISIS-held territory in Syria, was involved with a group of women who 'actively promote the political beliefs of ISIS',[229] took her children to

[220] Ibid, 52.

[221] Ibid, 49.

[222] Ibid, 41.

[223] Ibid.

[224] Ibid. See also Ahdash (n 164 above).

[225] J Blackbourn and C Walker, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 73 MLR 840, 848.

[226] Taylor (n 76 above), 51.

[227] Ibid.

[228] Ibid, 49.

[229] See n 50 above, para [19].

political rallies 'in the presence of many known political extremists'[230] and radicalised her children to the extent that they themselves expressed 'chilling' views supportive of ISIS atrocities.[231] Similarly, in *London Borough of Tower Hamlets v B*, Hayden J found that B had suffered 'serious emotional harm'[232] as a result of her exposure to the 'shocking'[233] and 'very significant amount of radicalising material'[234] which included 'very violent videos and images produced by ISIS'.[235] Moreover, B had not only 'believed in the cause that the Islamic State was fighting for'[236] but was, in fact, 'frank about her intentions to travel to the Islamic State'.[237]

Therefore, according to Taylor, whereas violent radicalisation is clearly and definitively identified as a new category of harm that can justify state intervention, the question of whether non-violent radicalisation can constitute a free-standing category of harm has been left open by the family courts[238] and, given the current state of the case-law, seems rather unlikely. Taylor welcomes this distinction in the case law's treatment of violent and non-violent radicalisation. Since children radicalised into violent extremist ideologies 'undoubtedly' suffer 'extensive emotional harm',[239] Taylor maintains that diverting children from actively supporting terrorist organisations and becoming involved in terrorism achieves clear child protection and safeguarding interests.[240] The suggestion here is that by distinguishing between violent and non-violent radicalisation and extremism and only treating the former as an independent category of harm that can warrant coercive intervention, the family courts have resisted being unduly influenced by the government's counter-terrorism concerns and priorities and have protected important family law principles by ensuring that the child, his or her protection from significant harm and his or her welfare remains the ultimate focus.

In a similar vein, Susan Edwards has lauded the family judges in the radicalisation cases for 'guarding against Orientalised misconceptions of Islamic devoutness', arguing that they have generally 'resisted' and even 'challenged' the 'popular stereotyping of devout Muslim families as being prone to "radicalisation"'.[241] Pointing to *Re A and B,* where Russell J rejected the mother's allegation that the father was a radicalised individual for its lack of cogent evidence and firmly stressed that 'there must be no suggestion that the courts would accept or tolerate any suggestion that adherents of the Islamic faith … are ipso facto, supporters of extremism',[242] Edwards claims that the family courts have

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[230] Ibid.

[231] Ibid, para [70].

[232] See n 16 above, para [28].

[233] Ibid, para [19].

[234] Ibid, para [14].

[235] See n 20 above, paras [60]–[67].

[236] Ibid.

[237] See n 16 above, para [8].

[238] Taylor (n 76), 52–53.

[239] Ibid, 51.

[240] Ibid, 50.

[241] S Edwards, 'Negotiating Faith, Culture and Gender in *J v B* and the *Child AB*' [2018] Fam Law 56, 57–58.

[242] See n 30, para [119].

'reject[ed] mere suspicion based on religious stereotyping'.[243]

Whilst I agree, and have argued elsewhere, that the approach of the family courts to radicalisation and extremism allegations has been 'rightly … cautious',[244] I think that the radicalisation cases and the interaction between family law and counter-terrorism should be approached with more trepidation and concern. There are a number of reasons for this.

First, whilst it might seem that the judges in the radicalisation cases distinguish between holding extreme and illiberal religious views and following conservative forms of Islamic observance and harmful radicalisation and extremism, this distinction is often difficult to maintain in practice. This can be seen from the way in which strict or literalist Islamic observance is problematised in some of the radicalisation cases. For example, in exploring the reasons behind B's radicalisation in *London Borough of Tower Hamlets v B*, Hayden J is clearly uncomfortable with the mother's 'zealous Islamic beliefs'.[245] So although Hayden J insists that he is not suggesting 'that the mother held radicalised beliefs',[246] the degree of the mother's Islamic observance is, nonetheless, problematised and directly linked to B's radicalisation: 'I have found on the spectrum of Islamic observance she is at the most committed end. In this family those beliefs proved to be fertile ground for B's journey to radicalisation'.[247] By the same token, a lack of 'strict Islamic observance',[248] including the fact that the father 'broke the Ramadan fast' in *Re A and B*[249] and the mother in *Re NAA* 'did not wear a hijab … or pray during the day'[250] are treated as evidence that they are not extremist individuals. Similarly, although Russell J was clear in *Lancashire County Council v M and Others* that the father's 'extreme views'[251] 'on their own' would 'not have made it necessary to remove the children',[252] the fact that the father who 'doesn't tolerate different views, races or religions',[253] is 'against democracy'[254] and 'hates gay people'[255] is used to explain why the father 'is no ordinary believer' but 'a bigot'[256] who poses a danger to his children.

Therefore, whilst non-violent but extreme and illiberal religious views and very conservative forms of Islamic observance are not treated as constituting a separate category of harm, the judges in the radicalisation cases are clearly uncomfortable with and apprehensive about the fact that, in the words of Munby P in *Re X (Children) (No 3),* 'not every parent is as steeped in the values and belief-systems of post-Enlightenment

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[243] Edwards (n 241 above), 57–58.

[244] Ahdash (n 164 above).

[245] See n 20 above, para [125].

[246] Ibid, para [124].

[247] Ibid, para [125].

[248] *Re A and B* (n 30 above), para [125].

[249] Ibid.

[250] See n 51, para [47].

[251] See n 51, para [21].

[252] Ibid, para [22].

[253] Ibid, para [26].

[254] Ibid.

[255] Ibid.

[256] Ibid.

Europe as we might like to imagine'.[257] The Orientalist undertone to this statement shows that the radicalisation cases are influenced by a narrative of Western cultural superiority that sees the parental rejection of 'post-Enlightenment' European values as being undesirable and even potentially harmful to children.[258]

Secondly, Taylor's suggestion that children exposed to violent, as opposed to non-violent, radicalisation and extremist ideologies that advocate and lead to terrorism suffer clear and obvious emotional harm that justifies the intervention of the family courts[259] requires careful consideration. Harm is a vague, 'conceptually foggy'[260] and indeterminate concept.[261] This is particularly true in the radicalisation cases where the harm in question is identified as being 'emotional' or 'psychological' in nature,[262] because such categories of harm are 'nebulous', 'contested' and especially 'difficult to establish'.[263] So we find that in *A Local Authority v M and Others*, exactly *how* the children suffered emotional and psychological harm as a result of their exposure to and adoption of their mother's extremist views is left unarticulated. And although Hayden J explains in *London Borough of Tower Hamlets v B* that B's exposure to violent ISIS propaganda had emotionally harmed her by leaving her 'de-humanised'[264] and 'inured to human suffering',[265] the problem is that these – somewhat ambiguous and elusive – conclusions are drawn without a specific expert psychological assessment of B and the emotional and psychological impact that the propaganda had on her.[266]

Thirdly, as I argued above, even though a phenomenon may be harmful in an objective sense, harm is 'discovered' or 'pointed out' through a process of social and political construction that is highly selective in nature.[267] Therefore, we find that right-wing radicalisation and extremism, albeit categories of radicalisation and extremism on the rise[268] and of concern (at least officially) to the government[269] do not feature in the radicalisation cases. In fact in *Re A*,[270] a case which included allegations by the local authority that a father had been an active member of the far-right group the English Defence League (EDL), was involved in violent protests and had espoused racist views,[271] Munby P held that membership of and involvement with the EDL was 'neither

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[257] See n 16 above, para [96].

[258] Reece (n 36 above), 10–14.

[259] Taylor (n 76 above), 55.

[260] J Kleinig, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27.

[261] A Bainham, *Children – The New Law: Children Act 1989* (Family Law, 1990), 101. See also J Fortin, 'Significant Harm Revisited' [1993] CFLQ 151.

[262] *A Local Authority v M and Others* (n 51 above), annex and *London Borough of Tower Hamlets v B* (n 16 above), [28].

[263] Bainham (n 17 above), 146–147.

[264] See n 20 above, para [94].

[265] Ibid, para [135].

[266] Although radicalisation experts were enlisted and asked to provide reports, there were academic reports which drew on general research on radicalisation. As such, B herself was not psychologically assessed. See n 20 above, appendix.

[267] Hendrick (n 69 above),159 and Kaganas and Diduck (n 114 above), 68.

[268] B Farmer, 'Far-Right and neo-Nazi terror arrests double' *The Telegraph* (9 March 2017).

[269] *CONTEST 2011* (n 197 above), para 2.39 and *CONTEST* 2018 (n 80 above), 5.

[270] See n 14 above.

[271] Ibid, paras [64]–[6]9.

here nor there'.[272] Munby P went as far as to state that '[m]embership of an extremist group such as the EDL was not, without more, any basis for care proceedings'.[273] There are, of course, differences between Islamist and far-right radicalisation, extremism and terrorism, not least the level and intensity of the threat posed by jihadist terror groups such ISIS. But for an allegation as serious as that of active and violent involvement in a far-right organisation as notorious as the EDL, in a climate of rising far-right extremism and terrorism, to be so quickly and strongly dismissed as entirely irrelevant without further probing suggests a double-standard in the application of the harm principle and risks re-creating the Muslim community as an inherently 'suspect community'.[274]

Fourthly, although preventing children from becoming terrorists and/or supporters of terrorism might seem like an obvious and legitimate concern for the family courts to be involved with, the implications so far have been serious and concerning. For by bringing family law into the fold of counter-terrorism, the radicalisation cases both continue and extend dominant practices in UK counter-terrorism. The history of counter-terrorism in the UK is one of deeper incursions into[275] and increasing control of social life and civil society[276] in the name of security and its prioritisation over all other considerations.[277] But whereas, historically, counter-terrorism has prioritised security over *liberty*,[278] with the radicalisation cases we see a prioritisation of security over *privacy*. This can be seen from the at times rather Draconian outcomes of the radicalisation cases which include: the interim[279] and (more rarely) permanent[280] removal of children from their homes; granting the local authority shared parental responsibility and potentially unlimited access to the children and families through permanent care orders;[281] granting the local authority significant access to the child and family through supervision orders;[282] transferring parental responsibility to the High Court through wardship orders;[283] and the electronic tagging of parents.[284] What makes these outcomes even more Draconian is that an appropriately thorough consideration of their impact on the right to respect for private and family life under Article 8 of the European Convention for the Protection

[272] Ibid, para [71].

[273] Ibid.

[274] C Pantazis and S Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation' (2009) 49 Brit J Criminol 646 and M Breen Smyth (n 144 above), 224.

[275] C Gearty, 'No Golden Age: The Deep Origins and Current Utility of Western Counter-Terrorism Policy' in R English (ed), *Illusions of Terrorism and Counter-Terrorism* (OUP, 2015), 73–74.

[276] R Jackson, 'Knowledge, Power and Politics' in R Jackson, M Breen Smyth and J Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (Routledge, 2009), 79.

[277] M Neocleous, 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' (2007) 6 *Contemporary Political Theory* 131; Gearty (n 190 above), 16.

[278] Gearty (n 190 above), 29.

[279] *London Borough of Tower Hamlets v B* (n 16 above); *Re X; Re Y* (n 50 above).

[280] *Lancashire County Council v M and Others* (n 51 above); *Leicester City Council v T and Others* (n 51 above) and *A Local Authority v T and Others* (n 49 above).

[281] *London Borough of Tower Hamlets v B* (n 20 above).

[282] *Re C (A Child) (Care Proceedings: Disclosure)* (n 51 above). Some of the barristers mentioned that supervision orders have been granted in some of the unpublished radicalisation cases.

[283] *Re Y* (n 82 above), *Brighton and Hove City Council v Mother* (n 39 above), *Re M* (n 40 above) and *London Borough of Tower Hamlets v M and Others* (n 18 above).

[284] *Re X; Re Y* (n 50 above); *Re C, D, E* (n 51 above). The Cafcass employees mentioned during interviews that there have been a couple of other unpublished radicalisation cases where electronic tagging has been used.

of Human Rights and Fundamental Freedoms 1950 is almost non-existent.[285]

Moreover, by establishing the family and the home as new frontiers in the state's battle against terrorism, the radicalisation cases have resulted in the unprecedented securitisation of the family, constructing the home and the family as potential security threats. In bringing counter-terrorism within the fold of family law, the radicalisation cases securitise the family in two main ways. First, by presenting radicalisation as a 'process' which 'goes on within families',[286] the radicalisation cases construct extremism, radicalisation and terrorism, which are essentially *political* problems, as *family* problems for which pathological or failed families are responsible. Because of its inscrutable and essentially private nature, the family is presented as a potentially dangerous site where extremism 'goes unchallenged'[287] and can be 'nurtured',[288] particularly when children are also home-educated, since home-schooling can contribute to the 'isolation and radicalisation' of children and can be used by parents as a way of 'circumventing' the 'scrutiny' of 'the system'.[289] Secondly, this *familialisation* of the terrorist threat is reinforced through the portrayal of radicalisation and extremism as either being, in and of themselves, parenting failures or the result of poor and deficient parenting. Parents who hold extreme religious beliefs are seen, 'by virtue of that fact alone',[290] as a risk to their children. Holding extremist or radical beliefs is, consequently, treated as a parental 'deviancy'.[291] The radicalisation of children is also blamed on parental failure and is presented as being 'above all else a significant parenting deficiency'.[292] In a way, the emphasis on parenting is an example of the increasing 'politicisation' of parenting in recent years[293] and the tendency to blame 'social ills,' such as anti-social behaviour, crime and youth violence on 'poor parenting'.[294] But by adding radicalisation, extremism and terrorism to the list of 'social ills' for which parents can be blamed, the radicalisation cases take the politicisation parenting one step further and *securitise* parenting.

Finally, this interaction between counter-terrorism and family law has also securitised family law. This can be shown from the use of electronic tagging and closed material procedures[295] in some of the radicalisation cases. Whereas electronic tagging and closed material procedures are very rarely used in the family justice system,[296] they are,

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[285] Article 8 is only given a very cursory mention in a few of the radicalisation cases.

[286] *Re Y* (n 82 above), para [25].

[287] *A Local Authority v M and Others* (n 51 above), para [74].

[288] Ibid, para [41].

[289] Ibid, para [49].

[290] *Re K* (n 51 above), para [13].

[291] Reece (n 36 above), 10–14.

[292] *London Borough of Tower Hamlets v B* (n 20 above), para [98].

[293] V Gillies, 'From Function to Competence with the New Politics of the Family' (2011) 16 *Sociological Research Online*, para 6.3.

[294] Ibid.

[295] *Re C (A Child) (Care Proceedings: Disclosure)* and *Re C (A Child) (Application for Public Interest Immunity)* (n 51 above).

[296] As Munby P stated in *Re X; Re Y* (n 50 above), electronic tagging is very rarely used in family proceedings save in a few exceptional international abduction cases. The use of closed material proceedings is also very rare in family proceedings. See D Burrows, 'Third party disclosure: public immunity and closed material procedures' [2017] Fam Law (3 February).

however, familiar to counter-terrorism law. The fact that these highly controversial practices, which have raised significant human rights concerns,[297] have been used in the radicalisation cases suggests that family law is at risk of being turning into a parallel counter-terrorism justice system where civil liberties and human rights protections can be eroded in the name of national security.

Conclusion

In this article I have argued that the radicalisation cases and the interaction between family law and counter-terrorism that they have engendered represent an important and novel legal moment that warrants careful analysis and critical examination. In Part I, I considered *how* this interaction has taken place by factually outlining the radicalisation places and situating them in the family justice system. In pointing out the factual and legal diversity of the radicalisation cases and the varied ways in which they have engaged the family justice system, I demonstrated that the radicalisation cases have led to a more far-reaching and enduring interaction between family law and counter-terrorism than was generally appreciated in the early academic literature.

In Part II, I looked more critically at *why* the radicalisation cases have emerged in the family courts at this point in time in particular and the reasons behind the unprecedented interaction between family law and counter-terrorism. To that end, I took issue with the apparently simple and apolitical official narrative that understands the radicalisation cases as an attempt by the state to protect vulnerable children from harm and promote their welfare. I argued the harms that the judges in the radicalisation cases seek to protect children from are both influenced by and in fact actively reinforce and further a changing social, political and legal context and a shifting counter-terrorist landscape that is increasingly concerned with and seeks to regulate Muslim cultural difference, Muslim family life and the security, ideological and civilizational threat posed by Islam and Islamism. In doing so, I showed why the radicalisation cases cannot be understood as a simple *response* or *reaction* by the family courts to a new terrorist threat that happens to raise patent child protection concerns and to engage the family justice system.

In Part III I examined some of the *implications* of this interaction between family law and counter-terrorism. Although I broadly agreed with the claim made by some academics that the family courts have, in general, been appropriately cautious and restrained in the radicalisation cases and have attempted to immune themselves from counter-terrorism and popular discourses on Islam and Muslims, I argued that we should be more guarded and apprehensive about the involvement of the family courts and family law in the counter-terrorist project.

[297] See H Fenwick, 'Preventive anti-terrorist strategies in the UK and the ECHR: Control orders, TPIMS and the role of technology' (2011) 25 *Computers and Technology* 129 and A Kavanagh, 'Cases: Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 MLR 863.