

Criminalising Terrorist Material Online

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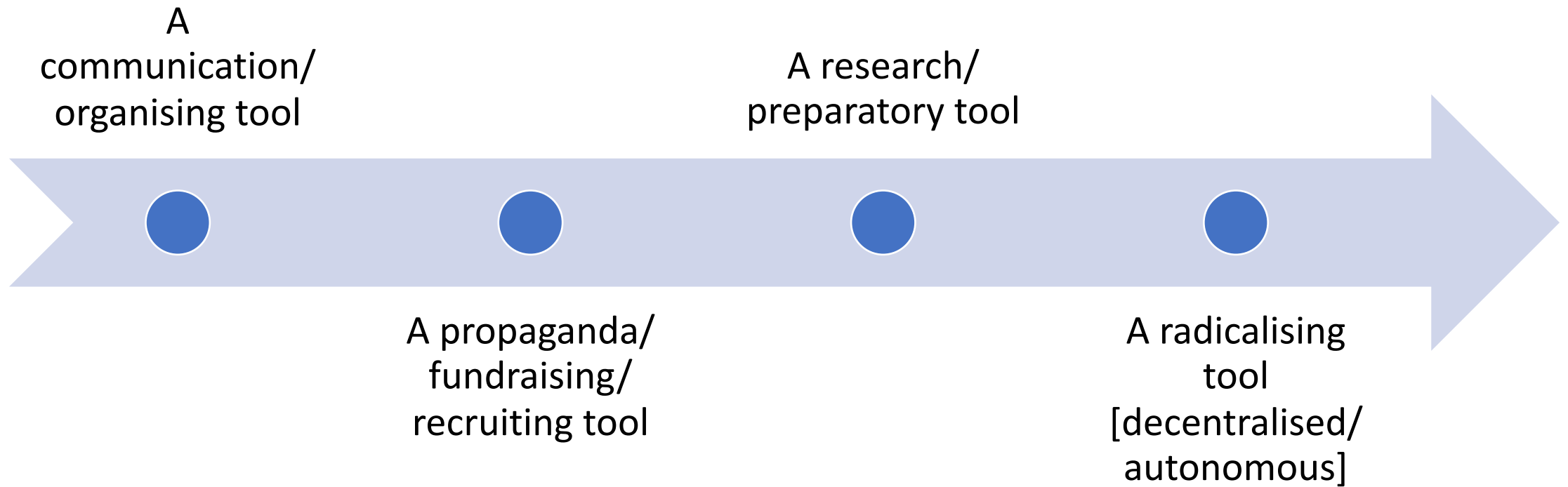
UCD Sutherland School of Law

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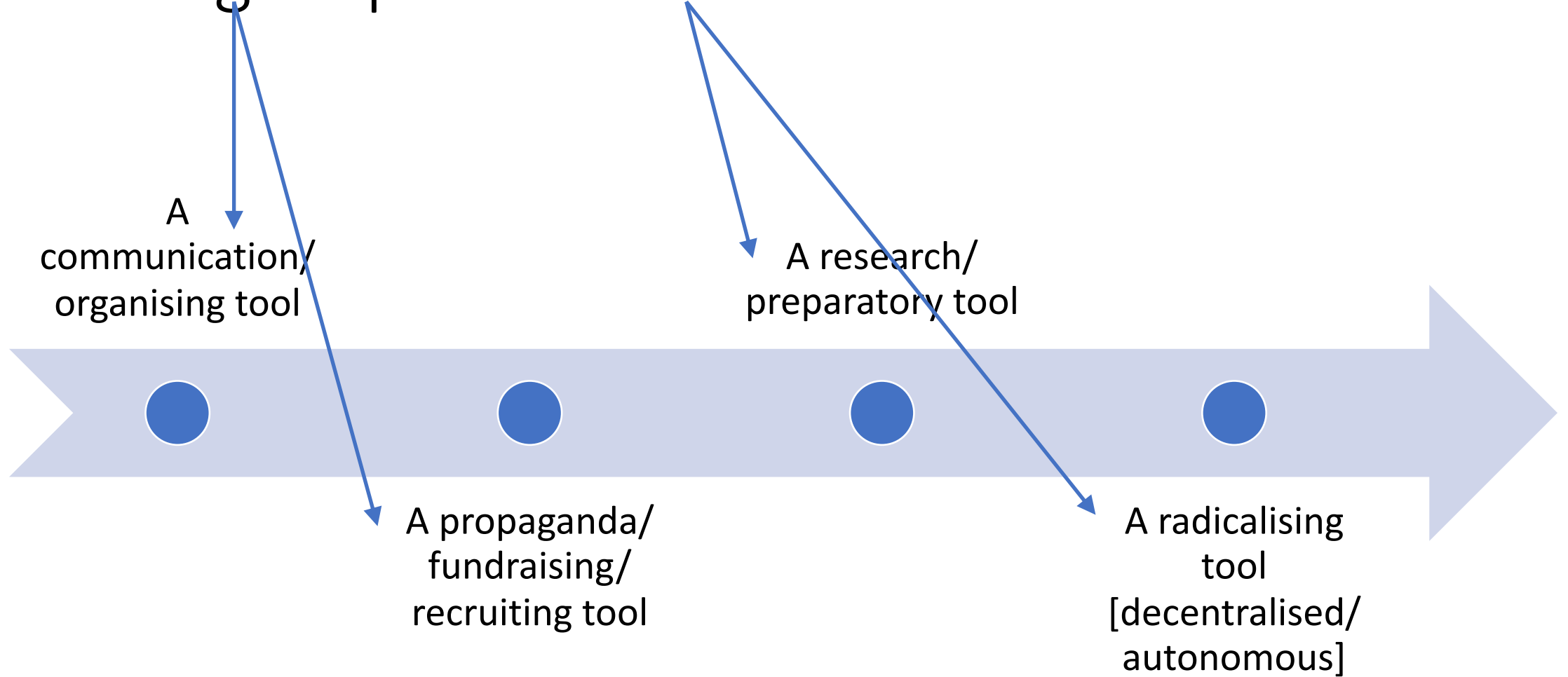
Outline

- Trends in the law on criminalising/censoring terrorist material online
- Move towards much wider precursor offences and offences implicating third parties based on failure to report
- Implications for principles of criminal law, fundamental rights, and academic/NGO research

The internet and terrorism – legal perspectives



From groups -> individual viewers



From public -> private action

Glorification/justification offences

- International development outlined by Duffy and Pitcher
 - UNSC Resolution 1624 (2005)
 - “to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts”
 - Council of Europe Convention on the Prevention of Terrorism (2005)
 - “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”
 - Directive on Combating Terrorism (2017)
 - “the distribution, or otherwise making available by any means... of a message to the public, with the intent to incite the commission of one of the offences... where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally”

Encouragement of terrorism

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

Expressing support

“A person commits an offence if the person—
(a) expresses an opinion or belief that is supportive of a proscribed organisation, and
(b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.”

- Counter-Terrorism and Border Security Act 2019 (UK)

No requirement of communication **to the public**

No requirement of **causing a danger**

No requirement that the other person **is likely to** support...

What do these prohibit?

”Consider the following examples, each of which could now potentially amount to a criminal offence:

- A person tweets that terrorists are incredibly brave to give up their lives for their cause;
- Another person, entering into the debate, re-tweets the previous statement without condemning it;
- A third person makes an online statement indicating that terrorism is the most effective way of getting a government to listen to a point of view and praises the strategy used by the Mumbai terrorists as an example.”

(Lord Carlile QC and Stuart Macdonald, “The Criminalisation of Terrorists’ Online Preparatory Acts,” in *Cyberterrorism: Understanding, Assessment, and Response*, ed. Thomas M. Chen, Lee Jarvis, and Stuart Macdonald (New York, NY: Springer New York, 2014), 155–73)

BBC



Possession offences

- E.g. s.58 Terrorism Act 2000 (UK):
 - “A person commits an offence if— (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.”
 - “It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.”
- In practice this can capture simple browsing due to cached files in internet history
- *R v. G* [2009] UKHL 13.
 - Information “useful” for terrorism? “whilst the information need not only be useful to a terrorist, it must by its very nature call for an explanation. So information on explosives would qualify (even though it might also be useful to a bank robber), but a train timetable would not.”
 - Reasonable excuse? “There must be an “objectively reasonable” basis for having this information”

Viewing offences

- Counter-Terrorism and Border Security Act 2019 (UK)
 - “the person views, or otherwise accesses, by means of the internet a document or record containing information of that kind” [useful for terrorism]
- A “one click” offence(!) (original Bill required three viewings)
- Reasonable excuse expanded slightly to include situations where:
 - “the person’s action or possession was for the purposes of—
 - (i) carrying out work as a journalist, or
 - (ii) academic research.”
- Still criminalises viewing based on simple curiosity
- Explanatory memorandum: “The offence would be committed whether the defendant was in control of the computer or was viewing the material, for example, over the controller’s shoulder.” (!)

French habitual viewing law

- “The act of habitually accessing online public communication services that exhibit messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts, and show images or representations of these acts that consist of voluntary harm to life is punishable by two years of imprisonment and a fine of €30,000. This Article is not applicable when they are accessed in good faith from normal professional activity that has the objective of informing the public, conducting scientific research, or for use as evidence in court.” (Loi no.2016-731 of 3 June 2016)
- Wider than UK law: covered viewing propaganda and killings, not merely “useful information”
- Narrower than UK law: required habitual viewing
- Struck down in 2017 as the defence was too vague; re-enacted in different form in 2018; struck down on similar grounds thereafter

Failure to report offences

Withholding information. **9.**—(1) A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—

(a) preventing the commission by any other person of a serious offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a serious offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding five years or both.

Failure to report offences

F1 [38B Information about acts of terrorism

- (1) This section applies where a person has information which he knows or believes might be of material assistance—
 - (a) in preventing the commission by another person of an act of terrorism, or
 - (b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.
- (2) The person commits an offence if he does not disclose the information as soon as reasonably practicable in accordance with subsection (3).
- (3) Disclosure is in accordance with this subsection if it is made—
 - (a) in England and Wales, to a constable,
 - (b) in Scotland, to a constable, or
 - (c) in Northern Ireland, to a constable or a member of Her Majesty's forces.
- (4) It is a defence for a person charged with an offence under subsection (2) to prove that he had a reasonable excuse for not making the disclosure.

What do these require?

- Volunteering of information
- About past and possible future offences
 - With retrospective effect (historic offences)
- Which you “believe” “might” be “of material assistance” in preventing, etc. a terrorist offence
- Disclosure to be made “as soon as [reasonably] practicable”
- Subject to an undefined “reasonable excuse” defence

Problems with failure to report offences

- Even more removed from concrete harm
- Criminalise failures to act rather than positive acts
- Relies almost entirely on state of mind of accused person
- Vague nature of offence based on belief about information which might be relevant to a crime which might take place in the future

Problems with failure to report offences

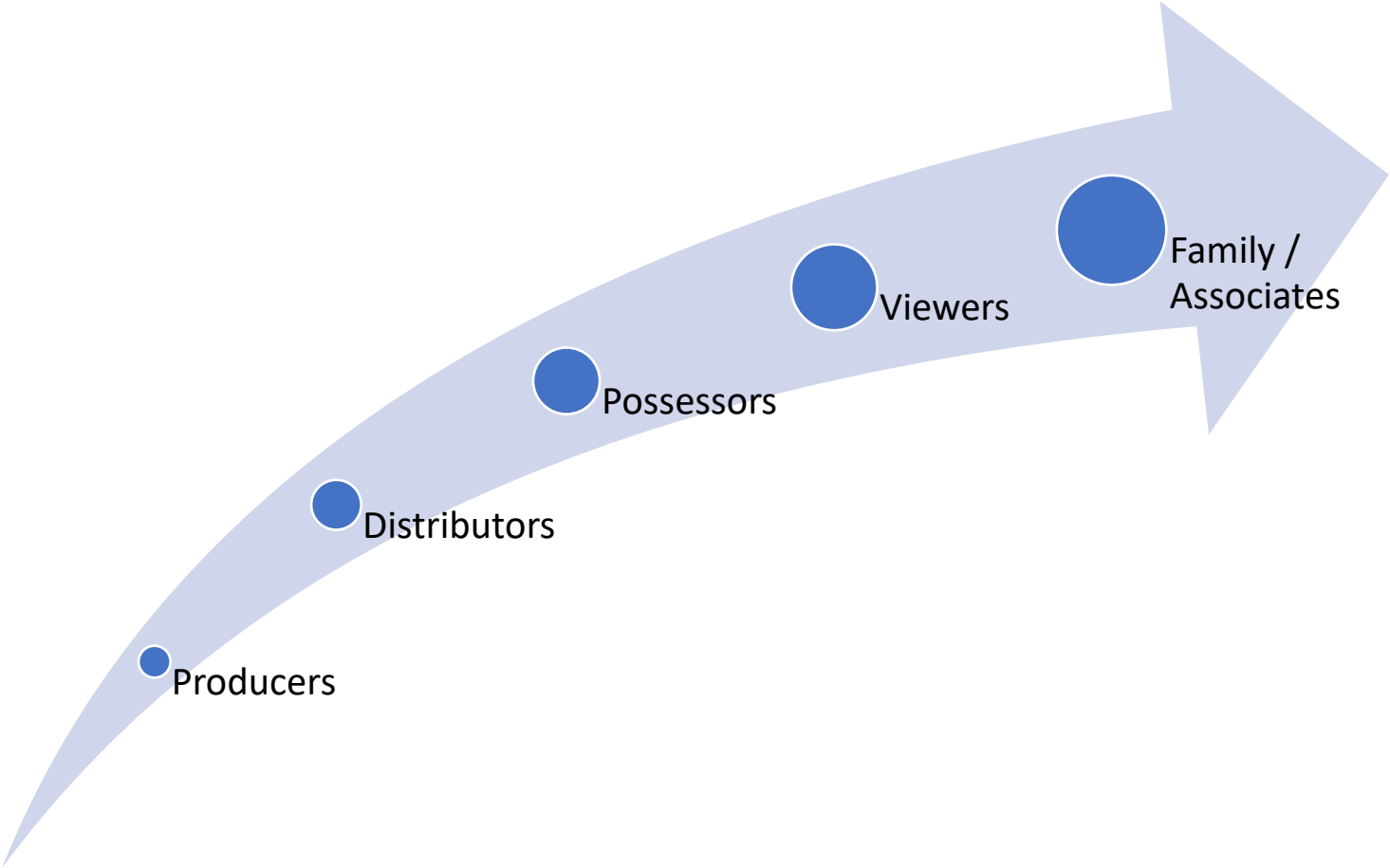
Can be abused to arrest uninvolved parties to put pressure on suspects:

2. The coercion of the applicant

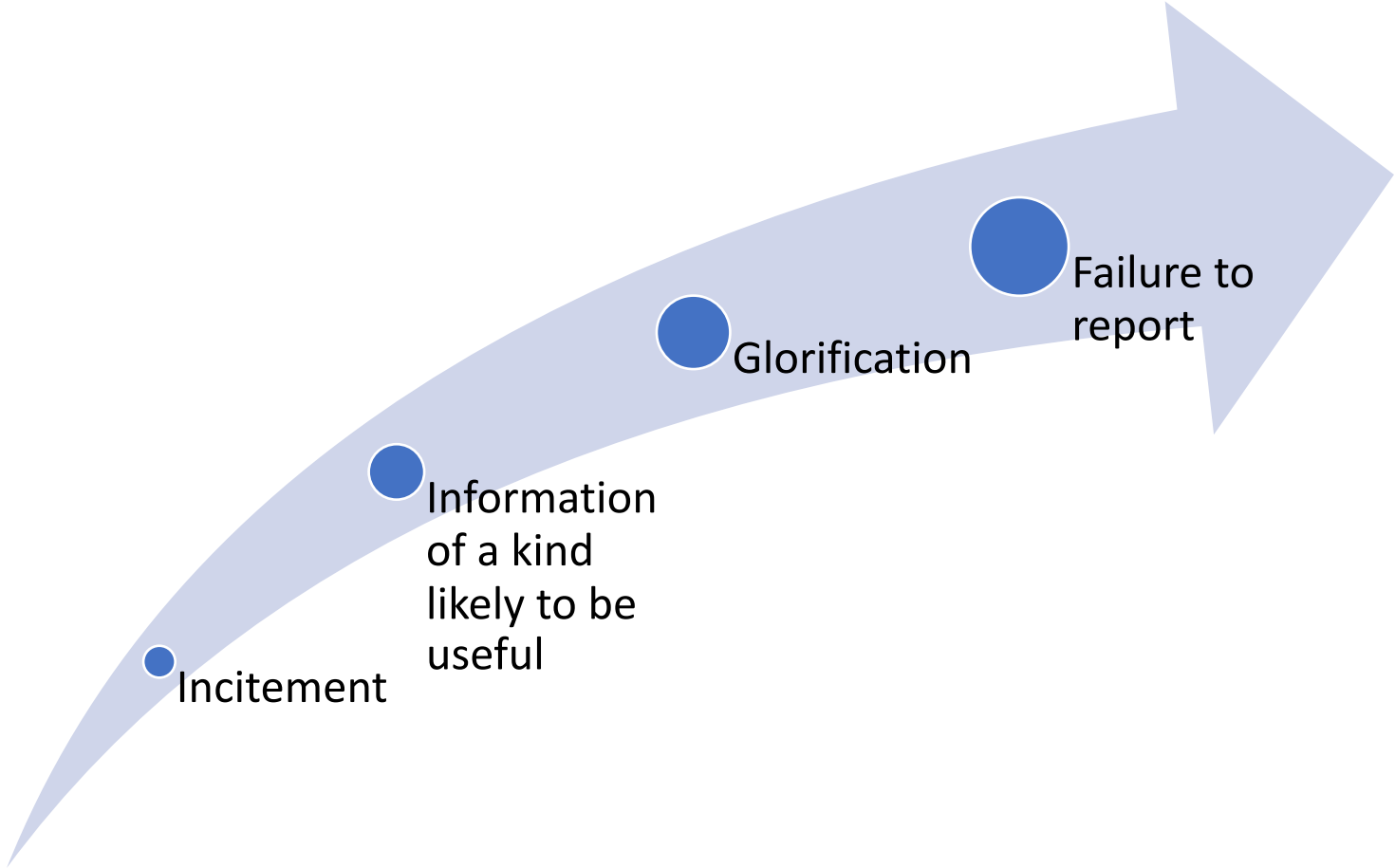
What is even more shocking, however, is that the applicant's confession occurred after clear intimidation by the police officers, wherein they arrested an obviously innocent person – “Ms G.”, the applicant's ex-girlfriend and the mother of his little daughter – in order to blackmail him with the fate of his child who would be separated from her mother pending such time as the applicant confessed. If such conduct does not qualify as police pressure, I wonder how else it could be described.

The psychological impact of these threats was assessed by the domestic courts in quite a creative way, as apparently threatening the applicant with the sufferings of his under-age daughter in being separated from her mother was by no means intimidation, but rather merely constituted an “appeal to his better nature and to his essential humanity” (see paragraph 28). Stalin's General Prosecutor, Andrey Vyshinsky, applauds from his tomb – he could never have dreamt of a more beautiful formula for the same ugly technique that was so widespread during the Great Purge, of

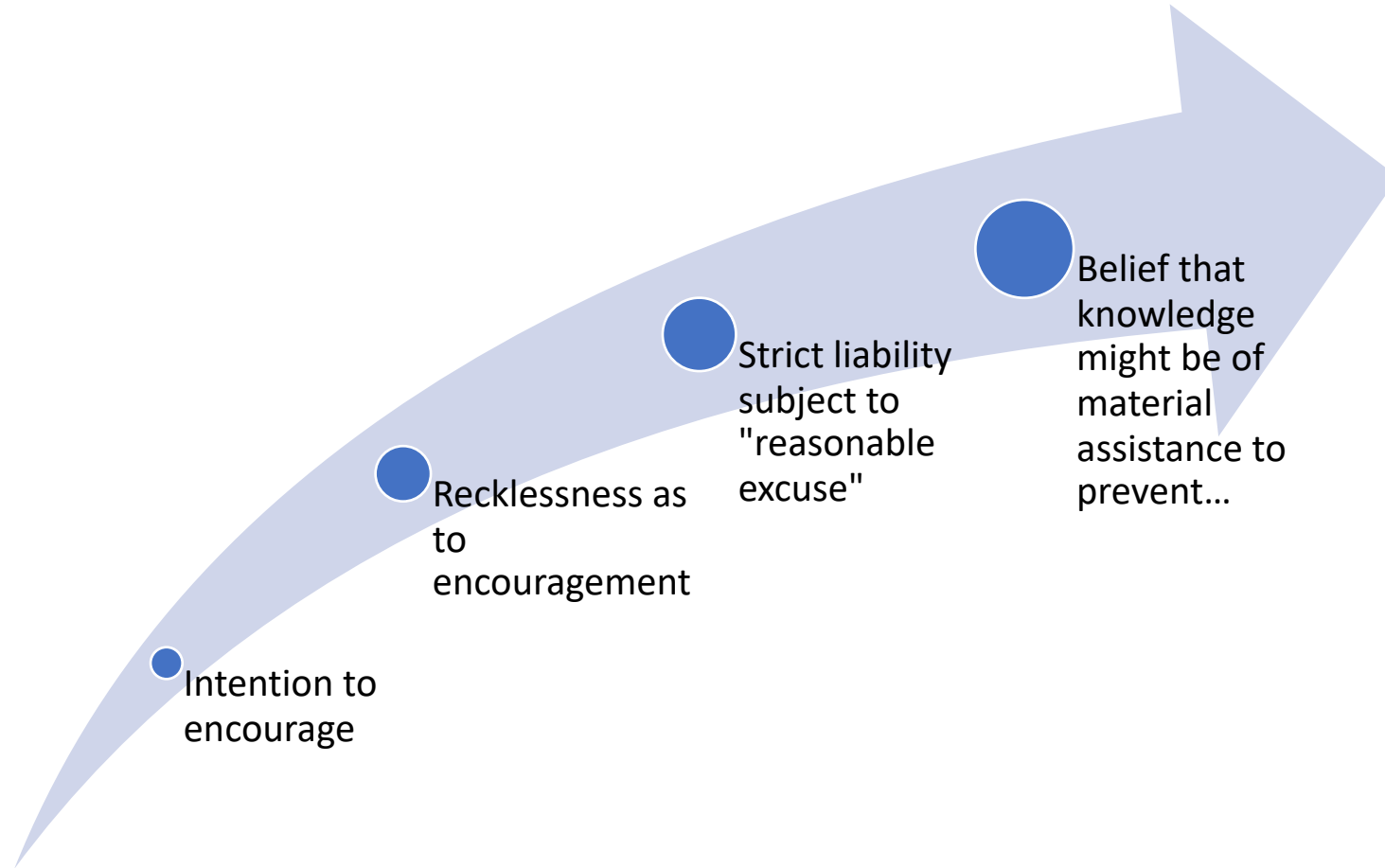
Trend 1: Who is targeted?



Trend 2: What is targeted?



Trend 3: What state of mind is targeted?



Analogies with child abuse material (CAM)?

- Similar progression from “making” to possession to viewing offences
- Both areas based on situational crime prevention/preventing corruption of viewers
 - Radicalisation equated with developing sexual interest in children
- But there are very significant differences
 - Rationales – revictimisation of children doesn’t have a terrorist equivalent
 - Legitimate reasons – civic participation, journalism, research, and NGO activity have almost no counterpart in the context of CAM

Implications

- Trend towards precursor offences
- Criminalising thought/intention rather than behaviour
- Vagueness in definition – not “prescribed by law”
 - What is “reasonable excuse”?
- Chilling effect on discussion, reading and research
 - UK viewing defences only provide for “journalists” and “academic” research – privileges institutions, undermines other civic participation
- Possession offences being used as a “consolation prize”
- Undesirable prosecutorial & police discretion/selective enforcement (“browsing while Muslim”)

Student researching al-Qaida tactics held for six days

- Lecturers fear threat to academic freedom
- Manual downloaded from US government website



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**Polly Curtis and
Martin Hodgson**

Saturday 24 May 2008
00.12 BST

A masters student researching terrorist tactics who was arrested and detained for six days after his university informed police about al-Qaida-related material he downloaded has spoken of the "psychological torture" he endured in custody.

Despite his Nottingham University supervisors insisting the materials were directly relevant to his research, Rizwaan Sabir, 22, was held for nearly a week under the Terrorism Act, accused of downloading the materials for illegal use. The student had obtained a copy of the al-Qaida training manual from a US government website for his research into terrorist tactics.

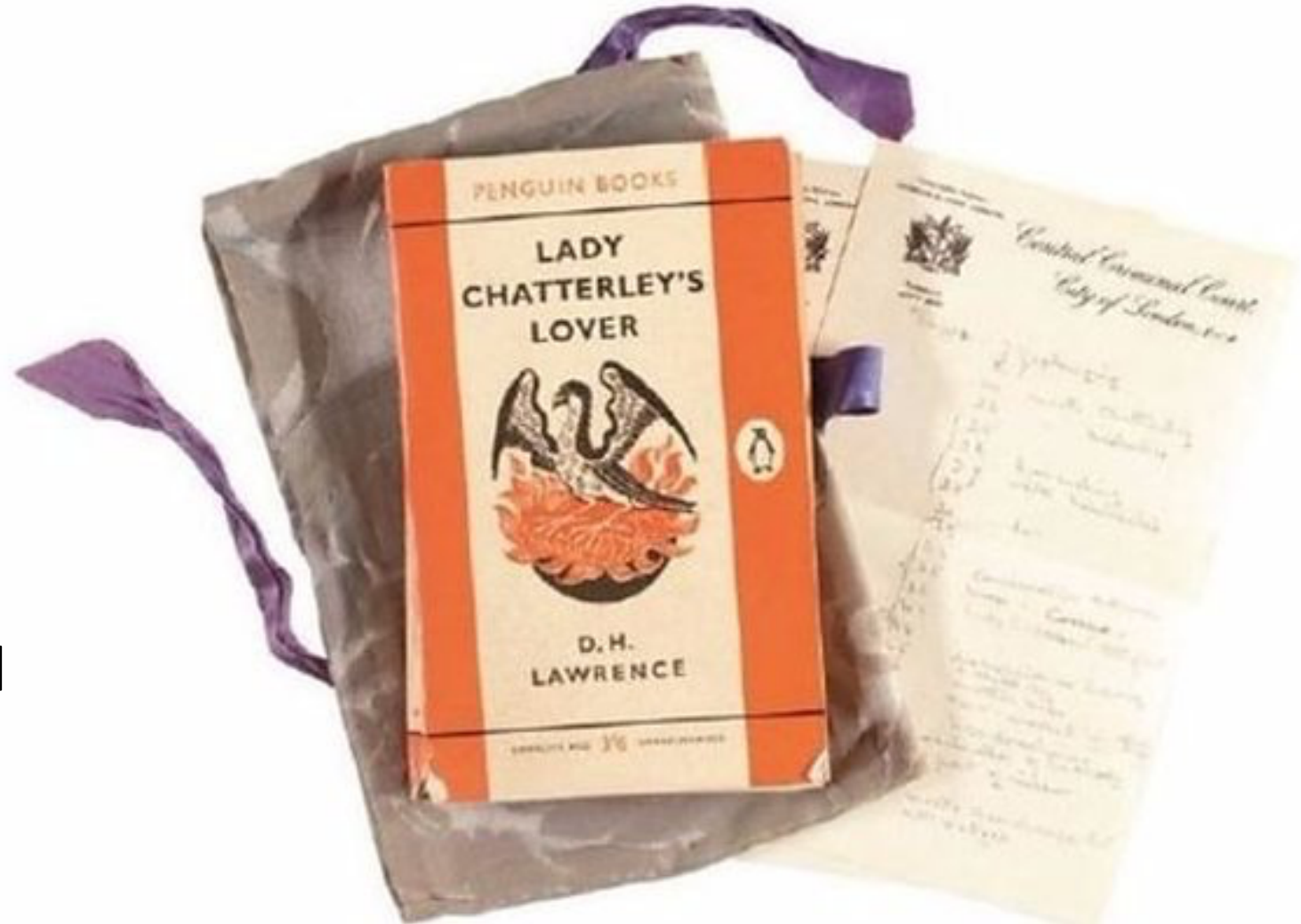
The case highlights what lecturers are claiming is a direct assault on academic freedom led by the government which, in its attempt to establish a "prevent agenda" against terrorist activity, is putting pressure on academics to become police informers.

Implications

- Excessive criminalisation
 - Severe custodial sanctions in UK/Irish law very different from modest fines in laws previously upheld by ECtHR
 - No requirement that anybody in fact be “encouraged”
- Failure to ensure necessity and proportionality (Art 10 ECHR)
- Compounded by widening definitions of “terrorism” to include e.g. disruptive/violent protest
- Justifies greater surveillance of private online communications
 - Piggybacking on architecture for child abuse material/hash value matching

Terrorist material as the new obscene publications?

- Assessed on tendency to deprave and corrupt
- Criminality dependent on context
- Effective exceptions for certain social groups / selective enforcement
- No concrete harm required



Reading

- Helen Duffy and Kate Pitcher, ‘Inciting Terrorism? Crimes of Expression and the Limits of the Law’, in *Security and Human Rights*, ed. Benjamin Goold and L Lazarus (Oxford: Hart Bloomsbury Publishing, 2018), <https://papers.ssrn.com/abstract=3156210>.
- Max Hill, “‘Law Tightened to Target Terrorists’ Use of the Internet”, *Independent Reviewer of Terrorism Legislation* (blog), 3 October 2017, <https://terrorismlegislationreviewer.independent.gov.uk/law-tightened-to-target-terrorists-use-of-the-internet/>.
- T.J. McIntyre, “Internet Censorship in the United Kingdom: National Schemes and European Norms,” in *Law, Policy and the Internet*, ed. Lilian Edwards (Oxford: Hart Publishing, 2018), <https://researchrepository.ucd.ie/bitstream/10197/10294/2/TJ%20McIntyre%20-%20Censorship%20preprint.pdf>.

Thank you.
Questions/comments?

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