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## Counter-Extremism, Fundamental Values and the Betrayal of Liberal Democratic Constitutionalism

By Julian Rivers\*

### Abstract

Over the course of the last three years, British Government counter-terrorism policy has shifted significantly to embrace “counter-extremism.” This is justified not only in terms of addressing the underlying causes of terrorism, but also in its own right as addressing the “harm” of extremism. These proposals raise fundamental questions about the limits of religious and other civil liberties. However, the problem of extremism is not new. The German public intellectual and constitutional lawyer Ernst-Wolfgang Böckenförde reflected extensively on the same problem in the context of German responses to left-wing radicalism in the mid-1970s. His work touched on both concrete legal problems as well as fundamental philosophical assumptions about the nature, characteristics, and limits of the liberal democratic constitutional state. In this article, I seek to retrieve his ideas and arguments for the current British context. I argue that the current discourse of extremism and fundamental British values risks being used as a vehicle for promoting a “progressive” public ideology of individual self-creation. This fails to take moral and religious diversity seriously, and its implementation betrays the foundations of the liberal democratic constitution. It provides striking confirmation of Böckenförde’s thesis that the liberal state is perennially prone to a totalitarian tendency to seek to generate its own distinctive ethical community. As Böckenförde recognized, what is needed instead is the recovery of a thin common morality of civic loyalty as shown pre-eminently in obedience to law.

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\* University of Bristol Law School. This article started life as a lecture for the Religion and Political Theory Centre at University College, London, on May 12, 2016. Some of the ideas were given a further airing at a conference on Ernst-Wolfgang Böckenförde’s Contributions to Theorizing the Relation Between Law and Religion at the Centre for Interdisciplinary Research, Bielefeld University, September 29 to October 1, 2016. I am grateful to participants at both events as well as to Steven Greer, Myriam Hunter-Henin, Mirjam Künkler, Cécile Laborde, Nora Markard, Simon McCrossan, and Tine Stein for their comments on various aspects of the ideas set out here, which remain my own.

## A. Introduction

In the closing paragraphs of a now-famous 1967 essay, Ernst-Wolfgang Böckenförde set out his thesis that “the liberal, secularized state draws its life from preconditions it cannot itself guarantee.”<sup>1</sup> The paradox he identified was that the program of political liberty characteristic of liberal democratic constitutionalism depends on certain prior forms of ethical community and also denies to itself the right to take steps to inculcate and nurture such a community. Any attempt to prescribe as public ideology the values on which it is based would lead back to the very totalitarianism the liberal state has sought to transcend. So, “what will the state fall back on in time of crisis?”<sup>2</sup>

It is still an open question whether the presence of radical Islam in the liberal democracies of the developed world represents a “crisis.” Governments are rather keen, for understandable political reasons, to avoid any suggestion that one religion in particular has been singled out for attention. Yet, parallels with the two closest manifestations in the British context—terrorism related to Northern Ireland and the public actions of the far-right—fail to persuade. The former was still rooted in 19<sup>th</sup> century notions of national identity and sought to align the political order with the complex mixes of ethnic, linguistic, cultural, and religious elements which constitute “unionism” and “republicanism.” Violence was generally used in a relatively disciplined, semi-militarized way for clear political ends. In that sense, the aims of both sides were intelligible within a modern political frame and potentially achievable. Above all, it was hard to portray religion as having a central role in the conflict: A marker of difference for sure, but hardly a legitimating force. As for right-wing radicalism, it has remained in the British context peripheral and reactionary, having neither a concrete political program nor major organizational strength. Right-wing radicalism poses a real risk of criminality, but not enough, as yet, to destabilize the political order.

One can understand those writers who see something new in radical Islam: a strand of a world religion aspiring towards expression in a form of political order and a legal system which is fundamentally hostile to the tradition of liberal democratic constitutionalism we have inherited.<sup>3</sup> This ideology is already socially rooted and dominant in some inner-city areas, and some of its adherents are at least willing to engage in random acts of large-scale violence to achieve their ends. Whether it actually represents an existential crisis may be

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<sup>1</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularisation [1967]*, in 2 RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

<sup>2</sup> *Id.*

<sup>3</sup> See generally CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM AND THE WEST (2010); DOUGLAS MURRAY, THE STRANGE DEATH OF EUROPE (2017).

doubted, but it certainly represents a major struggle within Islam with repercussions for all.<sup>4</sup> How is the state to respond?

In this article, I trace the British Government's response to radical Islam in its counter-extremism strategy. The government has recently moved beyond a familiar concern with terrorism, and the use of special powers to deal with the threat of terrorism, to address the ideologies which lie behind terrorism.<sup>5</sup> Here we can see signs of the latent state totalitarianism of which Böckenförde warned us. But the rise of radical Islam also forces us to consider once again the nature of the beliefs and practices which must characterize a liberal society. How can the concern to nurture forms of ethical community capable of sustaining a liberal polity be addressed without simultaneously undermining the liberal democratic political project? Böckenförde can help us in that respect also. For there are close parallels between his experience of 1970s communist extremism and our experience of Islamic extremism. The lessons he drew from that experience are equally relevant today. In what follows, I will trace the development of British counter-extremism policy (B), consider Böckenförde's views on the defense of the liberal democratic constitution (C), and set out the current human rights constraints on counter-extremist strategies (D). I will then suggest ways in which "equality and human rights" can become distorted when conceived of as fundamental values (E), before suggesting alternative strategies to respond to the problem of extremism (F) and concluding (G).

## B. The Development of British Counter-Extremism Policy

### *I. From Counter-Terrorism to Counter-Extremism*

Modern British counter-extremism policy has its roots in counter-terrorism. In 2007, Prime Minister Gordon Brown, leader of the Labour Party, introduced *Prevent* as one strand of the government's revised anti-terrorism strategy.<sup>6</sup> *Prevent* sought to address ongoing concerns about terrorism by focusing on combatting ideologies most closely associated

<sup>4</sup> See generally SARA KHAN, *THE BATTLE FOR BRITISH ISLAM: RECLAIMING MUSLIM IDENTITY FROM EXTREMISM* (2016).

<sup>5</sup> Terrorism is defined in Section 1 of the Terrorism Act 2000 as:

(a) [T]he use or threat of serious violence against a person, serious damage to property, endangering another's life, causing serious risk to the health or safety of the public, or interfering with or seriously disrupting an electronic system, which (b) is designed to influence the government or to intimidate the public, and which (c) is made for the purpose of advancing a political, religious, racial or ideological cause.

Terrorism Act 2000, c. 11, § 1 (UK).

<sup>6</sup> The other strands are labeled "Pursue," "Protect," and "Prepare." For further background, see the helpful Briefing Paper by Joanna Dawson & Samantha Godec, *Counter-Extremism Policy: An Overview* (House of Commons Library, no. 7238, Feb. 5, 2016).

with terrorism, in other words, violent extremism. It sought to address the problem of violent extremism through funding programs of community cohesion and supporting “mainstream voices” within Muslim communities.

In 2010, the new Coalition Government—comprised of Conservatives and Liberal Democrats—commissioned a review of *Prevent*, overseen by Lord Carlile of Berriew QC.<sup>7</sup> This was critical of the 2007 strategy. In particular, it expressed concern that government funding had found its way into the hands of Islamic extremists who, while they did not advocate the use of violent means, nonetheless were committed to the same political programs of radical Islam shared by terrorists. The new 2011 *Prevent* strategy sought to deal with this by including within its scope non-violent extremism. It defined “extremism” as “the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.”<sup>8</sup> Calls for the death of British armed forces overseas were also understandably considered extremist. This definition has become central in subsequent policy development.

Nonetheless, the 2011 *Prevent* strategy was noteworthy for its repeated insistence that the law would not change: “[W]e remain committed to protecting the freedom of speech which many of those same extremists set out to undermine.”<sup>9</sup> No new powers were deemed necessary. As a result, there was a clear distinction in the 2011 strategy between criminal behavior and extremist speech. This bifurcation was neatly summarized in one paragraph dealing with religious groups: “Where faith groups or institutions are supporting terrorism we will take law enforcement action. Where they are expressing views we regard as extremist those views will be subject to challenge and debate.”<sup>10</sup>

Thus, the main purpose of *Prevent* was—and still is—not to address extremism as such, but to coordinate the action of public bodies to intervene where there is evidence of a person being drawn into terrorism. Section 26 of the Counter-Terrorism and Security Act 2015 created a new and wide-ranging public-sector duty to “have due regard to the need to prevent people from being drawn into terrorism.”<sup>11</sup> The most controversial element of this duty is the inclusion of universities and colleges within the list of public bodies subject to

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<sup>7</sup> HM GOVERNMENT, REPORT TO THE HOME SECRETARY OF INDEPENDENT OVERSIGHT OF PREVENT REVIEW AND STRATEGY, 2011 (UK).

<sup>8</sup> SECRETARY OF STATE FOR THE HOME DEPARTMENT, PREVENT STRATEGY, 2011, Cm. 8092, at 107 (UK).

<sup>9</sup> SECRETARY OF STATE FOR THE HOME DEPARTMENT, CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM, 2011, Cm. 8123, ¶ 5.3 (UK).

<sup>10</sup> *Id.* at ¶ 5.71.

<sup>11</sup> Jessie Blackburn & Clive Walker, *Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015*, 79(5) MOD. L. REV. 840–70 (2016).

the new duty. An academic outcry that this requirement forced staff to monitor the opinions of their students resulted in express statutory protection for academic freedom and freedom of expression alongside the new public-sector duty.<sup>12</sup> And the Statutory Guidance issued alongside that legal duty is still careful to mark the distinction I have already noted.

[P]reventing people becoming terrorists or supporting terrorism requires challenge to extremist ideas where they are used to legitimise terrorism and are shared by terrorist groups. And the strategy also means intervening to stop people moving from extremist (albeit legal) groups into terrorist-related activity.<sup>13</sup>

However, even in the field of *Prevent*, a certain degree of conceptual slippage is already apparent. An implicit causal claim, that those holding and expressing “extreme” views are vulnerable to engaging in acts of violence, emerges often. It is of course true that those engaging in terrorist acts hold extremist opinions, but it is not obvious that all extremists will become terrorists. An ambiguous phrase is repeatedly used by senior politicians and in policy documents: “[E]xtremist views that risk drawing people into terrorism.”<sup>14</sup> Does this refer to a problematic subset of extremism—that which leads to violence—or to a causal assumption—extremism is problematic because it leads to violence? Strictly speaking, any such slippage is legally irrelevant. As a matter of law, the *Prevent* guidance cannot override the underlying statutory duties to have “due regard” to the need to prevent people being drawn into terrorism as well as “particular regard” for freedom of speech and academic freedom.<sup>15</sup> Higher Education Institutions must make their own judgments in such matters. Yet, the way in which official guidance and institutions reconcile those imperatives can be more or less expansive into the extremist penumbra of terrorism. Additionally, it is hardly conducive to the rule of law if institutions effectively have to be invited to depart from clear government guidance in order to act lawfully.<sup>16</sup>

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<sup>12</sup> Counter-Terrorism and Security Act 2015, c. 6, § 31 (UK). One letter to THE GUARDIAN on Feb. 3, 2015 was signed by over 500 senior academic staff. The intemperate debate which followed is helpfully clarified by Steven Greer & Lindsey Bell, *Counter-Terrorist Law in British Universities: A Review of the “Prevent” Debate*, PUB. L. 84–105 (2018).

<sup>13</sup> HOME OFFICE, REVISED PREVENT DUTY GUIDANCE: FOR ENGLAND AND WALES, 2015, ¶ 8 (UK).

<sup>14</sup> See, e.g., HOME OFFICE, PREVENT DUTY GUIDANCE: FOR HIGHER EDUCATION INSTITUTIONS IN ENGLAND AND WALES, 2015, at 4 (UK).

<sup>15</sup> See *R (Butt) v. Sec’y of State for the Home Dep’t* [2017] EWHC (Admin) 1930 [61].

<sup>16</sup> In *Butt*, Ouseley discussed this problem at some length, concluding that the Guidance was not unlawful because the Minister had had due regard to the law in formulating it, but suggesting that it may be appropriate for institutions to depart from it. See *id.* at paras. 41–68.

*II. Countering Extremism in Law*

Two early exceptions to the otherwise tolerably clear distinction between extra-legal “challenging” of extremist ideas and new legal powers to deal with terrorist activity lay in the partially linked fields of education and charity regulation.

In the case of schools, efforts to combat extremism were given added impetus by the “Trojan Horse” scandal in which it was alleged that conservative Muslims had systematically sought to take control of a number of state schools in Birmingham with a majority of Muslim pupils.<sup>17</sup> In fact, the vast majority of schools with an official Muslim ethos are independent and not state-maintained.<sup>18</sup> The government has taken steps to ensure that all schools, whether within the state-maintained sector or the independent sector, promote “fundamental British values.” In the case of state-maintained schools, the vehicles have been the Teachers’ Standards, which apply to the training, appraisal, and discipline of teachers, along with the advice issued in respect of the duty to provide for the “social, moral, spiritual, and cultural development” of pupils.<sup>19</sup> In 2012, the Teachers’ Standards were reformed and given statutory force.<sup>20</sup> They contain this statement: “Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by . . . not undermining fundamental British values, including democracy, the rule of law, individual liberty and mutual respect, and tolerance of those with different faiths and beliefs.”<sup>21</sup>

In 2014, the Department for Education published guidance on promoting fundamental British values in the context of social, moral, spiritual, and cultural (SMSC) development<sup>22</sup> and the Office for Standards in Education (Ofsted) common inspection framework (August 2015) sets out how conformity is assessed as part of the government inspection process.

In the case of independent schools, the law has imposed direct obligations on the proprietors of schools with increasing insistence. Until the turn of the millennium, the law was remarkably relaxed about the standards applicable to independent schools, seeing this as largely a matter for the parents. Schools which only serve the interests of a small self-

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<sup>17</sup> DEPARTMENT FOR EDUCATION, REPORT INTO ALLEGATIONS CONCERNING BIRMINGHAM SCHOOLS ARISING FROM THE ‘TROJAN HORSE’ LETTER, 2014, HC 576 (UK).

<sup>18</sup> The Association of Muslim Schools lists 156 in 2014, 13 of which are state-funded. For a recent discussion, see JOHN R. BOWEN, ON BRITISH ISLAM 199–205 (2016).

<sup>19</sup> Education Act 2002, c. 32, § 78 (UK).

<sup>20</sup> The Education (School Teachers’ Appraisal) (England) Regulations 2012 SI 2012/115 reg. 6; The Teachers’ Disciplinary (England) Regulations 2012 SI 2012/560 reg. 4.

<sup>21</sup> DEPARTMENT FOR EDUCATION, TEACHERS’ STANDARDS, 2011 (Eng.).

<sup>22</sup> DEPARTMENT FOR EDUCATION, PROMOTING FUNDAMENTAL BRITISH VALUES AS PART OF SMSC IN SCHOOLS, 2014 (Eng.).

enclosed religious community were allowed to exist. In the one case on this point to reach the High Court, Woolf J.—as he then was—interpreted the basic legal requirements in broad and tolerant terms. Education would be suitable if it

[P]rimarily equips a child for life within the community of which he is a member rather than the way of life in the country as a whole, as long as it does not foreclose the child's option in later years to adopt some other form of life if he wishes to do so.<sup>23</sup>

State regulation should be “sensitive to the traditions of the minority sect” with interference not going beyond what is necessary.

This relaxed attitude changed in 2003, when new standards were introduced applying SMSC requirements to independent schools.<sup>24</sup> The regulations were revised in 2012 to introduce for the first time a new precept: “(vi) Encourage pupils to respect the fundamental British values of democracy, the rule of law, individual liberty and mutual respect and tolerance of those with different faiths and beliefs.”<sup>25</sup> The regulations also contained new requirements to avoid political partisanship and present a balance of opposing views.

In 2014, this requirement was strengthened in various ways. Fundamental British values were moved to the top of the list and given a separate paragraph of their own, with an obligation to promote them actively. In addition, in a quiet recognition of the lived reality of *Shari'a* among some Muslim communities in the UK, “respect the law” was clarified as “respect the civil and criminal law of England”. The fifth precept was reversed such that instead of assisting pupils to appreciate and respect their own and other cultures in a way that promotes tolerance and harmony, schools became obliged to “further tolerance and harmony between different cultural traditions by enabling pupils to acquire an appreciation of and respect for their own and other cultures.” And two new precepts were added: “(vi) encourage respect for other people, paying particular regard to the protected characteristics set out in the Equality Act 2010; and (vii) encourage respect for democracy and support for participation in the democratic process, including respect for the basis on which the law is made and applied in England.”<sup>26</sup>

<sup>23</sup> R v. Secretary of State for Education and Science ex parte Talmud Torah Machzikei Hadass School Trust, THE TIMES, Apr. 12, 1985.

<sup>24</sup> Education Act 2002, § 157; Education (Independent School Standards) (England) Regulations 2003 SI 2003/1910 sch. 1 ¶ 2.

<sup>25</sup> Education (Independent School Standards) (England) (Amendment) Regulations 2012 SI 2012/2374 sch. 1(2) ¶ 5.

<sup>26</sup> Education (Independent School Standards) Regulations 2014 SI 2014/3283 sch. 1 ¶ 5.



The legislation also contained new powers to prohibit those who have engaged in conduct aimed at undermining fundamental British values from participating in the management of independent schools, and also ensured that local authorities do not fund early years' provision by providers who do not actively promote fundamental British values.<sup>27</sup>

In the case of charities, the Charity Commission Guidelines cover both legal obligations and "good practice."<sup>28</sup> Legally, trustees and managers need to avoid encouraging or glorifying terrorism, and to avoid inciting racial or religious hatred as well as other criminal acts including public order offenses. But beyond that "there are a range of views that may not be appropriate for a charity to support under charity law."<sup>29</sup> The guidance continues: "If a charity provides a platform for the expression or promotion of extremist views, this is not likely to be in furtherance of the charity's purpose or comply with the public benefit requirement. Trustees are also likely to be in breach of their fiduciary duties."<sup>30</sup>

The Guidance also points out that the promotion of views which are not normal, or traditional, or which are controversial, does not necessarily mean that they are inappropriate. It mentions rights to freedom of expression and religion. But the overall effect is the creation of a considerable area of uncertainty around what beliefs and opinions a charity can promote. Wise trustees would steer well clear of anything even vaguely "extreme." Such conceptual slippage is not unfamiliar in the case of charity regulation generally, which has addressed other related problems such as child safeguarding with a similar lack of legal foundation.<sup>31</sup> The Multi-Agency Child Safeguarding Policy published in March 2015 contains the interesting assertion that voluntary and private sector organizations should adopt the same arrangements as public bodies.<sup>32</sup> There is no statutory basis for this; it is pure soft law.

The Charities (Protection and Social Investment) Act of 2016 amends the Charities Act 2011 to give new powers to the Charity Commission, allowing it to disqualify individuals from acting as charity trustees or senior managers. As well as covering those who have committed a range of criminal offenses, the power contains a catch-all provision in relation

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<sup>27</sup> Independent Educational Provision in England (Prohibition on Participation in Management) Regulations 2014 SI 2014/1977; School and Early Years Finance (England) Regulations 2014 SI 2014/3352.

<sup>28</sup> CHARITY COMMISSION, PROTECTING CHARITIES FROM ABUSE FOR EXTREMIST PURPOSES, 2013 (UK).

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.*

<sup>31</sup> CHARITY COMMISSION, STRATEGY FOR DEALING WITH ISSUES IN CHARITIES INVOLVING THE SAFEGUARDING OF VULNERABLE PEOPLE, 2013 (UK).

<sup>32</sup> DEPARTMENT FOR EDUCATION, WORKING TOGETHER TO SAFEGUARD CHILDREN, 2015, ¶ 43 (UK).

to “any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.”<sup>33</sup> The Charity Commission Policy document, outlining how it intends to use this power, does not expressly refer to “extremist” activity, but it is still broadly enough phrased to extend this far.<sup>34</sup>

### *III. Extremism as a Harm in its Own Right*

In October 2015, the government published a new Counter-Extremism Strategy.<sup>35</sup> An immediate shift in thought was apparent. From now on, extremism was to be treated as a social problem in its own right. “. . . We must go further. We must counter the ideology of non-violent and violent extremism alike.”<sup>36</sup> “The overriding purpose of this strategy is to protect people from the harm caused by extremism.”<sup>37</sup>

This is coupled with an implicit hypothesis that true religions and beliefs are compatible with each other and are not extremist. The Strategy quoted Lord Ahmad (the Home Office Minister then responsible for counter-extremism) approvingly:

Our faith communities live, learn and breathe alongside each other; indeed they give oxygen to each other to strengthen the harmonious society we all value. This shows the extent of diversity in our great country. Together we are one family and that is where we reveal our greatest strength<sup>38</sup> . . . . We will therefore commission an independent review to understand the extent to which Shari’a is misused . . . .<sup>39</sup>

The changed assumptions of the 2015 Strategy are striking: There are true and false interpretations of religions, and government can distinguish between them. In particular,

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<sup>33</sup> Charities Act 2011, c. 25, § 181(7) Condition F (UK).

<sup>34</sup> CHARITY COMMISSION, POWER TO DISQUALIFY FROM ACTING AS A TRUSTEE, 2016, at 4 (UK). The Charity Law Association has criticized the policy for its lack of clarity and predictability.

<sup>35</sup> HOME DEPARTMENT, COUNTER-EXTREMISM STRATEGY, 2015, Cm. 9148 (UK).

<sup>36</sup> *Id.* at ¶ 39.

<sup>37</sup> *Id.* at ¶ 41.

<sup>38</sup> *Id.* at ¶ 84.

<sup>39</sup> *Id.* at ¶ 48; HOME DEPARTMENT (COUNTER-EXTREMISM UNIT), THE INDEPENDENT REVIEW INTO THE APPLICATION OF SHARIA LAW IN ENGLAND AND WALES, 2018, Cm. 9560 (UK). The Review was chaired by Professor Mona Siddiqui.

*Shari'a*—properly used—supports Western-style liberal democracy, or, at any rate, does not support “extremism.” Controversy about religious and political values is peripheral; underneath the superficial differences we all basically agree. Being exposed to, and coming to believe, certain views—“extremist views”—is a harm from which the government can and should protect people, particularly children. The government needs new legal powers to do so.

Currently, very little concrete evidence exists to show for these policy proposals. The Queen’s Speech delivered on May 18, 2016 repeated promises of legislation made a year previously. These included new powers to ban extremist organizations, powers to restrict the activities of extremist individuals, and powers to restrict access to premises which are repeatedly used to support extremism. There would also be new powers for Ofcom—the Office of Communications which regulates telecommunications—in relation to channels which broadcast extremist content, and an extension of the Disclosure and Barring Service to enable employers to prevent extremists from working with children.<sup>40</sup> In one area, a major change was proposed in some detail. The Counter-Extremism Strategy expresses concern that “some supplementary schools may be teaching children views which run contrary to our shared values, encouraging hatred of other religions.”<sup>41</sup> The context implies that the concern lies particularly with some supplementary Islamic schools (*madrassas*). In November 2015, the Department for Education published proposals on how to regulate what it calls “education in out-of-school settings.”<sup>42</sup> Subsequently, the Welsh Government published similar proposals.<sup>43</sup>

The Consultation Document set out the basic elements of a completely new system of regulation: Compulsory registration by the Office for Standards in Education (Ofsted) to ensure compliance with certain standards, sanctions to prevent individuals who have failed to register or who have breached the standards from working with children, and to prevent the use of inadequate premises. The applicable standards included “undesirable teaching, for example teaching which undermines or is incompatible with fundamental British values, or which promotes extremist views.”<sup>44</sup> The proposals covered all forms of “intensive education,” defined as more than 6–8 hours a week, whether regularly or “for a fixed period of time, for example during school holidays or in the run up to exams.”<sup>45</sup> The paper referred to “tuition, training or instruction,” as well as “activities and education for

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<sup>40</sup> Queen’s Speech: Background Briefing Notes (May 18, 2016), at 49.

<sup>41</sup> COUNTER-EXTREMISM STRATEGY, *supra* note 35, at ¶ 74.

<sup>42</sup> DEPARTMENT FOR EDUCATION, OUT-OF-SCHOOL EDUCATION SETTINGS: CALL FOR EVIDENCE, 2015 (UK).

<sup>43</sup> WELSH GOVERNMENT CONSULTATION DOCUMENT, OUT-OF-SCHOOL EDUCATION SETTINGS, 2016 (Wales).

<sup>44</sup> OUT-OF-SCHOOL EDUCATION SETTINGS: CALL FOR EVIDENCE, *supra* note 42, at ¶ 3.19.

<sup>45</sup> *Id.* at ¶ 3.7.

children in many subjects including arts, language, music, sport and religion.”<sup>46</sup> In short, any structured and supervised activity with minors outside the home for more than the threshold number of hours in any given week, including the activity of churches and other religious groups, would be covered.

This would have been a remarkable expansion of government oversight, and it generated a very large public response.<sup>47</sup> Political debate in 2016 showed continued and considerable confusion between illegal, unregistered and unregulated schools, legal home schooling, unregulated extra-curricular youth clubs and activities, and—an admittedly complex problem of—the use of youth clubs and activities in partial fulfilment of the parental legal duty to provide an efficient and suitable education which is basically taking place through home-schooling.

The message that emerges from the Government is mixed. The Counter-Extremism Strategy states that there will be strong safeguards for any new power, a high level of judicial scrutiny, and clear guidance for the police and local authorities. These powers will not be used against privately-held views or people expressing religious beliefs. The Government will not curtail the democratic right to protest or close down debate or limit free speech.<sup>48</sup> As time passed, there were repeated hints that Home Office lawyers were having considerable difficulty in drafting measures which were legally robust and human rights compliant.<sup>49</sup> It was then reported from sources supposedly close to the Home Office that the counter-extremism proposals were close to “sinking without trace,”<sup>50</sup> and they now seem to have been quietly dropped. The turmoil of Brexit may well have had a part to play here as well.

Although concrete legal proposals for new powers have been sidelined for the present, the strategy still has a place in the Home Office’s five-year plan.<sup>51</sup> That plan reports the

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<sup>46</sup> *Id.* at ¶ 2.5.

<sup>47</sup> Lord Nash reported that over 18,000 had been received. House of Lords, vol. 777, col. 1953 (Jan. 11, 2017), <https://hansard.parliament.uk/Lords/2017-01-11/debates/DB30E95B-8165-4766-9944-73B6776936C6/ChildrenSafeguarding>.

<sup>48</sup> COUNTER-EXTREMISM STRATEGY, *supra* note 35, at ¶¶ 111–15.

<sup>49</sup> On April 26, 2017, there was a telling exchange in the House of Lords on this problem. Lord Morris of Aberavon (Labour) asked, “My Lords, can extremism ever really be legally defined?” Baroness Williams of Trafford (Minister of State, Home Department) responded, “It will be legally defined when it is defined in law.” House of Lords, vol. 782, col. 1385 (Apr. 26, 2017), <https://hansard.parliament.uk/Lords/2017-04-26/debates/AF6812B2-EF43-4CDD-866D-7810C8840151/TerrorismDomesticExtremism>.

<sup>50</sup> Mark Townsend, *Theresa May’s Counter-Terrorism Bill Close to ‘Sinking Without Trace’*, THE GUARDIAN (Jan. 28, 2017), <https://www.theguardian.com/politics/2017/jan/29/theresa-may-counter-terrorism-bill-sinking-without-trace-extremism-british-values>.

<sup>51</sup> HOME OFFICE, SINGLE DEPARTMENTAL PLAN 2015 TO 2020, 2016 (UK).

establishment of a new Office for Counter-Extremism to coordinate strategy as well as a cross-government Extremism Analysis Unit “to identify and provide analysis of individuals, groups or issues of concern and to lead the government’s work on understanding trends in extremist attitudes across the country.”<sup>52</sup> The use of information gathered by the Extremism Analysis Unit to characterize an individual as an “extremist” has recently survived its first legal challenge.<sup>53</sup> And if the 2017 Conservative Party Manifesto showed signs of a more cautious approach to policy development—noting that “we need to learn from how civil society and the state took on racism”<sup>54</sup>—it also committed the government to the establishment of a new Commission for Countering Extremism. On January 24, 2018, the Government announced that the new Commission will be led by Sara Khan.

A further element of policy development has recently been added by Dame Louise Casey in her substantial review of opportunity and integration in modern Britain.<sup>55</sup> In addition to strengthening the emphasis on “British values” in education and the acquisition of citizenship, she recommends the creation of a new oath for all holders of public office to protect fundamental British values. The Casey Review discusses problems of extremism at several points, but leaves problems of definition unresolved.<sup>56</sup> Without ever committing to clear boundaries, extremism is associated in the Review with “division” and “hate,”<sup>57</sup> “regressive attitudes” on issues such as gender equality and sexual orientation,<sup>58</sup> “inequality,” and “intolerance.”<sup>59</sup> Further evidence of an expansive tendency in non-legal definitions of extremism can also be seen in the latest revision to the Child Safeguarding Guidelines. For the first time, extremism is expressly mentioned as a threat to the welfare of children,<sup>60</sup> and the “official” definition of extremism found in the 2015 strategy is glossed as follows:

Extremism goes beyond terrorism and includes people  
who target the vulnerable—including the young—by

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<sup>52</sup> *Id.* at ¶ 1.1.

<sup>53</sup> *R (Butt) v. Sec’y of State for the Home Dep’t* [2017] EWHC (Admin) 1930 (Further actions, for defamation, are ongoing.).

<sup>54</sup> FORWARD TOGETHER: THE CONSERVATIVE AND UNIONIST PARTY MANIFESTO 2017, 55 (May 17, 2017).

<sup>55</sup> DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT, THE CASEY REVIEW, 2016 (UK).

<sup>56</sup> *Id.* at ¶¶ 9.16–9.27.

<sup>57</sup> *Id.* at ¶ 1.13.

<sup>58</sup> *Id.* at ¶ 8.23.

<sup>59</sup> *Id.* at ¶ 8.34.

<sup>60</sup> DEPARTMENT FOR EDUCATION, WORKING TOGETHER TO SAFEGUARD CHILDREN: A GUIDE TO INTER-AGENCY WORKING TO SAFEGUARD AND PROMOTE THE WELFARE OF CHILDREN, 2018, at 25 (UK).

seeking to sow division between communities on the basis of race, faith or denomination; justify discrimination towards women and girls; persuade others that minorities are inferior; or argue against the primacy of democracy and the rule of law in our society.<sup>61</sup>

In her speech to the Republican party conference on January 26, 2017, Prime Minister Theresa May claimed that the UK was world-leading in the prevention of violent extremism, and that there was a continuing need to “address the whole spectrum of extremism, starting with the bigotry and hatred that can so often turn to violence.”<sup>62</sup> Even if the only clear legal instantiation of attempts to counter non-violent extremism is so far to be found in schools, the cumulative effect of various other proposals, ambiguous statutory guidance, and political debate since 2015 has been to blur the boundaries of extremism and detach it from its origins in counter-terrorism. Government policy has created a penumbra of public suspicion around those who are perceived to hold “extremist” views, whether those views are violent or not. At the same time, it is increasingly unclear what exactly extremism is.

### **C. Ernst-Wolfgang Böckenförde in Defense of the Liberal Democratic Constitution**

There are good reasons for considering Böckenförde’s writings in the context of the current British debate about extremism. As a result of the experience of the Weimar Constitution’s vulnerability to totalitarian evisceration, the German Basic Law contains numerous provisions to defend itself. Article 1 of the Basic Law roots all state power in the duty to respect and protect human dignity, the protection of human rights, and the subjection of all organs of state to the fundamental rights of the Basic Law. Article 20 states that Germany is a democratic and social federal state. The “eternity clause” of Article 79(3) makes it impossible to amend the fundamental principles of Articles 1 and 20. Article 19(2) protects the essential core of each fundamental right even from legislative limitation. Article 9(2) prohibits associations with criminal objects or which are directed against the constitutional order. Article 18 denies the protection of freedom of expression, association, and assembly to those who use those rights to fight against the “free democratic basic order.” Article 21(2) renders unconstitutional those political parties whose object or actions threaten the free democratic basic order. Thus, awareness of the vulnerability of liberal democratic constitutionalism is already written into the text of the German Basic Law at several points.

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<sup>61</sup> *Id.* at 110.

<sup>62</sup> Prime Minister’s Speech to the Republican Party Conference, (Jan. 26, 2017), <https://www.gov.uk/government/speeches/prime-ministers-speech-to-the-republican-party-conference-2017>.

In 1972, public concern about the threat of communist terrorism by the *Rote Armee Fraktion* and the fear of radicalization within the German public service led the Chancellor Willy Brandt to issue a controversial decree (*Radikalenerlass*) requiring all civil servants—a broad concept, which includes, for example, teachers and university academic staff—to show personal loyalty to the values of the German constitution.<sup>63</sup> The order initiated a practice of intensive questioning of current and potential civil servants about their past associations and activities in an attempt to elicit their ideological sympathies. And it led to the exclusion of individuals who had, for example, participated in public demonstrations as students or who had temporarily joined left or right-wing extremist organizations. Although it had no clear foundation in the Basic Law, the Federal Constitutional Court declared the restrictions on public service lawful in 1975.<sup>64</sup>

As a public intellectual and constitutional lawyer in this context of German militant democracy, Böckenförde reflected extensively on the problem of the limits of the liberal democratic constitution. It is striking that he never adopted the idea of militant democracy.<sup>65</sup> In his 1978 essay, *The State as an Ethical State*, Böckenförde engages with Hegel's vision of the state as a spiritual and ethical unity which transcends and subsumes the individual.<sup>66</sup> He argues that the modern state must indeed be a unit of peace, authoritative decision-making, and power. In order to protect everyone, the state must be an order of domination which is also potentially capable of oppressing everyone. But its purpose is to secure fundamental human life goals: external peace, security of life and rights, liberty, welfare, and culture. These goods are not transpersonal; they are rooted in the liberty and self-realization of each individual equally. This is the ethical significance of the state. Anything beyond or above it, in Hegel's sense, leads to totalitarianism. In particular, Böckenförde argued that the state is emphatically not a unit of moral conviction (*Gesinnungseinheit*): "Translated into practice, an unquestioned political faith as the foundation of the state means nothing other than a state-administered and state-fostered political ideology, a secularized version of the classical polis religion, by means of which politics lays hold of the disposition (*Gesinnung*) of the individual."<sup>67</sup>

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<sup>63</sup> For a brief background, see Mirjam Künkler & Tine Stein, *Böckenförde's Political Theory of the State*, in ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 47–49 (Mirjam Künkler & Tine Stein eds., 2017).

<sup>64</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 22, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 334.

<sup>65</sup> I am grateful to Tine Stein for making this point.

<sup>66</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 96 (Mirjam Künkler & Tine Stein eds., 2017).

<sup>67</sup> *Id.* at 97.

The state can be protective and supportive of its underlying values, but it must not go beyond that: “The order of freedom must set itself apart from the order of unfreedom also—and especially—by the methods of its defence.”<sup>68</sup>

The essay developed ideas which Böckenförde had already contributed to the wide-ranging public debate about “fundamental values” (*Grundwertedebatte*) in the late 1970s.<sup>69</sup> In response to the concerns of Roman Catholic bishops about the liberalization of law, he denied that it was the task of the state to preserve an “ethical consciousness” by citizens. Instead, his conception of the limited state led him to take clear positions in three areas of debate relevant for the current British context: The use of special powers, the rights of extremists, and the interpretation of fundamental rights.

First, in respect of the state of emergency and special powers to deal with terrorism, he was keen to preserve as far as possible the rule of law.<sup>70</sup> This meant that if necessary, the state should use strictly limited and temporary executive measures, the exercise of which would be subject to parliamentary and judicial oversight. Although the recourse to emergency powers might seem illiberal, Böckenförde’s point was that the visibility of emergency measures—and accountability for their use—would prove less of a longer-term threat to the law of a free society. By virtue of their extraordinary nature, they preserve—rather than corrupt—the regular law.<sup>71</sup>

Second, “the so-called enemies of freedom do not lose their rights.”<sup>72</sup> Böckenförde mounted a vigorous critique of the attempts to exclude extremists—or, “radicals” in the then-current term—from public employment.<sup>73</sup> He observed a chilling textual parallel between the 1933 Nazi law to “restore the civil service” and Brandt’s 1972 decree. The 1933 order had stated that civil servants stood “in a public law relationship of service and loyalty to the Führer and the empire” and that only those “who can be guaranteed at all

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<sup>68</sup> *Id.* at 100.

<sup>69</sup> Böckenförde had ghost-written Chancellor Helmut Schmidt’s 1976 speech, *Ethos and Law in State and Society*. See Künkler & Stein, *supra* note 63, at 39.

<sup>70</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Repressed State of Emergency [1978]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., 2017). This was his inaugural lecture at the University of Freiburg.

<sup>71</sup> For further details, see Ernst-Wolfgang Böckenförde, *Ausnahmerecht und demokratischer Rechtsstaat*, in DIE FREIHEIT DES ANDEREN: FESTSCHRIFT FÜR MARTIN HIRSCH 259–72 (Hans Jochen Vogel, Helmut Simon, & Adalbert Podlech eds., Nomos Publishing Company 1981).

<sup>72</sup> See Dieter Gosewinkel, *The Biographical Interview with Ernst-Wolfgang Böckenförde [2011]*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 386 (Mirjam Künkler & Tine Stein eds., 2017).

<sup>73</sup> Ernst-Wolfgang Böckenförde, *Verhaltensgewähr oder Gesinnungstreue*, FRANKFURTER ALLGEMEINE ZEITUNG, Oct. 25, 1978, at 10–11 (reproduced in *id.*, STAAT, VERFASSUNG, DEMOKRATIE (1991)).



times and without restraint to stand up for the national state” could hold office.<sup>74</sup> The only changes in the modern law were that the object of ethical commitment had changed to the “free democratic order in the meaning of the Basic Law,” and the phrase “without restraint” was omitted. In reflecting on this, Böckenförde contrasted two models of civil service: A model of service and legality, in which what matters is the law-abiding behavior of the official, as well as their capacity to fulfill their role with competence and impartiality, and a quasi-feudal model of loyal relationship, which draws a distinction between the “legal” use of liberty and the “legitimate” use of liberty. Such a distinction struck at the root of the protection of liberty under the rule of law.<sup>75</sup> It was deeply regrettable, he argued, that failure to make proper use of the formal constitutional means of dealing with anti-constitutional parties had been remedied by this informal and flexible way of dealing with individuals on account of suspect associations.

Finally, Böckenförde’s concern to ensure that the liberal democratic state did not breach its own limits led him to reject certain interpretations of fundamental rights. In a famous 1974 article, he contrasted five different theories of interpretation: A liberal—civic rule of law—theory, an institutional theory, a value theory, a democratic-functional theory, and a social state theory.<sup>76</sup> He pointed out that while the Federal Constitutional Court tended to draw on these theories randomly to suit the purposes of the case at hand, academic writers tended to align themselves with one theory or another. Neither approach was correct in his view, since the Basic Law itself gave clear indications which theory ought to be adopted. The history of its drafting, as well as its structure and content, pointed the way. In the light of the experience of Nazism, its starting point was the liberal rule of law conception. Civil liberty was to be protected by law as a sphere of individual freedom for its own sake against the incursions of the state. Nevertheless, this was modified by the social state principle that obliged the state to take positive action to secure the social preconditions for the real enjoyment of liberty. The principle of democracy also played a mutually supportive role with liberty and could justify limits to liberty where democracy was really threatened.

Böckenförde’s own theory of interpretation need not detain us here. His clear and forceful rejection of the value-theory of fundamental rights interpretation is noteworthy. He associated this theory with Rudolf Smend’s integration theory in which constitutional rights are means to the end of securing a state conceived as a community of experience, culture, and value. Böckenförde’s response was that this neither had a basis in the drafting history nor in the text of the Basic Law. It turned fundamental rights from subjective claims into objective norms and had the effect of relativizing their content depending on the use

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<sup>74</sup> *Id.*

<sup>75</sup> See the *Introduction* to ERNST-WOLFGANG BÖCKENFÖRDE ET AL., *EXTREMISTEN UND ÖFFENTLICHER DIENST* 15 (1981).

<sup>76</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Fundamental Rights: Theory and Interpretation [1974]*, in *CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS* (Mirjam Künkler & Tine Stein eds., 2017).

to which they are put. In this respect, Böckenförde aligned himself with Carl Schmitt's critique of the "tyranny of values." As examples he gave Smend's argument that freedom of expression should be subject to the restriction of general laws, understood as "the generality of those shared values that as such take precedence over the initially individualistically conceived confirmations of the fundamental rights."<sup>77</sup> More recent instances included the denial of freedom of religion or belief to sceptics and nihilists and the limitation of freedom of the press to publications which promote fundamental rights values. In Böckenförde's argument, the value-theory abandons traditional methods of legal reasoning and opens the door to the dominant cultural values of the day, which are non-rational and potentially rapidly changing. Rights such as freedom of conscience become meaningless because they only extend to those who do not need them: Those whose moral values are already in line with the majority. Dissidents and outsiders are excluded.

In terms of broad outcome, at least as regards anti-radicalism, Böckenförde seems to have largely won the argument. The German Federation dismantled its system for assessing the loyalty of public employees in 1979, and the Länder, which in some cases had been rather unwilling to take it seriously in the first place, slowly followed suit. Willy Brandt himself later regretted the policy and described it as "using cannon to shoot at sparrows," or as we might say, using a sledgehammer to crack a nut. Two recent judgments of the Federal Constitutional Court are firmly in the spirit of Böckenförde's argument. His famous 1967 essay noted at the start of this article was cited by the Federal Constitutional Court when it decided a case in 2000 on the legal status of Jehovah's Witnesses.<sup>78</sup> The question was whether they qualified for status as a "public law body"—there is a rough analogy to the question in English law whether a religious group qualifies for charitable status. Registration had been refused on the grounds that the Witnesses actively discouraged their members from participating in elections and democratic bodies, and in that sense were "anti-democratic." But, as far as the enjoyment of rights is concerned, the Federal Constitutional Court was clear that all that can be required of any person or group is obedience to law (*Rechtstreue*) not the thicker commitment to display active loyalty to the state and its values.<sup>79</sup> Furthermore, obedience to law is to be assessed by the organization's actions, not merely by the content of its belief or teachings.<sup>80</sup>

Early in 2017, the Court declined to declare the right-wing German National Party unconstitutional.<sup>81</sup> Although the Court is clear that the objects of this political party run

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<sup>77</sup> *Id.* at 278.

<sup>78</sup> Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Dec. 19, 2000, 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 370.

<sup>79</sup> *Id.* at para. 94.

<sup>80</sup> *Id.* at para. 95.

<sup>81</sup> Bundesverfassungsgericht, Jan. 17, 2017, 144 BVERFGE 20.

directly counter to the values of the Basic Law, it also held that its chances of more than very minimal political success meant that it did not pose a serious threat to the basic order. Regular application of the criminal law, together with civil society opposition, were a sufficient and more effective protection. One might think that this is a wise decision in the light of the publicity and ineffectiveness of a formal constitutional ban.

We can take two key elements from this experience and response. First, there is a strong emphasis on the legality of a person's behavior, as opposed to conformity of belief and expression to majority political values. Secondly, legality itself needs construing in "hard-edged" terms of the rights and rules which set limits to acceptable action, both by citizens and the state. Just as the state is to concern itself with orthopraxy, not orthodoxy, so also modes of legal argumentation which turn law into a repository of political values are to be resisted.

#### **D. Counter-Extremism and Human Rights Compliance**

The core of any response to the British Government's counter-extremism policy must be to insist on respect for the boundaries set by fundamental human or constitutional rights. There is a clear tendency in recent official documentation to soften the requirements of human rights by turning them from "rights" into "values" to be taken into account in looser administrative processes of wide-ranging decisional balancing.<sup>82</sup> As Böckenförde argues, we should not be tempted to think that the boundaries set by rights apply with any less rigor in cases of speech and action directed against fundamental constitutional values. Whether the limits of relevant rights have been reached turns on the application of familiar legal methods bearing in mind their primary function in securing civil liberty under law.

The British Human Rights Act of 1998 draws on the European Convention on Human Rights and its jurisprudence to determine concrete problems involving rights and their limits. In the context of extremism, there are two routes by which restrictions on rights can be justified. If we are searching for a definition of extremist speech and action, then case-law under Article 17 is the best starting-point, because it is in respect of this article that the European Court of Human Rights most frequently refers to the concept of a "democracy capable of defending itself."<sup>83</sup>

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<sup>82</sup> THE EQUALITY AND HUMAN RIGHTS COMMISSION GUIDANCE, DELIVERING THE PREVENT DUTY IN A PROPORTIONATE AND FAIR WAY: A GUIDE FOR HIGHER EDUCATION PROVIDERS IN ENGLAND ON HOW TO USE EQUALITY AND HUMAN RIGHTS LAW IN THE CONTEXT OF PREVENT, 2017 (casting its advice in terms of "assessing impact on equality, human rights and good relations.") (Eng.).

<sup>83</sup> *Vogt v. Germany* (A/323), 21 Eur. Ct. H.R. 205 (1995); *Zdanoka v. Latvia*, App. No. 58278/00, Eur. Ct. H.R. paras. 79-80 (Jun. 17, 2004: Chamber); and para. 100 (Mar. 16, 2006: Grand Chamber).

Article 17 ECHR states that

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The article only applies in “exceptional” and “extreme” circumstances to prevent individuals and groups with totalitarian aims from exploiting Convention principles in their own interests.<sup>84</sup> It has the effect that the speaker forfeits at the admissibility stage<sup>85</sup> their Convention rights to freedom of religion, freedom of expression, or freedom of association, among others.<sup>86</sup> If anything, the Court seems to have tightened the criteria for its application in recent years.<sup>87</sup> The recent judgment in *Perincek v. Switzerland* emphasizes the very narrow nature of Article 17 in the context of controversial speech.<sup>88</sup> As well as reiterating the point about extreme and exceptional circumstances, the Grand Chamber adds the requirement that forfeiture only applies if it is immediately clear that the impugned statements are clearly contrary to the values of the Convention. The decisive question for both Chamber and Grand Chamber is whether the statements aim at stirring up hatred or violence. In this case, claims about the Armenian “genocide” by the Ottoman Empire in 1915, although controversial and even offensive, did not fall within Article 17; indeed, seeking to prevent the debate amounted to a violation of Article 10. Another test which has emerged in recent case-law is whether the applicant has “expressed contempt for the victims of totalitarian regimes or belonged to a group with totalitarian ambitions.”<sup>89</sup> Defending communism, to pick another example, does not put one outside the scope of

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<sup>84</sup> *Paksas v. Lithuania*, App. No. 34932/04, Eur. Ct. H.R. para. 87 (Jan. 6, 2011: Grand Chamber).

<sup>85</sup> Although by a curious logic, in Article 11 cases, the Court considers Article 17 after Article 11(2) when it invariably adds nothing to the analysis.

<sup>86</sup> But not all: *Lawless v. Ireland* (no. 3), App. No. 332/57 (A/3), Eur. Ct. H.R. para. 6 (Jul. 1, 1961). For example, in *Saybatalov v. Russia*, App. No. 26377/06, Eur. Ct. H.R. (Mar. 14, 2013), the Court found a violation of Article 7 in respect of the banning of Hizb-ut-Tahrir in Russia, while also holding the complaints based on Articles 9 to 11 inadmissible on account of Article 17.

<sup>87</sup> See, e.g., the looser formulation in *Witzsch v. Germany*, App. No. 7485/03, Eur. Ct. H.R. para. 3 (Dec. 13, 2005), although on the facts holocaust denial clearly falls within Article 17.

<sup>88</sup> *Perincek v. Switzerland*, App. No. 27510/08, Eur. Ct. H.R. para. 52 (Dec. 17, 2013: Chamber), paras. 113–15 (Oct. 15, 2015: Grand Chamber).

<sup>89</sup> *Vajnai v. Hungary*, App. No. 33629/06, Eur. Ct. H.R. para. 25 (Jul. 8, 2008); *Vona v. Hungary*, App. No. 35943/10, Eur. Ct. H.R. para. 37 (Jul. 9, 2013).

Convention protection.<sup>90</sup> The Court assumes that the absence of a criminal conviction indicates that it was inappropriate for the State to rely on Article 17.<sup>91</sup> That makes sense: Activities which are dangerous enough to warrant taking an applicant outside the scope of protection of expressive Convention rights ought to be criminal.

Nevertheless, beyond the scope of Article 17, restrictions on speech may also be justified under paragraph 2 of Article 10. The basic principles have been stated repeatedly over the last four decades. On the one hand, individuals and groups have the right to promote ideas which “offend, shock or disturb” and one is entitled to engage in open discussion of matters which are sensitive and which may cause offence, and this is an important part of what means to live in a democratic, tolerant and pluralist society.<sup>92</sup> “There is little scope under Article 10 of the Convention for restrictions on political expressions or on debate on questions of public interest.”<sup>93</sup> That includes challenges to the value of democracy, the rule of law, or individual liberty.

On the other hand, there is speech which the Court considers to be “clearly unlawful.” Good examples are defamation, hate speech, and incitement to violence. Here, so long as the restrictions are clearly set out in law, there will be no real difficulty showing that they are justified. Calls for the death of members of the armed forces would seem to fall within this category—and could be criminalized—as of course incitement to hatred and the encouragement or glorification of terrorism already are in English law. Increasingly, the Court seems to be restricting the scope of justifiable restrictions to this category of “clearly unlawful speech.”<sup>94</sup> Such rule-based clarity is to be welcomed.

When it comes to banning groups, the Court is even more cautious about the use of Article 17. In *Vona v. Hungary*, the Court pointed out that banning a group is more serious than restricting its speech, and that therefore the banning of the “Hungarian Guard”—a right-wing, racist, and paramilitary group—should be considered under Article 11(2), not Article 17.<sup>95</sup> The court linked article 17 to protecting against those who take active practical steps to promote a totalitarian agenda. In other words, this targets terrorism, not extremism. In the context of Article 11, paragraph 2, the Court draws another distinction between the

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<sup>90</sup> *United Communist Party of Turkey v. Turkey*, App. No. 19392/92, Eur. Ct. H.R. (Jan. 20, 1998); see also *Vajnai*, App. No. 33629/06.

<sup>91</sup> This is implicit in *Vona v. Hungary* and *Özdep v. Turkey*, App. No. 23995/94, Eur. Ct. H.R. (Dec. 8, 1999).

<sup>92</sup> For a recent statement, see *Delfi AS v. Estonia*, App. No. 64569/09, Eur. Ct. H.R. para. 131 (Jun. 16, 2015).

<sup>93</sup> *Annen v. Germany*, App. No. 3690/10, Eur. Ct. H.R. para. 53 (Nov. 26, 2015).

<sup>94</sup> *Delfi AS v. Estonia*, App. No. 64569/09, Eur. Ct. H.R. para. 131 (Jun. 16, 2015); *Id.* at para. 67; *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, App. No. 22947/13, Eur. Ct. H.R. para. 64 (Feb. 2, 2016).

<sup>95</sup> *Vona v. Hungary*, App. No. 35943/10, Eur. Ct. H.R. para. 36 (2013).

banning of a political party and banning or dissolving other types of social or religious group. Political parties have a particular role to play in securing democracy, and thus represent a greater threat if they adopt an anti-democratic ideology. Under strict conditions they can be dissolved, as was the case with the Refah Party in Turkey.<sup>96</sup> Outside the context of political parties, the Court stresses the drastic nature of banning or dissolution. When states have attempted this, the Court has generally found a violation of the Convention. Similarly, dissolving or banning a group because it has breached regulatory requirements is disproportionate and a violation of the Convention if there are less intrusive means of dealing with the problem. In a recent case the Russian state had tried to close down a Christian training college and prosecute its director on account of alleged breaches of health and safety requirements.<sup>97</sup> There was also an admission that the inspectorate had been looking for evidence of “extremism.” The Court found a violation of Article 9 in the light of Article 11. The Court noted that dissolving an association was a “harsh” and “drastic” measure which could only be warranted in the most serious of cases. The organization had operated for 11 years without any problem. There was confusion as to the relevant law, lack of notice, and no clear and immediate danger to the life and limb of students. And the decision also had the effect of denying to the applicants the practical legal rights to enjoy freedom of religion.

Less familiar, perhaps, are the human rights concerns around the compulsory registration of religious groups. Many legal systems have no way of conferring basic legal personality on groups without an administrative act, so international human rights law stops short of prohibiting any form of registration whatsoever. In a number of cases, the European Court of Human Rights has found violations of the Convention in respect of refusals to register religious groups.<sup>98</sup> It has so far stopped short of saying that registration processes are in general contrary to human rights standards,<sup>99</sup> but other human rights bodies have not been so inhibited. In 2004 the OSCE Venice Commission adopted Guidelines for the Review of Legislation pertaining to Religion or Belief.<sup>100</sup> These state that:

(1) Registration of religious organizations should not be mandatory per se, although it is appropriate to require registration for the purposes of obtaining legal personality and similar benefits;

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<sup>96</sup> *Refah Partisi v. Turkey*, App. No. 41340/98, Eur. Ct. H.R. para. 98 (Feb. 13, 2003).

<sup>97</sup> *Biblical Centre of the Chuvash Republic v. Russia*, App. No. 33203/08, Eur. Ct. H.R. (Jun. 12, 2014).

<sup>98</sup> *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01, Eur. Ct. H.R. (Oct. 6, 2006); *Kimlya v. Russia*, App. No. 76836/01, Eur. Ct. H.R. (Oct. 1, 2009).

<sup>99</sup> *Magyar Kereszteseny Mennonita Ehyhaz v. Hungary*, App. No. 70945/11, Eur. Ct. H.R. para. 76 (Apr. 8, 2014).

<sup>100</sup> *Organization for Security and Co-operation in Europe, Guidelines for Review of Legislation Pertaining to Religion or Belief*, (June 18–19, 2004).

(2) Individuals and groups should be free to practice their religion without registration if they so desire . . . .

The recent OSCE Guidelines on the Legal Personality of Religious or Belief Communities simply state: “[T]he freedom to manifest religion or belief in community with others is accorded to human beings as rights-holders and cannot be made subject to any prior restraint through the use of mandatory registration procedures or similar procedures.”<sup>101</sup>

This position has been stated by successive UN Special Rapporteurs on freedom of religion or belief, pointing out that registration regimes are “rarely efficient” in tackling criminal activity.<sup>102</sup> According to the outgoing Special Rapporteur, Professor Heiner Bielefeld, “the right to freedom of religion or belief, owing to its nature as a human right, inheres in all human beings and can never be rendered dependent on any specific acts of State approval or administrative registration.”<sup>103</sup>

The UN Human Rights Committee has also held that registration can only be refused for health and safety reasons, not to prevent the conduct of religious ceremonies.<sup>104</sup> In short, one cannot require compulsory registration and inspection before children are taught by religious groups, even if that teaching lasts for more than 6–8 hours a week.

Concerns about the breach of international human rights obligations have played a central part in criticisms of the British Government’s counter-extremism proposals. In his September 2015 report on the operation of the Terrorism Acts, the government’s Independent Reviewer, David Anderson QC, identified 15 distinct legal problems any new legislation would need to surmount.<sup>105</sup> He has several times expressed his skepticism about extending the law any further.<sup>106</sup> And it is clear that the Home Affairs Select Committee and the Parliamentary Joint Committee on Human Rights (JCHR) are both very concerned about counter-extremism policy. In its report of July 22, 2016, the JCHR called on the government to reconsider the strategy and only introduce legislation where there was

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<sup>101</sup> Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, *Annual Report (2014)*, <http://www.osce.org/odihr/139046?download=true>.

<sup>102</sup> Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Mission to Turkmenistan*, ¶ 30, A/HRC/10/8/Add. 4 (Jan. 12, 2009).

<sup>103</sup> Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), *Mission to Kazakhstan*, ¶ 26, A/HRC/28/66/Add. 1.

<sup>104</sup> Malakhovsky and Pikul v. Belarus, Communication No. 1207/2003, U.N. Doc. CCPR/C/84/D/1207/2003 (2005).

<sup>105</sup> DAVID ANDERSON Q.C., *THE TERRORISM ACTS IN 2014* ¶ 9.29 (2015).

<sup>106</sup> Joshua Rozenberg, *Terrorism, Extremism and the Law*, BBC RADIO 4 LAW IN ACTION (Nov. 3, 2016) <https://www.bbc.co.uk/programmes/b080t882>.

evidence of legal gaps.<sup>107</sup> In particular, the JCHR identified six problem areas: The unproven assumption that conservative religious views escalate to violence; the unclear definition of extremism; the dilemma between targeting Muslims and applying restrictive laws indiscriminately across sectors of society with conservative moral or religious views; the tension between duties on universities to promote free speech and restrict extremist speech; the use of civil orders to achieve criminal law purposes; and the tendencies to see the problem in terms of “safeguarding” children without being clear what one is safeguarding them from.

The public debate which followed the recent conviction of radical Islamist Anjem Choudary on August 16, 2016 for supporting the Islamic state in Syria exposed the underlying political disagreement well.<sup>108</sup> The police and Crown Prosecution Service had found it hard to gather robust evidence that Choudary had committed any specific offense. For a long time, he had stayed “just the right side of the line.” For some, the fact that he was eventually convicted supports the view that current police powers are adequate; for others, the difficulty of alleging a specific criminal offense, and time it took to do so, suggests that they are not. But do we want it to be easy to charge people with speech crimes? In the light of the European Court’s increasing clarity about the limited grounds for restricting the civil liberties of “extremists,” whether under Article 17 or the second paragraphs of Articles 9–11, it is hard to see that further developments in the criminal law are either desirable or possible.

### **E. “Equality and Human Rights” as Fundamental Values**

As well as insisting on the boundaries to counter-extremism policy set by fundamental rights, Böckenförde’s writings suggest that we should look deeper at whether British Government counter-extremism policy is becoming a vehicle for promoting a new public ethic in the guise of fundamental values. Is the state becoming, once again, a “unit of moral conviction?”

From a historical perspective, the British Constitution achieved relative ideological neutrality over a period of time from about 1850 to 1920.<sup>109</sup> Before 1850, the general position of English law was that the only lawful religions were the religion maintained by the established Church and those other religions expressly tolerated by statute. Toleration had expanded gradually from Trinitarian Protestantism through Unitarianism, Catholicism,

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<sup>107</sup> JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-EXTREMISM, 2016–17, HL Paper 39, HC 105 (UK).

<sup>108</sup> Vikram Dodd, *Anjem Choudary jailed for five-and-a-half years for urging support of Isis*, THE GUARDIAN (Sept. 6, 2016), <https://www.theguardian.com/uk-news/2016/sep/06/anjem-choudary-jailed-for-five-years-and-six-months-for-urging-support-of-isis>.

<sup>109</sup> JULIAN RIVERS, THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM (2010), at 20–31.



and Judaism until by the 1850s “any religious denomination” could be registered by law.<sup>110</sup> The courts quickly followed suit and held that even bizarre and eccentric beliefs qualified for legal privileges so long as they were not subversive of all morality.<sup>111</sup> The nails in the coffin of the view that the state had a general responsibility to secure ideological truth and combat ideological falsehood were hammered in by the House of Lords in two cases in 1917 and 1919, in which the highest court confirmed first that atheism is not contrary to public policy, and secondly that there is no such thing as “superstitious”—that is unlawful—religion.<sup>112</sup>

In making “fundamental British values” the centerpiece of its counter-extremism strategy, the government has tried simultaneously to reconnect to older, conservative ideas of British national identity and also to adopt the precepts of a universalizing liberal politics. There is here a revival of 19<sup>th</sup> and early 20<sup>th</sup> century public discourse. But it takes place in the context of an intellectual milieu which is very sensitive to charges of cultural hegemony and implicit racism, so there is a striking unwillingness to identifying anything that is distinctively British. As Niall Gooch trenchantly put it:

If you were to compile a list of specific British achievements and characteristics, there would be great potential for causing controversy and offence . . . . [Y]ou’d spend a lot of time talking about Christianity, Britain’s stint as Top Nation, tradition, hierarchy, elitism, high culture, independence from bossy government, and Dead White Men.<sup>113</sup>

Reasserting “Britishness” in that robust and conservative sense is clearly not a real political option. So, it is hardly surprising that the so-called “fundamental British values” of the rule of law, democracy, individual liberty, and mutual respect and tolerance of others are in fact the universal values of liberal democratic constitutionalism.

But what goes wrong when equality and other human rights get turned into “values?” The problem is that supposedly universal human rights were articulated in response to state oppression; they cannot be straightforwardly applied to all personal relationships. Some of them can be: The classic Lockean or Blackstonian “natural” rights of life, personal security, personal liberty, and property have close parallels in every human relationship. Such rights

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<sup>110</sup> Places of Worship Registration Act 1855, 18 & 19 Vict. c. 81 (Eng).

<sup>111</sup> See, famously, *Thornton v. Howe* [1862], 54 ER, 1042, 31 Beav 14.

<sup>112</sup> *Bowman v. Secular Soc’y* [1917] AC 406; *Bourne v. Keane* [1919] AC 815.

<sup>113</sup> *Is Britain a Nation of Immigrants? Plus Some Thoughts on the “British Values” Problem*, NIALL’S WRITING BLOG (Aug. 29, 2016), <http://niallthinksandwrites.blogspot.co.uk/2016/08/is-britain-nation-of-immigrants-plus.html>.

are defensive of core human interests from all threats, whether public or private. Political and procedural rights, by contrast, have little or no relevance to interpersonal relationships. One might identify loose private analogies to the right to vote, or the right to fair trial, but, in essence, these are rights unique to the human person as political subject or citizen. Civil liberties represent a contested middle ground: Do children enjoy privacy rights in relation to their parents? Does a member of a religious organization enjoy freedom of religion in relation to that organization? Does an official in a political party have the right to disagree with the party's policies and join a different party, without leaving her original party? Probably not—or at least only in an attenuated sense. Equality rights are the most complex of all, not only because it is sometimes entirely appropriate to discriminate in private life in ways which are rightly unlawful in public, but because different protected characteristics give rise to quite different “equality profiles” and may require different expressions in different social contexts.<sup>114</sup> Talk of “human rights values” creates a risk of flattening out all these important nuances and of imposing obligations on all people which only properly apply to the state.

Such a flattening of personal and political ethics can be supported by some interpretations of the liberal tradition. In his last great work, *Justice for Hedgehogs*, Ronald Dworkin defends the ultimate unity of value by way of a constructivist epistemology that seeks to reconcile skepticism about foundationalism with the inescapability of the human condition. He works out the political and legal implications of the ethics—we might even say, the aesthetics—of self-creation in exemplary fashion. Human dignity is his root normative concept. Human dignity should be interpreted in terms of two principles, self-respect and authenticity. In discussing authenticity, Dworkin includes these telling words:

The analogy to artistic value is useful here again. We do count a work of art's integrity as indispensable to its value, but we do not count integrity as a stand-alone value. Otherwise we could not distinguish banal monotony from the brilliant coherence of complexity. That is equally true in ethics. We seek coherence in imposing a narrative on a life, but coherence endorsed by judgment, not just a coin flip. Nietzsche is sometimes taken to be a nihilist in value. But he had no doubt that some lives really are better than others. In fact, he said he was aware of only three people whose lives were truly great. One of them was himself.<sup>115</sup>

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<sup>114</sup> For this reason, fulfilling the public-sector duty to “promote equality” proves remarkably complicated and risky. See Julian Rivers, *Promoting Religious Equality*, 1 OXFORD J. OF L. & RELIGION 386–401 (2012).

<sup>115</sup> RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 213 (2011).

Dworkin's starting-point—respect for oneself as author of one's own life—is what ultimately grounds morality, namely respect for others, and then underlies the familiar features of the liberal polity: Human rights, equality, liberty, and democracy. Into these ideas can be fitted familiar features of his work such as the right to equal concern and respect and the right to ethical independence.

The superficial attractiveness of Dworkin's theory lies in the ease with which political values and personal values are interchangeable. Thus, if the state is required to respect the religious choices of the individual, the value of religion to the individual must lie in the fact that it is chosen. Freedom of religion means not only that we have the right to choose our religion but that we are right when we choose our religion. We cannot be “wrong” because Dworkin's morals are without metaphysics. If the state requires us not to discriminate on grounds of a range of personal characteristics, it must be because the adoption of an identity rooted in those characteristics merits respect from others.<sup>116</sup> It is not that we avoid discrimination in the name of a given common humanity, for there is no such thing, but we do so in affirmation of each other's self-constructed difference. Thus, the “true liberal” is a radical ethical subjectivist, whose conception of self and the universe he or she inhabits is no more or less true than the conception of self and the universe adopted by the next person, but who merits respect simply by virtue of the fact that it is his or hers. Such a view is directly opposed to a typically religious stance which finds the value of freedom in personal submission to an inescapable and externally-given truth.<sup>117</sup>

Something like a Dworkinian interpretation of the liberal tradition seems to be holding increasing sway in the minds of public policy-makers. Instead of a political liberalism, which seeks to sustain a *modus vivendi* between competing religions and ideologies, liberal views are re-construed as matters of required personal ethos.<sup>118</sup> One subtle indicator of this shift in thought is the slippage between two different definitions of fundamental British values. What started out as “mutual respect and tolerance of *those with* different faiths and beliefs” later became “mutual respect and tolerance of different faiths and beliefs.”<sup>119</sup> In spite of later clarification that the two phrases are interchangeable,<sup>120</sup> they are not.

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<sup>116</sup> This seems to be the intention of the Education (Independent School Standards) Regulations 2003, SI 2003/1910, sch. 1, ¶ 2, as amended, which require children to have “particular regard to the protected characteristics set out in the Equality Act 2010” when learning to respect others.

<sup>117</sup> I discuss a range of possible justifications for freedom of religion in Julian Rivers, *Justifying Freedom of Religion: Does ‘Dignity’ Help?*, in UNDERSTANDING HUMAN DIGNITY 405 (Christopher McCrudden ed., 2013).

<sup>118</sup> For this distinction, see generally JOHN GRAY, TWO FACES OF LIBERALISM (2000).

<sup>119</sup> Compare the TEACHERS' STANDARDS, *supra* note 21, and the Independent School Standards Regulations, *supra* note 25, with the COUNTER-EXTREMISM STRATEGY, *supra* note 35.

<sup>120</sup> See the answer of Lord Ahmad of Wimbledon to this written question (HL7297) on April 7, 2016, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-03-22/HL7297/>.

Respecting a person even though they hold views one considers false and dangerous is quite different from respecting the views themselves. In the famous words attributed to Voltaire, it is precisely the difference between disagreeing with someone and defending their right to say it. The risk is that religious disagreement is heard as a form of intolerant disrespect and even a denial of rights. This is then used to justify restricting the liberties of the other party. For example, in addressing the Communities and Local Government Committee on her Review, Dame Louise Casey identified Roman Catholic views on marriage as a problematic form of religious conservatism requiring state intervention.<sup>121</sup> Why is this not simply a matter of free opinion and expression? Presumably because in some sense it is “illiberal” or “contrary to human rights values.” The ongoing *cause célèbre* of the Ashers bakery case in Northern Ireland also exposes the drift nicely.<sup>122</sup> Is it unlawful discrimination on grounds of sexual orientation to refuse to bake and decorate a cake with a slogan promoting the campaign to recognize same-sex marriage? It is clear that the bakery would have served all customers regardless of their sexuality and would also have refused to provide the cake even if it had been ordered by a heterosexual person. Unlike some recent US cases, this is not a case of denying a person a neutral service on grounds of who they are.<sup>123</sup> It is about compelled speech. Yet both the court of first instance and the Court of Appeals held this refusal to transmit the moral and political opinions of another to be unlawful discrimination by association. Is it? The radical individualism of “liberal values” enables an easy slippage from equality of treatment of persons—meaning equal rights—via the equality of beliefs and practices to legal constraints on those who dissent from the *values* supposed to underlie the modern liberal state.

It is clear that Böckenförde looked for the spiritual motor of liberalism elsewhere. Liberal democratic constitutionalism is rooted in the equal right to freedom of conscience, that is, the right to one’s own judgment on the ultimate nature and purpose of human existence.<sup>124</sup> But acts of Nietzschean self-creation cannot provide the weight that claims of conscience need to make. If the claim of right I make on my political community is merely based on my own fleeting sense of who I am and who I might be, it is hard to see how this can have weight against the collectivity when our interests collide. Yet, if my claim is based on my perception of an objective, external order, which presses on me with all the force of a non-negotiable reality, my predicament deserves more sympathy. Liberalism grew out of

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<sup>121</sup> Transcript of Oral Evidence: Integration Review, Communities and Local Government Committee, Jan. 9, 2017, HC 881, <https://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/inquiries/parliament-2015/integration-review-16-17/publications/>.

<sup>122</sup> Lee v. McArthur [2016] NICA (Civ) 39. The case is on appeal to the Supreme Court.

<sup>123</sup> See *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), *cert. granted*, 85 U.S.L.W. 3593 (U.S. Jun. 26, 2017) (No. 16–111).

<sup>124</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Basic Right of Freedom of Conscience [1970]*, in 2 RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

the need to accommodate irreconcilable disagreements about the nature of external reality, not out of a mutual desire to affirm our acts of self-creation.

As the new ethical liberalism fails to take conscience seriously, it also risks undermining the claims of community. It is at least arguable that the central idea of liberalism is not even the free individual, but the community of persons committed to the collective pursuit of truth, goodness, and beauty, free from the coercive orders of politics and law.<sup>125</sup> This idea reaches back behind the second more individualistic wave of liberalism, associated with the Enlightenment and the values of the French Revolution, to what Böckenförde—and others such as Harold Berman and Larry Siedentop—identified as the first step towards the liberal secular state in the 11<sup>th</sup> century Gregorian reforms and the emergence of the Church as a competing authority to kingly rule.<sup>126</sup> But it is also present in 19<sup>th</sup> century struggles to disentangle church from state both to purify the former and to confine the latter.<sup>127</sup> Böckenförde would go even further and argue that it is the unavoidably contestable nature of the boundary between “church” and “state” and its consequent fluidity, subject to perpetual negotiation under the influence of the concrete and practical implications of the “Christian message of salvation,” which is an important guarantor of the liberal society.<sup>128</sup> The focus here is not on individual identity and diversity, but on a diversity of distinctive communities and institutions. In short, a better reading of the liberal tradition is pluralist rather than merely individualist, not least because a liberal pluralism of institutions can guard against the destruction of a free civil society in the name of a homogenizing defense of the individual against competing communities of conviction.<sup>129</sup>

British counter-extremism policy contains striking confirmation of Böckenförde’s thesis: The liberal state is perennially prone to a totalitarian tendency to seek to generate its own distinctive ethical community.<sup>130</sup> By undermining fundamental rights such as freedom of

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<sup>125</sup> I make this argument in Julian Rivers, *Liberal Constitutionalism and Christian Political Thought*, in *CHRISTIAN PERSPECTIVES ON THE LIMITS OF LAW* (Paul Beaumont ed., 2002). See also Julian Rivers, *The Secularisation of the British Constitution*, 14 *ECCL. L. J.* 371 (2012).

<sup>126</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularization*, in 2 *RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS* (Mirjam Künkler & Tine Stein eds., forthcoming 2018); HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014).

<sup>127</sup> This is a 19<sup>th</sup> century struggle, even in the case of the United States, as Steven Green has persuasively shown: STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT* (2010).

<sup>128</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *Political Theory and Political Theology: Comments on Their Reciprocal Relationship [1983]*, in 2 *RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS* (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

<sup>129</sup> The liberal pluralist tradition of Gierke, Maitland and Figgis is beginning to be recovered by, e.g., VICTOR M. MUÑIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM: ON THE AUTHORITY OF ASSOCIATIONS* (2014).

<sup>130</sup> This emerges very clearly in his interventions in the *Grundwertedebatte* from 1976 onwards.

conscience, religion, expression, and association in the name of fundamental values it paradoxically calls into question its own liberal-democratic credentials.<sup>131</sup> What is new is the radically individualist reading of the liberal tradition now increasingly promoted as a constitutionally-mandated public ideology.

#### **F. Beyond Fundamental Values: Securing the Liberal Democratic Polity**

Our first response to extremism, then, must be to hold our nerve and to reassert the basic commitments of the liberal democratic constitutional order. Radical Islam is a threat to which the idea of a free civil society encapsulated in the rights to freedom of religion, of expression and association must not be sacrificed. Nevertheless, we must also recognize that underlying our vulnerability is not only the violent opposition of Islamic extremists, but also a legal response which re-interprets the liberal political tradition in the direction of a new homogenizing public ideology. This, too, threatens the basic rights of individuals as well as the distinctive communities—not just churches, but also families, professions, workplaces, social clubs, and universities—that are the location for our multiple intersecting identities and roles, and thus the social prerequisite for effective civil freedom.

The point, of course, is not simply to win the intellectual battle for the ownership of the liberal tradition. That is, to look in at the state from the perspective of political theory and ultimately political theology. The point is to look outwards from the state to secure in practical ways the liberal democratic constitution we are already committed to. At times, it seems as if Böckenförde had little to say about this. He ends his 1982 essay on the relationship between state and religion in Hegel's thought in fatalistic terms: the "values" supposedly underlying the constitution are purely consensual, precarious and labile, mere "surrogates, which are open to manipulation and to the strategy of the political steering of consciousness."<sup>132</sup> It would be easy to read this essay as a precursor for a conservative insistence on the importance of a background cultural and civic Christianity. But this is a step he never took.<sup>133</sup> Instead, in his 2007 essay he expressed himself more optimistically. "Instead of expansive professions of values, loyalty to the law becomes the foundation of a shared life. The attendant ethos of lawfulness is able to help stabilize such an order."<sup>134</sup>

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<sup>131</sup> In a surprisingly robust dictum, even the Supreme Court has warned of a risk of creeping totalitarianism: *Christian Institute v. Lord Advocate* [2016] UKSC 51, ¶ 73 (UK).

<sup>132</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *Thoughts on the Relationship Between State and Religion in Hegel [1982]*, in 2 RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

<sup>133</sup> Peter E. Gordon, *Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and the Dialectics of Secularization in Postwar Germany*, 80(1) SOC. RES. 173–202 (2013).

<sup>134</sup> ERNST-WOLFGANG BÖCKENFÖRDE, *The Secularized State: Its Character, Justification and Problems in the 21st Century [2007]*, in 2 RELIGION, LAW AND DEMOCRACY: SELECTED WRITINGS (Mirjam Künkler & Tine Stein eds., forthcoming 2018).

The sentiment is surprisingly close to one once expressed by Jürgen Habermas: “Legal norms are what is left from a crumbled cement of society: if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that would otherwise fall into pieces.”<sup>135</sup>

But this requires us also to adopt something like Habermas’s idea of constitutional patriotism. Originally growing out of a context of a fledgling liberal democracy aware of its vulnerability to fascism and communism, it is intuitively plausible that its resources can be brought into play in confronting radical Islam as well. The search here is for a thin form of civic loyalty to liberal political institutions, which can exist alongside thicker social identities and perhaps more problematically even in place of thicker national identities. We need a practical concept on which we can agree regardless of our deeper ideological commitments. The language of constitutional patriotism or civic loyalty can help us avoid the unthinking relativism in the government’s reference to “respect for different faiths and beliefs” and can bridge between more individualist and more pluralist readings of the liberal tradition.<sup>136</sup>

This needs considerable work, but there are some immediately obvious advantages in re-locating the debate in this way. First and foremost, it is positive rather than negative. Rather than offering hostility to the vague and ill-defined danger of extremism, it offers a thin, but positive account of the civic good which the state can legitimately require all to hold in common; it makes clear that the values at stake are distinctively political rather than generally humane. They can—and must—be held alongside whatever wider frame of reference and identity we adopt. The reference to the constitution makes it clear that we are trying to secure commitment to an institutional framework for civilized disagreement, rather than the suppression of difference in the name of “fundamental values”; and the idea of mutual loyalty inherent in constitutional patriotism speaks as much to a government tempted to adopt unconstitutional measures to suppress dissent as it does to those who seek to use unconstitutional means to promote their own religious and political agendas. Finally, constitutional patriotism belongs to a family of ideas stretching through militant democracy and Article 17 of the European Convention on Human Rights to McCarthyism, which more clearly illustrates its dangers and limits.<sup>137</sup>

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<sup>135</sup> Jürgen Habermas, *Between Facts and Norms: An Author’s Reflections*, 76 DENV. L.R. 937 (1999).

<sup>136</sup> I set out my reasons for preferring “civic loyalty” in Julian Rivers, *Fundamental British Values and the Virtues of Civic Loyalty*, 21(5) ETHICS IN BRIEF (2016), [http://klice.co.uk/uploads/Ethics%20in%20Brief/EiB\\_Rivers\\_21\\_5\\_WEB.pdf](http://klice.co.uk/uploads/Ethics%20in%20Brief/EiB_Rivers_21_5_WEB.pdf).

<sup>137</sup> There is obviously a considerable literature on constitutional patriotism I cannot engage with here. For a helpful discussion, see the essays by Jan-Werner Müller, Karol Edward Soltan, Mattias Kumm and David Abraham, in: Symposium, *Constitutional Patriotism*, 6 INT’L J. CONST. L. 67–152 (2008).

The liberal democratic state is not powerless to promote—or "protect and support" in Böckenförde's terms—the thin moral agenda of civic loyalty, but it does so through positive encouragement rather than the restriction of rights.<sup>138</sup> As the occasional success stories of counter-terrorism show, capacity-building and developing good working relationships with religious groups is far more important than fine-tuning the boundaries of hate speech law. I have already noted that specific changes have been made in education and charity law to counter extremism. Education law is clearly an arena in which the state can intervene to promote civic loyalty. In principle, it is hard to object to a higher degree of accountability than currently applies for those who home school or who use supplementary schools in fulfillment of their legal obligation to educate. This is quite different from seeking to regulate out-of-hours voluntary youth work, whether or not it has a religious component. But the object must be to secure minimum standards of conformity to law in the context of promoting good citizenship, not the universal affirmation of religious or other beliefs and practices which are subject to legitimate disagreement.

The reason that charity law reform is an option is that from a human rights perspective, charitable status is not to be seen as a condition of existence and operation, but as a financial and reputational privilege granted by the state. Charities are there to promote the public good, of which the state is inevitably the ultimate judge. However, the implication of the pluralist liberalism I have been defending here is that the requirements of "equality and human rights"—are quite different for charities than for state public bodies. It is not conducive to the public good for the state actively to promote a specific religion, but it is nonetheless entirely charitable for a private organization to promote a specific religion, so long as it does not thereby encourage unlawful behavior. The principle of legality requires state regulators to abandon vague soft law inducements in the direction of "equality and human rights values" and set out clearly—with sufficient parliamentary authority—what the common minimum standards are for a much more diverse conception of the public good than that which animates governmental bodies.<sup>139</sup> This vital point secures the continued existence of a pluralistic civil society. There is space here to secure both liberty and civic loyalty on the part of organizations which are charities.

A final area in which government could have some beneficial influence is in the area of religious literacy and public information. The recent Butler-Sloss Commission on religion in

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<sup>138</sup> Böckenförde makes this very clear in his essay ERNST-WOLFGANG BÖCKENFÖRDE, *The State as an Ethical State*, in 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 101–5 (Mirjam Künkler & Tine Stein eds., 2017).

<sup>139</sup> The contrast here is between something like a Rawlsian "thin theory of the good" for public bodies and a fuller conception implicit in, say, devotion to a religious community. Concerns about the tendencies to impose "equality and human rights values" simplistically on faith-based welfare organizations are discussed in JULIAN RIVERS, *THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM* 276–88 (2010).



public life quite rightly makes the call for increased religious literacy.<sup>140</sup> The view that religion is a purely private matter that we know little of and discuss less is a serious problem if we wish to tackle the very real problems we face with intelligence and discretion. Not all religion is good, and not all religion is bad, and until we learn more about the vast range of beliefs and practices present in the United Kingdom today we will lurch unsteadily between naivety and hostility. Above all, we need to understand better how different religious groups can and do make the journey to civic loyalty from within the resources of their own faith-tradition.<sup>141</sup> A serious commitment to substantial, widespread understanding of religion must start in the schools, but it must continue into government and public life more generally.<sup>142</sup>

### G. Conclusion

We must not trivialize the risks we face of terrorist activity and the Government, in this sense, is right: The root of the problem is indeed ideological. But the solution is not to revert to the tools of the oppressive confessional state. Multiplying the oaths to be sworn in public office, as Louise Casey suggests,<sup>143</sup> has been tried before and found wanting! Rather, it is to recognize that the virtue of living under a liberal democratic constitutional order with a limited government and a strong civil society is very attractive to large numbers of committed Muslims, Christians, Hindus, Jews, atheists, humanists, and even, I imagine, Jedi knights.<sup>144</sup> Perhaps it is true that, to use Milton's famous words, the virtues of the liberal democratic constitutional order, in the British context, for too long have been "fugitive and cloistered," "unexercised and unbreathed."<sup>145</sup> We have taken them for granted, and if not exactly "militant" at least we need to be more explicit and more positive about them.

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<sup>140</sup> Woolf Institute Commission on Religion and Belief in British Public Life, *Living with Difference: Community, Diversity and the Common Good* (Dec. 7, 2015).

<sup>141</sup> Throughout his life, Böckenförde was committed to persuading his own fellow Roman Catholics, and their Church institutionally, to commit—for Christian reasons—to the principles of a free democratic order. See, e.g., ERNST-WOLFGANG BÖCKENFÖRDE, *Das Ethos der modernen Demokratie und die Kirche*, in *KIRCHE UND CHRISTLICHER GLAUBE IN DEN HERAUSFORDERUNGEN DER ZEIT* (2004).

<sup>142</sup> The work of the independent Commission on Religious Education is clearly significant here. See Commission on Religious Education, <http://www.commissiononre.org.uk/> (accessed Nov. 9, 2017).

<sup>143</sup> THE CASEY REVIEW, *supra* note 55, at 169.

<sup>144</sup> The introduction of a question on religious identity in the 2001 National Census provoked a popular movement which saw 390,000 people identify themselves as "Jedi knights." However, the 2011 Census only recorded 177,000, a rate of reduction surpassing even that of the older Protestant denominations.

<sup>145</sup> JOHN MILTON, *AREOPAGITICA* (1644).

But there are real dangers in going down this path. Böckenförde's writings suggest the main lines of defense. They are these: (1) Keep terrorism and extremism clearly distinguished; (2) avoid loose talk of "liberal values"; (3) instead, hold fast to equal basic rights, pre-eminently the right to freedom of conscience and its progeny the freedoms of religion, expression, and association; and (4) seek practical ways of inculcating commitment to a thin shared morality of legal loyalty to the principles and institutions of the liberal democratic constitution as a way of living peaceably and justly together, notwithstanding our increasingly deep differences. Slippage into a coerced public ideological uniformity of values, even in the name of "democracy and human rights, the rule of law, and mutual respect and tolerance", is not progress, but betrayal.

