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RESEARCH ARTICLE

A terrorist mindset: findings from an empirical enquiry into prosecutions, evidence, and mindset material

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Abstract

This paper explores the use of mindset material in terrorism cases. Mindset material is a broad category of evidence, including social media activity and internet search histories, relied on to infer or imply that the accused is affiliated or aligned with terrorists. Although mindset material plays a central role throughout the justice process in terrorism cases, no work to date has explored and discussed its use in depth. In this paper I draw on doctrinal and empirical findings, including interviews, to examine how and why it has come to play such a central role in terror cases. While mindset material is a well-intentioned tool used to selectively enforce broadly drafted and vaguely defined terrorism offences, it is also a blunt tool, and sees great emphasis placed on the accused's inferred status as terrorist (or not). In this paper I explore and problematise the use of mindset material and the inferences drawn from it, specifically in relation to to fantasists, the merely curious, and young autistic defendants. I posit that mindset material is symptomatic of a need to revisit the substantive law and to rethink the proper role of the criminal law in preventing terrorism.

Keywords: mindset material; terrorism offences; criminal justice; prosecutions; sentencing; autism

Introduction

This paper explores the rise and centrality of mindset material. Mindset material is a form of evidence relied on in terrorism prosecutions to explain what the accused was doing and why. This is a broad category of evidence, ranging from internet search histories and social media activity to the individual's associations and possessions. It is used, in prosecutions and at trial, to illustrate the mindset of the accused and to evidence their being a terrorist or affiliated to terrorists. The Independent Reviewer of Terrorism Legislation remarked in his 2023 report that 'juries may baulk at [convicting] individuals with the s 58 offence unless satisfied that the individual is a terrorist or terrorism-aligned', referring to the use of mindset evidence and the import thereof in terrorism-related proceedings to respond to concerns over the breadth of pre-inchoate offences and to demonstrate the sensible use of offences to target genuine risk.[1]

Although the use of mindset material is both considerable and on the rise, we know little about it. This category of evidence has been subject to limited academic attention to date,[2] as much scholarly

[1] J Hall 'The Terrorism Acts in 2021' (Independent Reviewer of Terrorism Legislation, 2023) para 7.22, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140911/E02876111_Terrorism_Acts_in_2021_Accessible.pdf (accessed 24 October 2024).

[2] A notable exception being the work of Cornford, which has touched on issues surrounding evidence, such as graphic videos possessed by the accused, in A Cornford 'Terrorist precursor offences: evaluating the law in practice' (2020) 8 Criminal Law Review 663.

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work on anti-terror offences generally has lacked an empirical footing. This has left under-explored the reality of how these offences are prosecuted. This paper aims to begin to fill that gap, using insights from doctrinal research and wider documentary enquiry complemented by a small sample of interviews. I offer empirical views of how mindset material has emerged as a tool for the selective enforcement of broadly drafted and vaguely defined terror offences. In doing so, I add to our understanding of how terror offences are investigated and and how risk is assessed and substantiated at the evidential level in prosecutorial case-building, as well as in court, and the role of mindset material therein. Through this paper I seek to problematise the role and function of mindset material, shedding light on and critiquing how status claims (of the 'X is a terrorist' kind) have come to play a central role in the criminal process. Concerns about an observed shift in focus in terrorism trials and in other contexts, where status and predisposition are prioritised over conduct, are not new,[3] but this paper offers the first detailed discussion of this shift, and the evidential category underpinning it, in the UK.

This paper combines insights from a number of sources. To complement the available appellate case law I also draw on Crown Prosecution Service summaries of successfully prosecuted terrorism cases between 2016 and 2020.[4] I use annual reports by the Independent Reviewer of Terrorism Legislation (the Reviewer), and a range of complementary documentary sources, including news reports, prosecutorial codes and guidelines, and Hansard debates. These sources are complemented by six in-depth semi-structured interviews conducted between 2022 and 2024 with two prosecutors (Alex and Noor) and four defence counsel (Sam, Robin, Amal, and Riley), each with substantial experience of working with terrorism cases. They are referred to here by gender-neutral pseudonyms. They were asked to share their professional experience of terrorism cases, of working with preventive terrorism offences, and of the use of mindset material; and to reflect on how and why it is being used. These in-depth first-hand accounts offer rare glimpses of a sensitive area of practice and complement doctrinal and documentary findings by shedding light on why mindset material is being used in the ways observed. The interview sample covers multiple jurisdictions in the UK, and yields an indicative account of practice across the three jurisdictions. Although jurisdictional differences in implementation are important, to preserve interviewee anonymity they are not discussed here.[5] I focus on UK-wide patterns, as terrorism is a reserved matter legislated for all UK jurisdictions at Westminster, and therefor use the term 'UK' throughout.

I begin below by setting out in more detail what mindset material is, and sketch the legal landscape in which it has emerged as a tool for selective enforcement. I focus in particular on the role it plays in prosecutorial case-assessments and charging decisions, but also discuss its role at trial and at sentencing. I outline how mindset material fills an important information gap in prosecutions and beyond, particularly where evidence is scarce, to help explain the nature of what the accused was doing and why. Mindset material is being relied on to infer the accused's status as terrorist or terrorist-aligned, acting as a basis for important decisions in prosecutions, convictions, and sentencing. Although mindset material is, on the evidence, a well-intentioned tool used in the implementation and (selective)

[3]WE Said 'Evidence and the criminal terrorist prosecution' in WE Said *Crimes of Terror: The Legal and Political Implications of Federal Terrorism Prosecutions* (New York: Oxford University Press, 2015) p 73; N Nguyen *Terrorism on Trial: Political Violence and Abolitionist Futures* (Minneapolis: University of Minnesota Press, 2023); K Morgan 'Pathologizing "radicalization" and the erosion of patient privacy rights' (2018) 59 Boston College Law Review 791.

[4]Crown Prosecution Service 'Successful prosecutions since 2016, cases CPS 2016–2020' (2020) https://www.cps.gov.uk/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016 (accessed 25 February 2022). The site has since become restricted pending internal review, and remains so at the time of writing, but can be accessed via the National Archives: https://webarchive.nationalarchives.gov.uk/ukgwa/20230129074804/https:/www.cps.gov.uk/crime-info/terrorism/counter-terrorism-division-crown-prosecution-service-cps-successful-prosecutions-2016. These summaries are drafted by prosecutors involved in the case, collected periodically, and reviewed for regulatory compliance prior to being uploaded.

[5]For the same reason, in drawing on interviews with prosecutors 'Alex' and 'Noor', identifying data including turns of phrase have been removed or paraphrased and I do not use direct quotes.

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enforcement of terror offences, its wider significance in relation to – but also *beyond* – the explicit elements of the offence(s) in question gives rise to important concerns.

In exploring this I seek to highlight how the framing of the accused and their conduct through the lens of mindset material shifts the focus of the criminal justice process to the accused's inferred status as terrorist or not rather than the elements of the offence(s) in question. I suggest that this raises a dual problem in its apparent links to blameworthiness as a driver of both prosecutions and convictions. Firstly, the reliance on status rather than conduct is cause for concern. The emphasis on mindset material sees questions of conduct ('what') being defined by attitudes (wider than intention, 'why') and the perceived riskiness thereof, which opens courtroom doors to bias and prejudice. Secondly, even conceding that 'why' may rightfully, or as a matter of pragmatic necessity, be a focal point in terror prosecutions, mindset material is not a robust basis from which to infer a terrorist mindset. It appears especially ill-suited for distinguishing between genuine risky terrorist intent, fantasy, and mere curiosity in the context of neurodiversity and online conduct – two increasingly dominant factors in caseloads with bearing on questions reaching beyond the terror context. I raise concerns for autistic defendants in particular, and note a divergence in approach between terror and non-terror offences.

In the conclusion, I contend that mindset material is symptomatic of a need for more substantial law reform and for rethinking the role and limitations of the criminal law as a preventive tool. Whereas procedural protections ought to be more robust, mindset material has emerged as a consequence of the construction of preventive terrorism offences. Without addressing the form of these offences, a tool like mindset material will be needed to fill gaps for prosecutors, judges, and juries. The rise and centrality of mindset material should cast doubt on criminal law's suitability in its current form to counter terrorism.

1. Setting the scene: implementing terrorism offences

Mindset material emerges as a scope-setting tool by which prosecutors (and others including judges and juries, as I explore below) selectively enforce terrorism offences which are notoriously broad in scope.[6] Preventive terror offences are some of the broadest offences to be found in UK law.[7] Several are referred to as pre-preparatory, or pre-inchoate, as they reach far back through chains of conduct ultimately (it is anticipated) leading to terrorism, prior to familiar inchoate modes of criminalisation such as attempt, assisting, or conspiracy.[8] Such offences target very early conduct and do so in vague terms which leave their scope – particularly at their margins – unclear.

Terrorism – the criminal behaviour aimed at by the offences – is a notoriously fuzzy and contested concept.[9] The aim of many offences in this area is the prevention of harm, making the risk of harm the object of the offences. The threat of terrorism is difficult to pin down. It is fast moving, by its nature secretive, and difficult to detect. The breadth and vagueness of the offences as defined in statute (as policy and debate records confirm) is a response to this uncertainty. They are intended to enable early criminal law interventions to prevent terrorist threats, often diffuse, being realised.[10] However,

[6]See for example A Cornford 'Narrowing the scope of absurdly broad offences: the case of terrorist possession' (2017) 38 Statute Law Review 286; L Zedner 'Terrorizing criminal law' (2014) 8 Criminal Law and Philosophy 99; J Hodgson and V Tadros 'How to make a terrorist out of nothing' (2009) 72 Modern Law Review 984.

[7]Although this remains true, the model of preventive and pre-preparatory offences is increasingly being exported into other areas of law. For a recent example, see the National Security Act 2023, s 18.

[8]R Kelly 'The right to a fair trial and the problem of pre-inchoate offences' (2017) 6 European Human Rights Law Review 596.

[9]J Hodgson and V Tadros 'The impossibility of defining terrorism' (2013) 16 New Criminal Law Review 494; L Stampnitzky *Disciplining Terror: How Experts Invented 'Terrorism'* (Cambridge: Cambridge University Press, 2013).

[10]In terms of some the offences as introduced here, see for example: HL Deb vol 613, cols 753–754, 23 May 2000, in relation to the mischief aimed at and the s58 offence; in relation to the s 1 offence see M Peck 'Research Paper 55/06, 20 Oct 2005, The Terrorism Bill 2005–06, Bill 55 of 2005–06' (House of Commons Library 2005) Research paper 55/06 11, https://researchbriefings.files.parliament.uk/documents/RP05-66/RP05-66.pdf (accessed 24 October 2024) on the issue of

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broad provisions are far from the full story of the UK's response to terrorism: discretion also plays an important role. The breadth of these offences is to be mitigated by selective enforcement – this is clear from Hansard debates on the Terrorism Acts 2000 and 2006 respectively, as well as published policy. Powers and offences are envisioned to be used on a selective basis, targeting the criminal behaviour aimed at (terrorism and the risk thereof) and relying on the good judgement of prosecutors and police officers to achieve this.[11] This raises the question: how are these offences selectively enforced, and on what basis? In other words, what does the relevant kind of risk look like in practice? The answer to this question is less apparent. It is not clear from the legislation or from the wider policy context how selective enforcement happens; neither is it clear how it is meant to happen.

Terrorism offences have been widely discussed in the context of preventive and increasingly risk-adverse modes of criminalisation.[12] Much of the scholarly attention afforded to such offences to date has emphasised concerns for overcriminalisation and the negative effects of focusing on risk, in particular in terms of what risk looks like (or might look like) in practice and the conflation of risk with characteristics such as race, culture, and custom.[13] Crucially, however, much of this work has had little to say about the implementation of broad and vague terror offences, and has lacked empirical footing. In this paper I add to our understanding of the implementation and selective enforcement of offences, and how risk is assessed in practice, by examining the use of mindset material.

It is useful to examine briefly the legal landscape in which mindset material has emerged. One of the most broadly drafted and vaguely defined terrorism offences is 'encouragement of terrorism' under section 1 of the Terrorism Act 2006. The offence criminalises both direct and indirect encouragement, defined as statements:

> likely to be understood by a reasonable person as a direct or indirect encouragement or other inducement, to some or all of the members of the public to whom it is published, to the commission, preparation or instigation of acts of terrorism or Convention offences.[14]

The closely related section 2 offence of dissemination similarly criminalises direct and indirect encouragement conveyed through the dissemination of publications.[15] The inclusion of indirect encouragement

speech 'creating a climate' where terrorism is seen as permissible; HC Deb vol 675, cols 871–872, 2 Nov 2005; see also Mr Clarke's oral evidence to the Joint Committee on Human Rights 'Counter-terrorism policy and human rights: Terrorism Bill and related natters, Volume II, oral and written answers' Third report of session 2005–06, HL 75-I, HC 561-I (2005) pp 3–4, https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/jtrights.htm (accessed 24 October 2024).

[11]'CONTEST: the United Kingdom's strategy for countering terrorism' (HM Government, June 2018) Cm 9608, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/716907/140618_CCS207_CCS0218929798-1_CONTEST_3.0_WEB.pdf (accessed 24 October 2024); HL Deb vol 613, col 754, 23 May 2000; HC Deb vol 438, col 335, 26 Oct 2005; HC Deb vol 438, col 873, 2 Nov 2005. The importance of discretion was also emphasised in the landmark case of *R v G; R v J* [2009] UKHL 13 at [85]. See also commentary in B Middleton 'Possession of terrorist information: role of intention' (2010) 74 Journal of Criminal Law (Hertford) 397, at 399–400.

[12]See for example H Carvalho *The Preventive Turn in Criminal Law* (Oxford: Oxford University Press, 2017) pp 1–22, 156–165; see also broader discussion in L Zedner 'Pre-crime and post-criminology?' (2007) 11 Theoretical Criminology 261. On 'pre-crime' and risk as wrongdoing; and on the front-loading of risk see P O'Malley *Risk, Uncertainty and Government* (Abingdon: Taylor and Francis, 2012) pp 135–137.

[13]T Choudhury 'The Terrorism Act 2006: discouraging terrorism' in I Hare and J Weinstein (eds) *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009) p 464; see also H J Ingram 'How counterterrorism radicalizes: exploring the nexus between counterterrorism and radicalization' in JL Esposito and D Iner (eds) *Islamophobia and Radicalization: Breeding Intolerance and Violence* (New York: Springer International, 2019); G Mythen et al 'I'm a Muslim, but I'm not a terrorist: victimization, risky identities and the performance of safety' (2009) 49 British Journal of Criminology 736; A Shamila *The 'War on Terror', State Crime and Radicalization: A Constitutive Theory of Radicalization* (New York: Springer International, 2020); TG Patel 'Surveillance, suspicion and stigma: brown bodies in a terror-panic climate' (2012) 10 Surveillance and Society 215.

[14]Terrorism Act 2006, s 1.

[15]Ibid, s 2.

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within the offences has been controversial because it lacks clarity and is potentially very wide in scope.[16] Indirect encouragement is only further defined as including statements glorifying terrorist acts or offences 'from which members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances'.[17] These offences have been criticised for lacking clarity as to what actually constitutes encouragement, the scope of 'potentially encouraging effects',[18] and the difficulty of predicting how a statement is 'likely to be understood',[19] particularly online. Work to date drawing on appellate cases suggests that potential encouraging effects have been sufficient for criminal liability, as dissemination of mere depictions and descriptions of terrorism have been successfully prosecuted.[20] Adding to the breadth of the offences, intention is not required, as encouragement can be committed recklessly.[21] Importantly, these offences are not only broad in scope, but also have unclear margins.

Another overly broad offence is collection of information as per section 58 of the Terrorism Act 2000, which criminalises the collection, possession, or accessing of information 'of a kind likely to be useful to a person committing or preparing an act of terrorism' without a 'reasonable excuse'.[22] The offence as enacted raises a series of questions of scope, in particular for how broadly usefulness will be interpreted in practice and for what constitutes a reasonable excuse.[23] From the letter of the law alone, the offence might cover a very broad range of material, including widely available specialist information, and possibly information that could be useful to anyone.[24] There is no intention requirement in the offence. The 'reasonable excuse' defence somewhat narrows section 58's scope by accounting for the accused's purpose in a limited sense, but it does so in unclear terms. As a result, the actual narrowing effect of the defence (in terms of what is actually considered reasonable or not) is not evident from the statute.[25] This is particularly important as the offence has been criticised for its potentially very wide reach, and for extending to conduct with potentially dubious connections to harm, like possessing everyday information such as a bus timetable.[26] The offence has also been described as in effect approaching a strict liability offence.[27] The section 58 offence is closely related to the section 57 offence of possession of articles 'in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of

[16]A Hunt 'Criminal prohibitions on direct and indirect encouragement of terrorism' (2017) Criminal Law Review 441, at 447–448; Cornford, above n 2, at 672; SA Marchand, 'An ambiguous response to a real threat: criminalizing the glorification of terrorism in Britain' (2010) 42 The George Washington International Law Review 123–158.

[17]Terrorism Act 2006, s 1(3).

[18]A Petzsche 'The penalization of public provocation to commit a terrorist offence – evaluating different national implementation strategies of the international and European legal framework in light of freedom of expression' (2017) 7 European Criminal Law Review 241; E Barendt 'Incitement to, and glorification of, terrorism' in Hare and Weinstein, above n 13.

[19]ECHR, Art 10; see detailed exploration in Petzsche, above n 18; Barendt, above n 18; S Macdonald and N Lorenzo-Dus 'Intentional and performative persuasion: the linguistic basis for criminalizing the (direct and indirect) encouragement of terrorism' (2020) 31 Criminal Law Forum 473. It is important to note, however, that the ECtHR has found that the criminalisation of indirect encouragement can be ECHR compliant, because freedom of expression it is not an unqualified right: see *Hogefeld v Germany*, App no 35402/97 (20 January 2000).

[20]Cornford, above n 2, at 672.

[21]Terrorism Act 2006, ss 1(2)(b)(ii), 2(1)(c).

[22]Terrorism Act 2000, s 58.

[23]On this, see KE Dinesson 'Preventing harm: the "collection of information" offence in commentary, case law and data' (2022) 6 Criminal Law Review 469; KE Dinesson '(Un)reasonable excuses – on "R v Dunleavy, R v Copeland", and section 58' (2022) 85 Modern Law Review 1550.

[24]A Cornford 'Criminal offences relating to terrorism' (2022) pp 12–13, available at https://www.research.ed.ac.uk/en/publications/criminal-offences-relating-to-terrorism (accessed 24 October 2024); Cornford, above n 2, at 679; see also Hodgson and Tadros, above n 6. The case of *R v G; R v J*, above n 11, addressed some of these questions, but left the scope of the offence broad.

[25]Cornford, above n 2, at 678–680; Dinesson (2022), above n 23.

[26]Hodgson and Tadros, above n 5.

[27]On this see Cornford, above n 2, at fn 98 on the effects of the Counter-Terrorism and Border Security Act 2019. This description as 'quasi-strict liability' seems apt, in particular in light of the very narrow reading of what constitutes a 'reasonable excuse' that has been adopted over time.

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terrorism'.[28] It is a defence to prove that possession was not for this purpose.[29] The seeming overlap between the offences under sections 57 and 58 has been considered across a series of cases which have, over time, identified section 58 as at its core being concerned with the nature of the article possessed and section 57 conversely being concerned with the context of possession.[30] Despite some clarification emerging over time, however, the scope of the offences remains unclear.

Finally, it is useful to also consider the section 5 'preparation of terrorist acts' offence.[31] The offence prohibits any 'conduct in preparation' to give effect to an intention to commit or assist others in committing acts of terrorism.[32] This offence stands in contrast to those set out above in a few key respects: preparation requires intention, which is the essence of the offence, and section 5 is by contrast very clearly and concisely drafted. Despite its simplicity (or, at least, lack of vagueness), however, the preparation offence raises similar questions of scope as sections 1, 2, 58 and 57. With such emphasis placed on preparatory intent, the offence may apply to just about any conduct, provided that intent can be evidenced. Notably, this extends liability far beyond comparable offences. Attempts typically require more than desire; they require a decision to bring about the given offence.[33] This requires D (used herein to denote the accused or the defendant interchangeably for simplicity as discussion spans the criminal process from prosecution decisions through to sentencing) to have embarked on the commission of the offence proper,[34] which section 5 preparation does not require.

Each of the offences outlined above could, on the face of it, be used to prosecute a very large number of individuals, including some with very tenuous links to terrorism or the risk thereof. It is clear that the offences are being selectively enforced,[35] but it is not immediately clear on what basis. Although the offences set out above – encouragement, dissemination, collection of information, possession of articles, and preparation – may seem to require very different things in terms of mental elements, as I detail below mindset material plays a key role in practice and is seemingly equally central in prosecutions for preparation as it is in prosecutions for collection of information. This speaks to the range of functions mindset material serves in prosecutions and beyond, to which I now turn.

2. Mindset material – a tool for selective enforcement

Mindset material is a subset of circumstantial evidence. It has come to play a significant role, on the evidence, at several points in terrorism cases as they move through the justice process. Mindset material is filling important information gaps to help prosecutors, juries, and judges understand the nature of defendants' conduct in context. This evidence plays an important role in charging decisions, in

[28]Terrorism Act 2000, s 57(1).

[29]Ibid, s 57(2).

[30]Most notably in the case of *R v G; R v J*, above n 11, at [42]–[54], departing from the prior interpretation in *R v K* [2008] 2 WLR 1026. On this, see successive commentaries by B Middleton 'Terrorism-related documents: defining the ambit of s 58 of the Terrorism Act 2000' (2008) 72 Journal of Criminal Law (Hertford) 102; 'Sections 57 and 58 of the Terrorism Act 2000: interpretation update: R v G; R v J [2009] UKHL 13' (2009) 73 Journal of Criminal Law (Hertford) 203; Middleton, above n 11; 'Preparing for terrorism' (2011) 75 Journal of Criminal Law (Hertford) 177.

[31]Terrorism Act 2006, s 5.

[32]Ibid, s 5(1).

[33]Criminal Attempts Act 1981, s 1(1); The Criminal Attempts and Conspiracy (Northern Ireland) Order 1983, s 3(1); James LJ in *Mohan* [1976] 1 QB 1; *Pearman* (1985) 80 Cr App Rep 259.

[34]RA Duff *Criminal Attempts* (Oxford: Oxford University Press, 1997) pp 385–379; *Docherty v Brown* 1996 JC 48, Lord Justice Clerk (Ross) at 60; A Ashworth and L Zedner *Preventive Justice* (Oxford: Oxford University Press, 2014) pp 97–99. The level of progression is not relevant to the offence but is relevant at sentencing, and accounted for in sentencing guidelines: see R Kelly 'Sentencing terrorism offences: no harm intended?' (2019) 9 Criminal Law Review 764, at 764–770; Cornford, above n 2, at 665.

[35]There were 159 arrests for terrorism-related activity in the year ending 30 June 2023, as per 'Operation of police powers under the Terrorism Act 2000 and subsequent legislation, quarterly update to June 2023' (Home Office, 14 September 2023), https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-june-2023/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-search-great-britain-quarterly-u (accessed 24 October 2024).

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case-building, at trial, and in sentencing. Its scope and centrality, and the functions it is made to play as a litmus test for risk and for a terrorist mindset, which I delve deeper into in this section, see a problematic emphasis on the accused's inferred status (as terrorist aligned, or not). This has implications for the whole criminal process.

(a) What the defendant has been doing, and why?

Mindset material is often relied on in cases involving preparatory or pre-preparatory terrorism charges. In such cases, D's circumstances and those of their activities become crucial to those assessing the case and making decisions, including whether to prosecute and on what charges. This was emphasised throughout interviews with both defence counsel and prosecutors. This context helps to explain what D was doing, and why, both in terms of whether their conduct amounts to terrorism as defined by section 1 of the Terrorism Act 2000, which underpins all terrorism offences, and in terms of amounting to a particular offence. Robin, a defence counsel, explained that mindset material draws on the section 1 definition's 'for a cause' element, and establishes the accused as 'a candidate for committing the criminal offence'. As further explained by Amal, a defence counsel speaking from experience as leading defence advocate in a recent case: 'it's a kind of circumstantial evidence of intention at the time of the act complained of'.

This body of contextual evidence of D's activities, potentially reaching far beyond the conduct element of the offence, serves to fill an important information gap in prosecutions. Alex (a prosecutor) explained in interview that it is common, when it comes to terrorism cases, that evidence is both complex and sparse due to the early stage of intervention. This has evidential implications for the prosecution in that cases will generally rely on circumstantial evidence where physical evidence is yet to come about or has been carefully managed by D in an attempt to avoid detection. In the absence of clear and explicit plans or intentions, these may be reflected by D's internet search history, social media activity, or propaganda in their possession.[36]

An important sub-category of this circumstantial evidence is material which is illustrative of D's mindset, which helps to explain the nature of what D has been doing and why. This material has come to be widely referred to as 'mindset material' in case law and by practitioners. This body of evidence has also historically (in the last two decades of permanent anti-terror legislation following the Terrorism Act 2000) been referred to as material demonstrating a commitment to a cause, ideology or organisation and as proof of radicalisation, and it is frequently used in court. Mindset material is considered relevant at many different stages in the criminal justice process and in relation to a diverse set of issues. It has been used at trial to help prove intention as well as a related but importantly distinct commitment to terrorist organisations or values; to disprove or cast doubt on defences; and to inform assessments at sentencing. This is a cause for concern. Mindset material is, in summary, a very wide range of evidence being used throughout the criminal justice process as 'proof' of a terrorist mindset. I explore its different functions more closely below.

Gaps left by broad and vague offences have left a need for such a tool by which preventive offences may be applied and enforced in a targeted way. However, mindset material is a *blunt* tool – relying, sometimes in a concerning manner, on inferences being made on potentially ambiguous evidence. This was reflected on by Riley, a defence counsel, in interview, recalling a recent case:

> as with any sort of inferential chain, and the drawing of inferences which very much relies upon that principle: the longer the chain is, the more tenuous the inference becomes. And you know, if

[36]Examples include diary entries and posts online, including pictures and memes reflecting extreme right-wing opinions in *R v Nugent (Michael)* [2021] EWCA Crim 1535, at [11], [34]; terrorist propaganda and recruitment texts and videos, chat records, images and animated gifs (saved by the accused or saved automatically to their laptop as part of online messaging app caches – this is not clear from the evidence as set out in the judgment) in *R v Siddique (Mohammed Atif) v HM Advocate* [2010] HCJAC 7, at [1], [20]–[37]; and poems, notes and communications in *R v Samina Hussain Malik* [2008] EWCA Crim 1450, at [4].

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> there's more than one inference, if there's more than one inference that can be drawn, then it's no inference at all.
>
> Which one do you pick? And this, this is the danger of it.

Overall, mindset material seems to be filling an important knowledge gap for prosecutors, juries, and judges tasked (albeit indirectly or in effect) with preventing the harm of terror. Sam, a defence counsel, shared a similar experience. They outlined how intention may be very clearly reflected in activities like preparation. For example, purchasing certain precursor chemicals may be reflective of a clear intention to manufacture a bomb. However, in other cases, Sam explained, such evidence is not present and then ideological material (mindset material) will often play a central role and be used to indicate D's mental state, purpose, and intentions. Although other factors also play important roles in charging decisions, including decisions by the police, mindset material was described by prosecutors Alex and Noor as an important part of a given case being considered and prosecuted as terrorism. Each emphasised that when it comes to terrorism, ultimately, you know it when you see it.

When asked more about this, and what terrorism looks like in the context of these preparatory and pre-preparatory offences, Noor (a prosecutor) and Sam (a defence counsel) both explain that they will look to the circumstances of the offender and the offending and the surrounding context of the case in order to assess the nature of what D was doing and why in relation to the offences. As Noor outlined, this may include a very wide range of evidence in considering whether, for example, the activities of the accused amount to giving rise to reasonable suspicion as per the possession of articles offence:[37] from past convictions, materials in possession, and known membership of certain groups or organisations to social media activity, internet search history, and D's social life, family life, and background. It is also clear from the case law, as discussed further below, that mindset material is relevant to elements of other offences such as those outlined in the previous section. It has been used to cast doubt on defences like a reasonable excuse under the section 58 collection of information offence, and to show that encouragement was intentional as opposed to reckless under the section 1 encouragement offence.[38] However, mindset material seems to remain a central preoccupation in proceedings beyond its relationship to issues directly linked to the offence in question. As outlined by Riley (a defence counsel) in reflecting on a past case involving a charge of encouragement:

> I could quite see the relevance of it, and an expert academic gave evidence … to understand the context in which that speech took place. So if that's mindset evidence … I can see its relevance.
>
> And if it's evidence of context, which in terms of publication is also necessary as a matter of law, because it has to be seen in its full context, then it's relevant. So there's an example where you go, yes, fine. You know. It's outside the ambit of the jury's experience, or probably is, so we're going to have an expert tell us about the scene to give it its proper context, and it's also going to be relevant to the mindset or the mens rea or the motivation of the defendant.
>
> So there will be times when it is relevant and necessary. But it seems to me that more often, or a lot of the time it's introduced under the banner of 'it's mindset evidence'. 'It's mindset evidence' when really, it's just prejudicial. And it doesn't form any sort of utility at all.

Riley's account suggests that mindset material has become a routine part of terrorism cases, whether directly relevant to issues of law or not. Defence counsel Amal's account echoed this observation, reflecting on their past terrorism cases: 'They (the prosecution) would serve a mass of that material which would feature heavily in the cases'. The body of available appellate case law and CPS case summaries both seem to support this account of mindset material's centrality, where a wide range of evidence of D's mindset is routinely led and seen to be relevant, including social media activity and

[37]As per the Terrorism Act 2000, s 57.

[38]See for example *R v Benmoukhemis (Khadidja)* [2021] EWCA Crim 1281, at [4]–[10].

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messages, non-illegal extremist material in possession, and internet search histories which show a persistent interest in extremism.[39] To date, examples of mindset material evidence detailed in the case law have included: poems, notes and communications;[40] terrorist propaganda and recruitment texts and videos, chat records, images and animated GIFs;[41] past relationships with individuals considered terrorists and internet searches along with pro-terrorist imagery;[42] open source internet material;[43] as well as diary entries and posts online including pictures and memes reflecting extreme right-wing opinions.[44] This is a very wide range of material from which a terrorist mindset is inferred in practice by prosecutors, juries, and judges.

(b) Tracing mindset material through the justice process

Mindset material is a very broad range of evidence which plays a central role through charging decisions and into court through trial, conviction, and sentencing. According to interviewees, as supported by the available case law, mindset material serves as an important sifting tool for prosecutors and serves as a basis for the selective enforcement of offences like encouragement and preparation. On these interview accounts, mindset material fills important information gaps and in doing so helps prosecutors to focus the offences, through their discretionary application of the material, on the criminal behaviour aimed at: on risky terrorist defendants, identified through evidence of their risky terrorist mindset. Case law suggests that much of the imposition of liability under the categories of broad and vague offences seems to hinge on the successful characterisation of a defendant as a terrorist, with a terrorist mindset, drawing on a wide range of evidence taken to be reflective thereof.

The earliest instance reported in the case law of mindset material being referred to as such is in *R v Qureshi (Sohail Anjum)*, also known as *Attorney General's Reference No 7 of 2008*.[45] D pleaded guilty to charges of preparation, collection of information, and possession of articles offences at the first instance,[46] having been arrested at Heathrow airport with luggage containing steel batons, a large sum of cash, a computer hard-drive and compact disc, and other articles.[47] The hard-drive and disc contained 'a theological justification for terrorism, and military and intelligence guides downloaded from the internet' as well as photographs and videos of executions, past terrorist attacks, and of D holding rifles.[48] A subsequent search of D's home led to the finding of further 'motivational material', indicative of D's mindset and plans. This material was used by the prosecution both to establish intent and to cast doubt on defences. This included communications on an extremist forum which detailed D's purchase of tools and plans to carry out an act of terror in Pakistan.[49] This case reveals some, but not all, the different functions that mindset material has come to play in terror cases, throughout the criminal justice process. I trace these below, in turn.

(i) Prior to trial

More recent case law reveals that mindset material has become central in many terrorism cases. Mindset material features throughout the criminal justice process, at overlapping and interrelated stages. First, mindset material seems to play an important role *prior to trial*, in prosecutorial charging decisions as a means of identifying 'terrorist' cases meriting prosecution. As outlined above, mindset

[39]Crown Prosecution Service, above n 4, *R v Ahmed Hussain, R v Mohammed Abbas Idris Awan, R v Fahim Adam, R v Amir Maqbool, R v Fahim Adam*.
[40]*Samina Hussain Malik*, above n 36, at [4].
[41]*Siddique*, above n 36, at [1], [20]–[37].
[42]*Benmoukhemis*, above n 38, at [9]; see also *R v Muhammed (Sultan)* [2010] EWCA Crim 227, [8].
[43]*R v Amjad (Adeel)* [2016] EWCA Crim 1618.
[44]*Nugent*, above n 36, at [11], [34].
[45]*R v Sohail Anjum Qureshi* [2008] EWCA Crim 1054.
[46]Terrorism Act 2000, ss 57, 58; Terrorism Act 2006, s 5.
[47]*Sohail Anjum Qureshi*, above n 45, at [1]–[2].
[48]Ibid, at [3]–[4].
[49]Ibid, at [5].

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material supports selective enforcement and factors into prosecutors' application of the evidential test and in assessing the realistic or reasonable prospect of conviction necessary to commence proceedings as a terrorism case. Both prosecutors and defence counsel emphasised the importance of the circumstances of the offender and the offending in assessing the nature of what the accused was doing and why. This relies, in large part, on mindset material to complement other evidence directly relating to elements of the offence(s) in question. This is notable. It suggests that mindset material does more than play a role in relation to the offence elements, that is (from the perspective of the prosecutor in question) in relation to the evidential test prosecutors employ as part of the two-stage test for prosecutors.[50] Mindset material also seems to play an important role in relation to the public interest test. Mindset material speaks not merely, it seems, to the question of whether the conduct in question meets the (very broad) evidential requirements. It also speaks to whether the conduct and the suspect fit into an assessment as terrorist which activates the public interest. As Alex, a prosecutor, explained in interview, due to the seriousness of terrorism, prosecution will almost always be in the public interest and the vast majority of cases taken to be terror-related pass this test.

(ii) At trial – offences, defences and conviction

Closely related to – but distinct from – these prosecution decisions, mindset material is also central in prosecutorial case-building before and at trial to help establish that the relevant offence has been made out.[51] This is clear from cases including *Sarwar*, where 'large quantities of jihadist literature and other material' along with social media activity were drawn on to support the assessment of D's journey to Syria being for the purposes of terrorism and thus constituting a section 5 offence.[52] In practice, preparatory and pre-preparatory terrorism offences all rely on context – explicitly in drafting or implicitly through the evidence routinely relied on, of which mindset material is a key part. The section 5 offence outlined above is a clear example, requiring the establishing of intention, in which mindset material plays an important role. This is clear from cases such as *Tabbakh*,[53] where D appealed against his conviction for the preparation offence. At trial, intention was proven on the basis of the possession of graphic videos, including one depicting an attack by Al Qaeda, and propaganda material including 'jihadist songs', in the absence of an explanation of why the accused possessed these materials.[54] This is cause for concern. Possessing propaganda material is in itself not a criminal offence. The case of *Tabbakh* raises two important questions: does the possession of such material require explanation? And, even if it does, should the absence thereof act as a basis for liability as a terrorist offender? In relying on mindset material in this way, encompassing such a wide range of evidence, the scope of terrorism offences seems to be further expanded through implementation in concerning ways, rather than narrowed.

We also see mindset material being used in relation to other offences, including in establishing reasonable suspicion under section 57. In *Lusha*, D appealed his conviction on five charges of the section

[50]The prosecution services of each jurisdiction in the UK follow their respective, but very similar, codes that guide the prosecutor in their work: the Public Prosecution Service (PPS) in Northern Ireland has the 'Code for Prosecutors', the Crown Office and Procurator Fiscal Service (COPFS) in Scotland has the 'Prosecution Code', and the Crown Prosecution Service (CPS) in England and Wales has the 'Code for Crown Prosecutors'. The code is the central guiding document on the decision to prosecute. Although differences exist between the different codes, prosecutors across the UK jurisdictions are instructed to assess cases by applying a two-stage test: the CPS refers to this as 'the full code test', PPS calls it 'the test for prosecution'; and COPFS the 'criteria for decisions'. The first part of the two-stage test is the evidential test, whereby the prosecutor must be satisfied that there is sufficient evidence to support a realistic or reasonable prospect of conviction or to justify commencing proceedings (dependent on jurisdiction). If the prosecutor is satisfied that the evidential test is met, they will then be directed to consider whether prosecution is in the public interest – the public interest test.

[51]It should be noted that here appellate judgments offer some insight. However, due to the overlapping nature of many of these offences and the common practice of charging multiples of them together to fairly reflect the criminality of the accused, as interviewees explained, the precise role of mind-set material in terms of precise offence elements can, at times, become unclear.

[52]*R v Sarwar (Yusuf)* [2015] EWCA Crim 1886, at [5].

[53]*R v Tabbakh (Hassan)* [2009] EWCA Crim 464, at [5].

[54]Cornford, above n 2, at 670.

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57 offence for the possession of articles, which included large quantities of petrol and manuals relating to explosives.[55] D had boastfully described himself to women online as a terrorist and a sniper,[56] and this was relied on as part of the Crown's case for a reasonable suspicion being made out.[57] In *Malik*, D had written poems under the pen-name 'the lyrical terrorist', which was seemingly given in evidence at the first trial alongside communications, notes and videos in D's possession to indicate D's mindset and as giving rise to a reasonable suspicion.[58] In the judgment in *Qureshi*, where the court considered whether D's sentence of four-and-a-half years was unduly lenient, we gain further insight into the use of mindset material.[59] D had been charged with preparation, possession of articles, and collection of information. At the first trial 'motivational material' was put forward by the Crown, including material described as providing theological justification for terrorism. This material supported the prosecution's case that D had been preparing for an act of terror and (importantly related) had possessed articles under circumstances giving rise to a 'reasonable suspicion'.[60]

As to cases involving encouragement and dissemination, mindset material is seen to play a similar role in terms of supporting the inference of intention to encourage.[61] This is clear from appellate case law such as *Alamgir*, in which mindset material 'revealed the nature, depth and commitment of the appellants to radical Islamist beliefs entirely consistent with support for ISIS',[62] and supported by CPS summaries of cases including *R v Ahmed Hussain*, where the Crown led evidence including Facebook posts 'written to demonstrate his resistance to British values and social integration'.[63] This included activities beyond those that were the subject of the charges, including liking images and profiles associated with terrorism on Facebook, and other posts which presumably do not amount to encouragement.[64] Mindset material also features in cases involving reckless encouragement or dissemination, according to the experience of the defence counsel interviewed, in showing the relevant effect by demonstrating that D and those they communicated with had a shared mindset.

Mindset material also frequently appears in the context of cases involving section 58 collection of information, despite the offence having no intention requirement. This is illustrative of the further functions of mindset material at trial, in relation to defences and as an important form of evidence for juries. First, beyond speaking to offence elements, mindset material is also being used to cast doubt on defences. This is a likely contributing factor as to why mindset material is a recurring focal point in judgments and prosecutions relating to the section 58 collection of information offence, despite the offence having been described as, in effect, one of strict liability.[65] Mindset material is seen in the available case law being used to cast doubt on justifications and excuses by challenging their reasonableness or by suggesting that D is terrorist-aligned.[66] Alex, Noor and Sam each emphasised the importance of Ds' wider behaviour in assessing defences like the reasonable excuse under section 58(3). Sam, a defence counsel, further explained how genuine curiosity will be evident from

[55]*R v Lusha (Krenar)* [2010] EWCA Crim 1761, at [7]–[14].
[56]Ibid, at [16]–[18].
[57]Ibid, at [15], [17].
[58]*Samina Hussain Malik*, above n 36, at [4], [12].
[59]*Sohail Anjum Qureshi*, above n 45.
[60]Ibid, at [5].
[61]As per the Terrorism Act 2006, s 1(2)(b)(i).
[62]*R v Alamgir (Mohammed) and Others (No 2)* [2018] EWCA Crim 1553, at [8].
[63]Crown Prosecution Service, above n 4, *R v Ahmed Hussain*.
[64]*R v Ahmed (Farhana)* [2018] EWCA Crim 133, at [9]–[10].
[65]Cornford, above n 2, at fn 98; see also for example *R v John (Ben)* [2022] EWCA Crim 54; *R v Bel (Oliver)* [2021] EWCA Crim 1461; and *R v Dunleavy* [2021] EWCA Crim 39.
[66]See for example *R v Dunleavy*, above n 65; as discussed in Dinesson, above n 25. This was further supported by the prosecutors interviewed, who explained that curiosity is not set out as a defence and that although it may hypothetically constitute a reasonable excuse, evidence from the wider context of the person and their activities is often present which suggests otherwise. From the direction of case law to date, complemented by this insight, curiosity now seems unlikely to be capable of amounting to a reasonable excuse in practice.

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surrounding evidence, whereas the accumulation of mindset material over time will be far more difficult to present as innocent to a jury.

This highlights a final important role that mindset material plays at trial. Beyond offence elements and defences, mindset material also seems to serve a wider function at trial, as set out by the Reviewer in his 2023 report on the operation of terror legislation in 2021. Here, the Reviewer suggests that 'juries may baulk at [convicting] individuals with the section 58 offence unless satisfied that the individual is a terrorist or terrorism-aligned'.[67] This highlights the wider importance of mindset material and may further explain its centrality in s 58 prosecutions and verdicts. Even where intention is not required, as in section 58, something short of intention is still of central import for conviction: D's being seen to be 'terrorist-aligned'. This is supported by the Reviewer's account, which is based on unrivalled access to information and decision-makers, and echoes interview accounts linking mindset material to the public interest test. This adds to interview accounts and shows the wider importance of the assessment in practice of D as being 'a terrorist', beyond the specific elements of the offences in question (at least, narrowly understood or as read from the letter of the statutes). Mindset material does not just operate to support the actus reus or mens rea, nor is it limited to rebutting defences. It also plays an important role in making juries comfortable convicting defendants even when they perhaps have no defence in law. As such, mindset material operates as a litmus test for, and the basis for the inference of, a defendant's status as a terrorist and their posing a genuine risk. This, in turn, plays a key role both before and at trial and is an important part of the reality of how terror offences are being selectively enforced.

This is a function of mindset material about which the defence counsels I interviewed raised particular concern. Robin described how, in their experience, mindset material carries a 'taint': 'because I think (the mindset material) carried this taint and I think the jury judged him very much by that sort of material'. Riley raised similar concerns for how mindset material 'can draw the eye away from what someone's actually supposedly done'. Whereas Sam, Robin, and Riley each expressed their general faith in juries and their ability to look fairly on many cases, they also raised concerns about juries being unduly influenced by mindset material. As Robin explained:

> Well, I think the danger, the risk is obvious, that – and it's that case … – it's where the jury takes it further than it should. It uses (mindset material) as actual outright evidence of guilt which it shouldn't ever do. That's a danger, that it's overused. It's too easily admitted. That it's misused by the jury.

(iii) At sentencing

Finally, mindset material also plays an important role in sentencing. The many functions served by mindset material are, of course, related. It seems likely that earlier reliance on this evidence is, at least in part, in anticipation of its significance at sentencing. In his overview of the sentencing of preinchoate terrorism offences, Kelly outlines how the sentencing guidelines for preventive terrorism offences focus on an assessment of *risk* – specifically the risk of harm and the likelihood thereof.[68] In assessing the risk of harm, the questions of intent and of mindset more generally become important considerations, and as a result mindset material frequently features in judgments. Here too, mindset material seems to be provding evidence for several considerations: the harm risked as well as for related questions around culpability and dangerousness. The case of *Nugent* is illustrative of this,[69] where mindset material was relied on to assess D's dangerousness and the risk involved in his conduct. This seems to further explain the prominence of mindset material in the context of section 58 charges. Mindset material also features in sentencing for other offences, including the encouragement and dissemination offences where, although intention is not required, the matter of whether encouragement or dissemination was intentional or reckless has arisen at sentencing such that mindset material came

[67]Hall, above n 1, para 7.22.
[68]Kelly, above n 34.
[69]*Nugent*, above n 36.

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to play an important role.[70] The quantity of such material also serves to emphasise the depth of the accused's interest or radicalisation to support the prosecution's case and/or judge's assessment that the accused is dangerous or poses a significant risk.[71] This is a cause for concern, especially in the context of an accused who is merely curious and/or neurodiverse, as discussed below.

Accounting for the sequential nature of decision-making in the justice process, it seems likely that each stage is at present reinforcing and cementing the centrality of this evidence.[72] Mindset material is also likely to play an important role in policing and intelligence, which lie outside the scope of this paper. Prosecutors' reliance on mindset material in court may in part serve as a substitute for intelligence/evidence which cannot be brought into court for various reasons. Regardless of where mindset material came from, however, its influence across the justice process is clear. It functions as a litmus test for D having a terrorist mindset, speaking to – but also going beyond – the mens rea and actus reus elements of offences. The use and centrality of mindset material raises a number of related questions about scope and relevance, and about mindset material's suitability as the basis for the selective enforcement of terror offences in supporting the inference of D's status as terrorist from this wide range of evidence. These are the questions to which I now turn.

3. Filling gaps and finding a terrorist mindset

These findings raise a series of important questions about mindset material, in particular around the appropriateness of focusing on D's status, and about the robustness of mindset material in acting as the basis for this framing and for the inference of such a status. In this section I develop two principal concerns about mindset material with a focus on defendants with autistic spectrum disorder (ASD), a rising factor in caseloads.[73] I first posit that a focus on status more so than conduct is cause for concern in its own right. Secondly, even if D's being seen to be terrorist-affiliated or not is practically an important consideration, especially given the pre-inchoate mode of the offences and the aim of prevention, I argue that mindset material (especially as presently broadly construed) is not a reliable basis from which to infer a terrorist mindset due to the very wide range of evidence considered relevant and probative to date. I raise concerns about merely curious or fantasising defendants and defendants with ASD and discuss how mindset material seems particularly ill-suited to fairly assess risk in relation to these defendants and in the context of technology and online activity.

(a) A terrorist mind

The use of mindset evidence to establish D's mindset and status to explain the nature of their conduct raises concerns in its own right, as criminal liability ought to depend on conduct and not status. Mindset material is frequently relied on to infer not (or, at least, not *only*) that the accused accessed certain information and did so with the intent of using it to commit an act of terrorism. It is also, or rather, used to infer that D accessed certain information with a terrorist mindset, driven by certain attitudes and beliefs, being terrorist-affiliated or aligned. As explained by defence counsel Sam, mindset material helps explain 'the direction of the mind's travel' when the activities in themselves do not demonstrate this clearly enough. Here, there is a clear, albeit limited, role for mindset material (or something similar to it) to play in positioning conduct in its context. However, it seems that in the context of pre-inchoate offences in particular, this may lead to proceedings becoming concerned with the status and motivations of the accused more so than directly with the elements of the

[70] *Benmoukhemis*, above n 38.

[71] Crown Prosecution Service, above n 4, see for example *R v Christopher Partington, R v Harry Blake Vaughan*.

[72] K Hawkins 'The use of legal discretion: perspectives from law and social science' in K Hawkins (ed) *The Uses of Discretion* (Oxford: Clarendon Press, 1992) p 28; K Hawkins 'Order, rationality and silence: some reflections on criminal justice decision-making' in L Gelsthorpe and N Padfield (eds) *Exercising Discretion* (Willan Publishing, 2003) p 194.

[73] Hall, above n 1, para 5.19.

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offence(s) in question. As Riley stated in interview, when asked to reflect on their experience of the use of mindset material in terrorism trials:

> the danger of it is that you start to criminalise people. Not for the purposes of the terrorism legislation, because they're encouraging acts of terrorism, or, you know, disseminating terrorist publications, but because of their views.

The recurring use and focus on mindset material throughout the criminal process as traced above shows that, in practice, the central question in many terrorism cases is not necessarily what conduct D has performed but the mindset with which they have performed it. This mindset, in turn, is defining the nature of the conduct as terrorist or not, which is serving as a key deciding factor throughout the criminal justice process, from prosecution decisions through to sentencing. The mindset which has driven D's conduct defines that conduct as being either terrorist activity and thus a case of genuine risk, or not.[74] This further concern was expressed by Riley in reflecting on a recent case in which mindset material featured centrally: 'And you know, you then start to think, well, what are these guys being really judged on?'.

The question of D having a terrorist mindset and being terrorist-aligned or affiliated plays a key role in defining the nature of their activities as sinister and as terrorism rather than something innocent: as dangerous *terrorist* research which is pre-preparatory and worthy of both prosecution and conviction, as opposed to mere curious browsing online. Here we see a blending of questions as to D's conduct, and the nature and blameworthiness (or, more precisely, the prosecution-, conviction-, and punishment-worthiness) thereof. These questions are being answered on the basis of whether prosecutors, juries, and judges can infer a terrorist mindset from the context of the D and their activities. Beyond the concern of how this centres the question of culpability, in practice, on D's inferred status and perceived riskiness – we also ought to be concerned about the robustness of that inference.

(b) What does a terrorist look at online?

Even if the emphasis on status strikes us as compelling, or if we are at least convinced that an assessment of status and mindset is needed and the reliance thereon is a pragmatic necessity in the context of preventive terrorism offences, mindset material should still give us pause as it is an unsuitable evidential basis from which to infer that status and terrorist beliefs, motives, or intent. Given its considerable breadth, mindset material seems particularly ill-suited to distinguish between risky terrorist intent and far less sinister curiosity, especially so in the context of neurodiversity and online conduct which are two increasingly dominating factors in caseloads.

This issue becomes particularly clear in the context of the growing prominence of online terrorist offending,[75] and in the upward trend of young persons with neurodiversity and mental health problems amongst those prosecuted and convicted of preparatory and pre-preparatory terror offences.[76] As acknowledged by the Reviewer in his most recent report at the time of writing, although official data does not track disabilities, poor mental health and neurodiversity (in particular among young men) have been linked to radicalisation in risk-assessments and feature heavily in counter-terrorism police caseloads through to convictions.[77] In line with these trends, the appellate case law features many cases in which D is described as exhibiting mental vulnerability, mental illness, and/or mental disabilities, in particular neurodiversity and ASD. These include: the case of *Roddis*, in which the prosecution introducted evidence, including the possession of graphic videos depicting a beheading, to assess 'whether his interest in acts of terrorism was simply morbid curiosity, or whether he had

[74]Ibid, para 7.22.
[75]On online conduct, see ibid, paras 5.31–5.37; 7.11–7.51.
[76]Ibid, paras 5.15–5.30.
[77]Ibid.

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attached himself to radical terrorist behaviour' where a subsequent failed appeal raised the defendant's ASD diagnosis;[78] the previously mentioned case of *Tabbakh*, in which the defendant suffered from mental illness and self-harm;[79] and *Rashid*, in which the defendant was argued by the defence to suffer from mental vulnerability.[80]

As highlighted in the previous quotation from Riley, multiple inferences could be drawn from evidence such as the possession of propaganda or activity on an extremist forum online: that the accused is motivated, intentional, and dangerous; or that they are lonely, fantasising, or merely curious. The available evidence of the centrality of mindset and status raises concerns about the extent to which this kind of evidence prejudices and supports biased and insufficiently robust inferences of intent, alignment, and predisposition. As outlined above, the centrality of mindset material shows that, in practice, the central question in terror cases is not necessarily what D's conduct has been, but with which mind-set it was done. This mindset, in turn, is defining the nature of the conduct, and seems to be a key deciding factor throughout the justice process. But we have important reasons to question whether mindset material provides a sufficiently robust basis for the inference of a risky terrorist mindset, or if this category of evidence is far too broad. Whereas in some instances inferences made from mindset material seem entirely appropriate, such material also allows for (and in some instances relies on) biased and potentially misguided assessments of risk: for example, *this is what a terrorist looks at online*.

Mindset material raises parallels to evidence of predisposition and status in terrorism trials elsewhere;[81] and in the UK context to the use of rap and drill music as evidence in joint-enterprise prosecutions.[82] In this sense, mindset material raises familiar concerns for how the emphasis in terrorism trials shifts from conduct to status and predisposition, broadly understood and sometimes questionably evidenced.[83] Beyond these familiar concerns however, the empirically informed examination of mindset material offered herein also shines a light on specific issues arising in practice. This is particularly so when these findings are situated in the context of the increasing number of young people with neurodiversity and poor mental health being prosecuted and convicted for pre-inchoate terrorism offences in the UK.[84] In relying on mindset material to evidence a risky terrorist mindset, and drawing on such a broad range of evidence, including search histories and GIFs,[85] we see a disproportionate focus on how these may or do indicate risk without adequate accounting for where these may be better (or also) understood as indicators of mere curiosity, fantasy, or difference in subjective experience. A striking example of this arose in interview, when Sam was asked how, in their experience, decision-makers might differentiate between intent and a terrorist mindset as opposed to mere curiosity or fantasy in the context of a possible terror offence. They suggested that this will be clear from the context, and that, for example, a merely curious person would look to both sides of an issue.

This seems too simplistic, in particular in the context of a fast-moving online environment increasingly reliant on algorithms which tailor content based on our past activity and other data, and in the context of youth, neurodiversity, and mental health being increasingly frequent in caseloads. Although a person with these characteristics can of course still pose a serious risk, potential manifestations of loneliness, curiosity, or vulnerability being disproportionately interpreted as evidence of a terrorist mindset is cause for serious concern. For example, a specific and obsessive interest into military matters may be adequately explained by an ASD diagnosis but may also be taken to be evidence of terrorist intent or affiliation. The use of mindset material, although well-intentioned, is a blunt tool made to

[78] *R v Roddis* [2009] EWCA Crim 585; *R v Roddis* [2020] EWCA Crim 396.
[79] *Tabbakh*, above n 53.
[80] *R v Rashid (Yahya)* [2017] EWCA Crim 2, at [50]–[53].
[81] This has been highlighted particularly in the US context by Said, Nguyen, and Morgan, above n 3.
[82] See for example E Quinn 'Racist inferences and flawed data: drill rap lyrics as criminal evidence in group prosecutions' (2024) 65 Race & Class 3.
[83] On such evidential concerns in the US context, see in particular Said, above n 3, pp 93–95.
[84] See n 76 above.
[85] See for example *Siddique*, above n 36, at [1], [20]–[37].

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play a crucial role in assessing risk and in attributing to D and their activities the labels 'terrorist' and 'dangerous' as opposed to 'vulnerable' or 'curious'. Importantly, the terrorism context here stands in contrast to similar offending which is not considered to be terrorism-related, where much greater leeway has been given to alternative explanations and a more nuanced accounting of risk.[86]

Whereas evidence such as D's internet search history and material saved on their computer may yield important insight directly relevant to assessments and outcomes across prosecutions, convictions and sentencing, greater attention ought to be given to the risks of such evidence giving rise to prejudice. Especially, as I have outlined, attention must be afforded to its potentially being indicative of mere curiosity as opposed to a dangerous terrorist mindset. As noted above, whereas the quantity of mindset material has been interpreted as aggravating and indicative of D's depth of commitment and dangerousness,[87] limited recognition seems to have been given to date to the explanatory role that an ASD diagnosis and strong interest may have to suggest that this should not be interpreted as increasing culpability or as indicating dangerousness. The very broad scope of mindset material routinely being led and relied on as the basis for decisions as to what D is doing and why, based on an assessment of whether D has a terrorist mindset, gives rise to important concerns. On the evidence, inferences such as 'a terrorist would probably look at this online and therefore you have a terrorist mindset' are playing a central role in the decisions leading to the prosecution and conviction of those accused of pre-inchoate terror offences. This is perhaps particularly concerning given indications of the emphasis put on such evidence by juries – a concern shared by the defence counsels interviewed. Whereas all defence counsel interviewees explained that brief directions about mindset material and its limitations are routinely issued to juries, they also raised concerns that the effect of such directions may be limited.[88] Riley explained further:

> The worry, certainly, when you defend is that the jury sits there, and it listens to all this. You know all sort of gory mindset evidence, which is, you know, in a sense, sort of titillating in a way that a judge's directions simply aren't. We'll never know how it's received.

4. The way forward

To properly address the concerns raised by mindset material, we need to return to why it has come to play such a central role in terror cases. Mindset material has emerged to fill gaps as to the scope and target of preventive terrorism offences generally as well as specific information gaps in cases involving preparation or pre-preparation but no completed act(s). It has emerged as a tool to assist various legal actors in the exercise of their discretion and applying broadly drafted and vaguely defined offences. Whereas efforts to manage mindset material better by reconsidering technical questions as to evidence (questions of relevance, probative value, and prejudicial effects) may lead to some welcome improvements,[89] the substantive law still requires our attention. Developing more robust guidelines for prosecutors and directions for juries may also serve as useful next steps, but on their own they are again insufficient to address the concerns raised in this paper. The evidence outlined here suggests that measures such as these will not address the underlying issue, which is that offences of terrorism rely on a concept which is political and indeterminate at heart, requiring discretionary assessments, throughout the enforcement process, of risk, dangerousness, and what a terrorist is and does. Proceedings tend towards questions of status precisely because status, predisposition, and inferences of risk are tools

[86]On this, see Dinesson, above n 25. This is in large part due to the construction of preventive terrorism offences and how they differ from more conventionally constructed criminal offences – highlighting the need for, as I outline in closing, statutory reform to address the concerns noted in this paper.

[87]Crown Prosecution Service, above n 4, see for example *R v Christopher Partington, R v Harry Blake Vaughan*, above n 71.

[88]A concern raised in the US context by commentators including Morgan, above n 3, and in the UK by Cornford, above n 2.

[89]Through the series of decisions in *Roddis* (2009), above n 78, *R v Choudary and Others* [2017] EWCA Crim 1606, and *Alamgir*, above n 62, courts have cemented the significance of mind-set material and left the door open to a wide range of mind-set material being relied on by the prosecution.

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that assist in the work of applying and selectively enforcing overly broad and vague preventive offices. Sufficiently robust assessments of relevance will need to be supported by narrower clarifications of these offences in order to properly define the scope that mindset may rightfully play in terrorism cases. Anything short of substantive law reform will inevitably leave a place for this kind of evidence. This is because the broad and vague form of preventive terror offences leave police, prosecutors, judges, and juries tasked with focusing broad offences on cases of genuine risk. As the law stands, this presently involves findings ways to interpret and selectively apply very broad provisions. Mindset material emerges as a tool that can help achieve this task, relying on notions of what is sinister and risky and terrorist, and conflating this with the question of what is criminal. This is symptomatic of an area of law and policy in need of greater clarity by way of parliamentary revisiting.

Conclusion

Mindset material is a very wide evidential category. It is used, throughout the justice process, to fill gaps left by broadly drafted and vaguely defined substantive law. It serves as a tool that enables the selective enforcement of offences by prosecutors, in supporting their assessment of the nature of what the accused was doing and why, and the accused themselves, as terrorist (or not). Mindset material also plays a central role at trial: to cast doubt on defences, in juries reaching verdicts, and in judicial assessments at sentencing. On the evidence, mindset material is central to a wider assessment – for prosecutors, juries, and judges alike – of whether the person in question is a terrorist or has a terrorist mindset. This raises a dual concern, as explored above: that mindset material sees focus throughout the criminal justice process shift to a question of status, and that mindset material is not a robust basis for the inference of such a status. I have examined these concerns with reference to young accused with ASD in particular, with concerns for online conduct and patterns in sentencing which merit greater attention. Incremental reform, and efforts to manage mindset material better may be important next steps. However, I have suggested that interventions short of narrowing and clarifying substantial law reform will inevitably leave a space for blunt tools, like mindset material, because broadly drafted and vaguely defined offences will continue to need to be selectively enforced.

The wider role of mindset material as a tool for selective enforcement, as outlined above, shows that we need to enquire not only about the tool itself but also about the gaps it fills. We need to be open to seeing mindset material as symptomatic of a need for more substantial reform, and for rethinking the role and limitations of the criminal law in preventing harm. This includes a reconsideration of its suitability as a means of countering terrorism. This is particularly so in terms of the serious challenges to core criminal justice principles and ideals, such as the rule of law raised through both the enactment and the implementation of pre-inchoate offences. Importantly, this paper constitutes a peek behind curtain, not an unveiling. Anti-terror law and its implementation, and discretionary practice in this area, remain in need of greater scholarly attention.

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