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### **Forensic Psychiatry and the Extremist: A Review of the Recent Violence Risk Assessment Tools for Offenders Convicted of Terrorism Offences**

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## INTRODUCTION:

Opining on the concept of dangerousness, Michel Foucault once characterized psychiatry as an endeavour that attempts “to rationalize the confused where madness and crime mix”.<sup>1</sup> In his view, psychiatry gained ‘prestige’ because it developed a framework of a medical discipline concerned with “a reaction to the dangers inherent to the social body”.<sup>2</sup> There is some truth to Foucault’s observations, given the intersection between psychiatry and the law in violence risk assessments. In the courtroom, the clinician’s role has become an “assessment-focused enterprise”,<sup>3</sup> particularly in violence risk assessments conducted for offenders branded as “terrorists”.<sup>4</sup>

The reliability of violence risk assessment tools is the subject of contention in psychiatric research. However, their utility in keeping assessors focussed on the most important risk factors, rather than being distracted by “risk”, seems to be less contentious. This paper assesses literature on “existing approaches to the risk assessment of common violence”<sup>5</sup>, and asks whether they can be applied to ascertain future levels of violence (i.e., risk) in convicted extremists. To be clear, this analysis is exclusively focused on risk assessment at the post-conviction stage.<sup>6</sup> Where possible, I refer to these offenders as “extremists” rather than “terrorists”.<sup>7</sup>

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<sup>1</sup> Michel Foucault, “About the Concept of the ‘Dangerous Individual’ in the 19<sup>th</sup> Century Legal Psychiatry”, translated by Alain Baudot & Jane Couchman (1978) 1 Int’l J L & Psych 1 at p 6.

<sup>2</sup> *Ibid* at p 7.

<sup>3</sup> Jennifer L Skeem & John Monahan, “Current Directions in Violence Risk Assessment” (2011) 20(1) Current Directions in Psychological Science 38 at p 38 [*Skeem & Monahan*].

<sup>4</sup> I prefer to use the word “extremist” rather than “terrorist” given the range of meanings this term has and the stigma that offenders face when charged with terrorism offences in the *Criminal Code*.

<sup>5</sup> John Monahan, “The Individual Risk Assessment of Terrorism” (2012) 18(2) Psychology, Public Policy, and Law 167 [*Monahan*].

<sup>6</sup> By post-conviction, I refer to sentencing and parole decisions. While a range of literature addresses methods to identify and prevent radicalization and extremism, it is beyond the scope of this paper.

<sup>7</sup> As noted at p 4 in Risk Assessment Decisions for Violent Political Extremism 2009-02, by D Elaine Pressman (Ottawa: Public Safety Canada, 2009), online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-02-rdv/index-en.aspx>>, “Extremism” is a culturally relative term that is subjective, emotionally laden, and pejorative (Hoffman, 1998; Laqueur, 1997, 2003)” [*Pressman*].

This paper studies the reliability and efficacy of violence risk assessment tools used to assess levels of extremism and future violence. It does so against a backdrop of traditional risk assessment models by highlighting their reported shortcomings in relation to the psychology of terrorism. These shortcomings explain why structured professional judgment models ["SPJs"], like the VERA and the TRAP-18, are worth utilizing. Although I argue that SPJ assessment models better capture the determinants of violent extremism, I acknowledge that they are imperfect tools. I argue that clinical awareness of the cultural, political, socio-economic, and religious background of the offender is also relevant to ensure the reliability of these assessments.

This paper is divided into three segments. Part I highlights the rationale for the use of traditional violence risk assessment models, providing a primer on key terms, and canvassing trends in the literature that shed light on the psychology of terrorism. In this section, I explain why it is important for clinicians to consider literature on terrorism in addition to traditional violence risk assessment models. In Part II, I review two violence risk assessment tools specifically developed to assess extremism. I engage in a cross-comparative analysis of their relative advantages and disadvantages by examining the personal, historical, and cultural factors relevant to the assessment of extremists. Finally, in Part III, I propose the codification and use of an assessment form in the *Criminal Code* for extremist offenders. If implemented, the assessment would incorporate the tools discussed in Part II, which draw on a broad range of literature about the psychology of terrorism. I conclude by providing suggestions that counsel may consider when dealing with expert evidence in this area.

## PART I: TRADITIONAL VIOLENCE RISK ASSESSMENT METHODOLOGIES AND THEIR PURPORTED RELIABILITY

Risk assessments in psychiatry and the law date back to the 19<sup>th</sup> Century.<sup>8</sup> The expansion of violence risk assessment methodologies in the mid-1970s was largely attributable to the shift away from paternalistic standards of civil commitment to a culture of treatment.<sup>9</sup> Following this shift, researchers and forensic psychiatrists developed a range of violence risk assessment tools. To do so, they studied dangerous and violent offender populations, largely across North America, with the objective of identifying common characteristics between offenders that could be used to predict future risk. For the most part, methodologies heavily emphasized the individual characteristics of offenders, reasons for maladaptive personalities, and mental illness. As research confirms, these traits rarely characterize extremists.

### [a] *Classic Violence Risk Assessment Tools and their Implications*

Risk assessment tools were historically dichotomized as belonging to either “clinical” or “actuarial” schools of thought.<sup>10</sup> The former, a first-generation assessment tool, is based on unstructured professional opinions derived from file reviews, while the latter, a second-generation tool, relies on structured, statistical, empirical-based approaches.<sup>11</sup> Over time, these methodologies have evolved, resulting in other tools that combine these approaches, some being more structured than others.

Skeem & Monahan identify four components required in violence-risk assessments: (1) identifying empirically valid risk factors; (2) determining a method for scoring them; (3) establishing a procedure for combining scores; and (4) producing an estimate of violence

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<sup>8</sup> J. Reid Meloy, Jens Hoffman, Angela Guldemann & David James. “The Role of Warning Behaviours in Threat Assessment: An Exploration and Suggested Typology” (2012) 30 Behav Sci & Law 256 at p 256.

<sup>9</sup> Hy Bloom & Richard D Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals* (Toronto: Irwin Law, 2006) at p 195 [*Bloom & Schneider*].

<sup>10</sup> *Skeem & Monahan*, supra note 3 at p 39.

<sup>11</sup> *Bloom & Schneider*, supra note 9 at p 197.

risk.<sup>12</sup> Few approaches address all four components. While unstructured clinical studies receive the least empirical support in terms of their predictive accuracy, there is “little evidence that one validated instrument predicts violence significantly better than another,” and there are no analysis “that systematically compares the predictive utilities” of the four structured components.<sup>13</sup> This means that the science of predicting violence and risk is probabilistic and far from exact.

In recent years, scholars recommended the use of SPJs as more accurate and reliable methods of risk assessment, particularly for extremist offenders.<sup>14</sup> SPJs combine empirical knowledge and professional judgment using sections labeled historical, contextual, and personality or individual factors.<sup>15</sup> They structure at least two components: the identification and measurement of risk factors.<sup>16</sup> Typically, an assessor rates or evaluates the relevance and presence or absence of risk factors and risk management factors that might mitigate risk.<sup>17</sup> Some SPJs allow the clinician to incorporate his or her professional, qualitative review, after the factors have been scored.<sup>18</sup> Generally, they “focus clinicians’ attention on variables that have been established over the years and have proven to be best practice models”.<sup>19</sup>

Examples of SPJ tools that assist clinicians in predicting violence include, but are not limited to the HCR-20 (Historical Clinical Risk), which predicts dangerousness and risk, the PCL-R (Psychopathy Checklist), and the VRAG (Violence Risk Appraisal Guide), which forecasts violent recidivism within seven to ten years based on twelve variably

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<sup>12</sup> *Skeem & Monahan*, supra note 3 at p 39.

<sup>13</sup> *Ibid* at p 40.

<sup>14</sup> *Monahan*, supra note 5 at p 184. SPJ tools are preferred over modified clinical risk assessment, since they function as a checklist to jog the assessor’s memory, allowing for key risk factors to simply be identified. See also *Pressman*, supra note 7 at pp 12 and 13.

<sup>15</sup> *Pressman*, supra note 7 at p 12.

<sup>16</sup> John Monahan & Jennifer L Skeem, “The evolution of violence risk assessment” (2014) *CNS Spectrums* 1 (Cambridge University Press) at p 2.

<sup>17</sup> *Pressman*, supra note 7 at p 12.

<sup>18</sup> *Skeem & Monahan*, supra note 3 at p 39.

<sup>19</sup> *Bloom & Schneider*, supra note 9 at p 215.

weighted factors.<sup>20</sup> For the purposes of this paper, I will review the reliability and efficacy of these tools alongside literature on the psychology of extremist offenders.<sup>21</sup>

While SPJs are preferred tools for assessing violent extremism, violence risk assessment is by nature a *prospective* inquiry, and does not guarantee future behaviour.<sup>22</sup> Dr. Stephen Hart supports this proposition, defining risk assessment as “a contingency-based action plan for what should be done in the future, not a quantitative statement of fact of what will occur in the future”<sup>23</sup>. Echoing these concerns, Dr. Hy Bloom and Justice Richard Schneider aptly observe:

The declaration that an individual represents a risk for dangerous conduct in the community does not necessarily say anything about the precise nature of the risk, when it will manifest, the degree to which it will manifest, exactly who it will affect, and whether it will be isolated in its expression (that is, occur once or more than once). It also says nothing about any variables, either previously identified or currently unknown, which, if present, could modify (that is, increase or decrease) or avert the expression of the risk.<sup>24</sup> [emphasis added]

It comes as no surprise that risk assessments might result in false positives or true negatives. False positives occur where violence was not predicted but occurred nevertheless, while true negatives emerge if violence was predicted and did not occur.<sup>25</sup> Although it is estimated that actuarial instruments have improved the predictive accuracy of violent recidivism in the range of 60% to 80%,<sup>26</sup> this statistic hardly forecloses the possibility of error, and furthermore, does not apply to terrorism offences. That is, the

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<sup>20</sup> *Ibid* at pp 214-216.

<sup>21</sup> For examples of other tools, see the Self-Appraisal Questionnaire that is deigned to predict violent and nonviolent offender extremism, the Level of Service Inventory (LSI-R) used to assess levels of risk in relation to decisions regarding supervision requirements for parole or probation, the General Statistical Information on Recidivism (GSIR) for decision-making in the placement and conditional release of federal male offenders in Canada (Wagdy Loza et al., “Reliability, Construct, and Concurrent Validities of the Self-Appraisal Questionnaire: A Tool for Assessing Violent and Nonviolent Recidivism” (2000) 27(3) Criminal Justice and Behaviour 356 at pp 358-359) [*Loza et al.*]).

<sup>22</sup> *Bloom & Schneider*, supra note 9 at p 189.

<sup>23</sup> *Ibid* at p 190 [emphasis added].

<sup>24</sup> *Ibid* at p 191.

<sup>25</sup> *Ibid* at p 196. It goes without saying that false positives can be particularly dangerous to the public.

<sup>26</sup> *Loza et al.*, supra note 21 at p 357.

impact of false positives or true negatives, as Bloom & Schneider rightly suggest, directly influences the liberty of an offender.<sup>27</sup>

The issue of false predictions is ripe in Canadian law and recently came to the fore in *Ewart v Canada*, 2015 FC 1093. Mr. Ewart, an Aboriginal offender, spent over thirty years in custody without parole, largely due to violence risk assessments like the PCL-R and the VRAG, which rated him at a high risk of reoffending.<sup>28</sup> Relying on expert testimony, the Federal Court declared that the actuarial scores had an adverse effect on his prospects of release,<sup>29</sup> were unreliable, and susceptible to cultural bias.<sup>30</sup> Correctional Service Canada was enjoined from using these risk assessment tools on Mr. Ewart and other Aboriginal offenders until it commissioned a study to establish the reliability of these tools.<sup>31</sup> The Federal Court of Appeal overturned these findings,<sup>32</sup> but the case was granted leave by the Supreme Court of Canada in 2017.<sup>33</sup>

Until the matter is heard by the Supreme Court, it is unclear how this decision will impact the use of actuarial instruments for offenders convicted of terrorism offences at the sentencing and parole stages. Learning from *Ewart*, courts should be circumspect about the application of generic violence risk assessment tools on extremist offenders, particularly given the jeopardy that looms on their liberty. For example, at the upper range, sentences for terrorism are between 15 to 20 years,<sup>34</sup> without the likelihood of parole for ten years or half of the sentence, whichever is less.<sup>35</sup> Negative risk assessments might preclude the possibility of parole for prolonged periods of time, or result in longer

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<sup>27</sup> *Bloom & Schneider*, supra note 9 at p 196

<sup>28</sup> *Ewart v Canada*, 2015 FC 1093 at paras 6 and 11.

<sup>29</sup> *Ibid* at para 7.

<sup>30</sup> *Ibid* at para 74.

<sup>31</sup> *Ibid* at para 113.

<sup>32</sup> *Ewart v Canada*, 2016 FCA 203 at para 24.

<sup>33</sup> Leave to appeal granted from the judgment of the Federal Court of Appeal, dated August 3, 2016, Docket No. 37233.

<sup>34</sup> *R v Khawaja*, 2012 SCC 69 at para 125.

<sup>35</sup> *Criminal Code*, RSC 1985, c C-46, s 743.6(3) imposes a mandatory bar on parole for ten years, or half the sentence, whichever is less, “unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender that the expression of society’s denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the Corrections and Conditional Release Act” [Code].



sentences. Therefore, clinicians should ensure that they are structuring their judgments with a view to the cultural, socio-economic and/or religious backgrounds of extremist offenders.

[b] *The Cultural Gap in Violence Risk Assessments*

As emphasized above, many violence risk assessment tools derive from studies involving traditional inmate and forensic populations which do not include radicalized offenders. This renders the reliability of these tools circumspect if applied to a range of offenders, particularly those with diverse cultural backgrounds who do not have a history with the criminal justice system.

Mental health professionals “routinely call for observations of behaviour in an individual’s wider social and cultural context”.<sup>36</sup> The fifth and latest edition of the Diagnostic and Statistical Manual (DSM-V), published by the American Psychiatric Association, is alive to the impact of cultural context on the reliability of the science of diagnosis:

The judgment that a given behavior is abnormal and requires clinical attention depends on cultural norms that are internalized by the individual and applied by others around them, including family members and clinicians. Awareness of the significance of culture may correct mistaken interpretations of psychopathology, but culture may also contribute to vulnerability and suffering (e.g., by amplifying fears that maintain panic disorder or health anxiety). Cultural meanings, habits, and traditions can also contribute to either stigma or support in the social and familial response to mental illness [...] Culture also affects the conduct of the clinical encounter; as a result, cultural differences between the clinician and the patient have implications for the accuracy and acceptance of diagnosis as well as for treatment decisions, prognostic considerations, and clinical outcomes.<sup>37</sup>  
[emphasis added]

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<sup>36</sup> Neil K Aggarwal, “How are Suicide Bombers Analysed in Mental Health Discourse? A Critical Anthropological Reading” (2010) 38(3) *Asian Journal of Social Science* 379 at pp 386-387 [Aggarwal].

<sup>37</sup> American Psychiatric Association, ed, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), 5th ed, online: <<http://dsm.psychiatryonline.org/doi/book/10.1176/appi.books.9780890425596>> at Section I: The Basics under “Cultural Issues”. See also Section III of the Manual for a Cultural Formulation Developed for Assessment.

By reproducing this excerpt, I am not suggesting that clinicians should construe extremist acts as normal variations of behaviour. Rather, I underscore that the above excerpt from the DSM is influenced by Western conceptions of different pathologies. Therefore, clinicians should be encouraged to differentiate what is deemed “normal” behaviour in the Western cultural context, from what is characterized as such among distinct cultural milieus. Otherwise, psychopathological diagnosis might only perpetuate cultural biases. As Pressman states, “[t]he person who holds views which are considered to be ‘extreme’ within one cultural context or time may not be considered to hold ‘extremist’ beliefs within another cultural context or time”.<sup>38</sup> Clinicians should be aware of these cultural nuances not only at the assessment stage, but also at the research level when developing violence risk assessment tools.

Concern about cultural biases is also reflected in literature bridging mental health considerations with extremism. For example, a 2010 study from Yale University reviewing existing literature on suicide bombers revealed that only “one study countering the idea of Palestinian suicide bombing as terrorism came from Kuwait” and was written “by an Arab psychologist, whereas all other studies originated in North America or Western Europe”.<sup>39</sup> Likewise, between 2008 and 2009, the British Psychological Society set up a working party to develop guidelines for clinicians assessing risk in extremists to close cultural gaps in assessment tools.<sup>40</sup> Explaining the pitfalls of standardized risk assessment tools, researchers made

... a number of suggestions, which principally focus on the need for the examiner to understand the social, cultural and political context in which the risk of future terrorist activities need to be considered. They emphasize, ‘Comprehensive understanding of the specific political contexts is paramount,’ and argue, ‘Most mental health professionals do not have any specific expertise’ in the area. They are ‘particularly concerned about the

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<sup>38</sup> *Pressman*, supra note 7 at p 4.

<sup>39</sup> *Aggarwal*, supra note 36 at p 389.

<sup>40</sup> Gisli H Gudjonsson, “The assessment of terrorist offenders: a commentary on the Dernevik et al. article and suggestions for future directions” (2009) 20(4) *Journal of Forensic Psychiatry & Psychology* 516 at p 517.

use of psychometric testing' [...] Instead, they emphasize the need to consult the literature on psychological, sociological and political issues...<sup>41</sup>

While some experts criticized the British approach, contending that it lacks constructive advice,<sup>42</sup> these recommendations parallel those excerpted in the DSM above. They also find support in the writings of medical researchers who argue that risk assessment should embrace an inter-disciplinary approach, "incorporating knowledge from political, historical, cultural, economic, ideological and religious scholarship".<sup>43</sup> As early as 1983, researchers highlighted that the identification of subtle biases in clinical assessments are critical to mitigating attribution, which is a tendency to "attribute stable personality attributes to people who are disliked who do things we do not approve of."<sup>44</sup> This should be juxtaposed with the fact that when people who are liked do bad things, their acts tend to become rationalized as the result of environmental circumstances.<sup>45</sup>

Given these concerns, violence risk assessment for extremist offenders must transcend the strictures of the DSM. Violence is a prediction-based enterprise.<sup>46</sup> Causal links and indicators of future violence are often inconclusive. Problematically, "there are few known links between [...] current presenting symptoms and the future exhibition of the proscribed dangerous behavio[u]rs",<sup>47</sup> making prediction a craft of "magic and art" rather than pure science.<sup>48</sup> Furthermore, the fluid nature of risk in human behaviour renders the predictive accuracy of risk assessment valuable only within a defined time frame. Thus, the absence of known causal links between current and future behaviour, as well as the dynamic nature of risk, heightens the difficulties of risk analysis.

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<sup>41</sup> *Ibid* at p 517.

<sup>42</sup> *Ibid*.

<sup>43</sup> Andrew Silke, ed, *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalization and Reform* (New York & London: Routledge, 2014) at p 127 [*Prisons, Terrorism and Extremism*].

<sup>44</sup> Eric D Shaw, "Political Terrorists: Dangers of Diagnosis and an Alternative to the Psychopathology Model" (1986) 8 *Int'l J L & Psych* 359 at p 361 [*Shaw*].

<sup>45</sup> *Ibid* at p 361.

<sup>46</sup> Henry J Steadman, "Predicting Dangerousness Among the Mentally Ill: Art, Magic and Science" (1983) 6 *Int'l J of Law & Psych* 381 at p 383.

<sup>47</sup> *Ibid* at p 383.

<sup>48</sup> *Ibid* at p 385.

[c] Comparing Violence Risk Assessment Tools with Literature on Terrorism

The chart below provides a cross-comparative analysis between the items tested in three commonly-used violence risk assessment tools, and samples of existing literature on the psychology of extremist offenders.

**Figure 1: Comparing Violence Risk Assessment Factors with Literature on Terrorism**

SPJ Instrument	Brief Glimpse of Literature on the Psychology of Terrorism
<p><b>HCR-20 (Historical Clinical Risk):</b> Previous violence; young age at first violent incident; relationship instability; employment problems; alcohol/drug abuse; mental disorder; psychopathy; early maladjustment; personality disorder; prior release or detention failure; lack of insight; negative attitudes; active symptoms of major mental illness; impulsivity; unresponsive to treatment; plans lack feasibility; exposure to destabilizers; lack of personal support; non-compliance with remediation attempts; stress.</p>	<p>Severe mental disorder is not commonly associated with terrorism.<sup>49</sup> As early as 1986, studies revealed that the “diagnostic explanation of terrorism as a function of mental disorder has been successfully critiqued”<sup>50</sup>. In fact, some research suggests that terrorist groups and organizations regularly screen out individuals who are “emotionally unstable” because “they represent a security risk” ...<sup>51</sup></p>
<p><b>PCL-R (Psychopathy):</b> glibness/superficial charm; grandiose sense of self-worth; need for stimulation/proneness to boredom; pathological lying; cunning/manipulative; lack of remorse/guilt; shallow affect; callous/lack of empathy; parasitic lifestyle; poor behavioural controls; promiscuous sexual contacts; early behavioural problems; lack of realistic, long term goals; impulsivity; irresponsibility failure to accept responsibility for own actions; many short term marital relationships; juvenile delinquency; revocation of conditional release; criminal versatility.</p>	<p>Some studies conclude that it is “difficult to generalise about psychological causes of terrorism because ‘most terrorists do not demonstrate serious psychopathology and there is no single personality type’<sup>52</sup>. While some members of terrorist groups are urged to deceive, and manipulate non-members, they are taught to be “honest and truthful to all and to abide by one set of ethics” in established religions.<sup>53</sup> The DSM minimally recognizes angry feelings or disorders of empathy,<sup>54</sup> which only accounts for one factor in the PCL-R assessment. Psychologists “have been unable to adequately define a terrorist mindset”.<sup>55</sup></p>

<sup>49</sup> Jeremy W Coid et al., “Extremism, Religion, and Psychiatric Morbidity in a Population-Based Sample of Young Men” (2016) 209 *British Journal of Psychiatry* 491 at p 491.

<sup>50</sup> *Shaw*, supra note 44 at p 360.

<sup>51</sup> *Prisons, Terrorism and Extremism*, supra note 43 at p 124.

<sup>52</sup> Samuel J Leisted, “Behavioural aspects of terrorism” (2013) 228 *Forensic Science International* 21 at p 22 [*Leisted*].

<sup>53</sup> *Ibid* at p 24.

<sup>54</sup> Ansar Haroun, “Psychiatric Aspects of Terrorism” (1999) 29(6) *Psychiatric Annals* 335 at pp 335-336 [*Haroun*].

<sup>55</sup> Wagdy Loza, “The psychology of extremism and terrorism: A Middle-Eastern perspective” (2007) 12 *Aggression and Violent Behavior* 141 at p 149 [*Loza*]. See also Andrew Silke, “Holy Warriors: Exploring the Psychological Processes of

<p><b>VRAG (Violence Risk Appraisal Guide):</b> PCL-R score; elementary school maladjustment score; meets DSM-III criteria for any personality disorder; lived with biological parents until the age of 16; failure on conditional release prior to index offence; Cormier-Lang score for juvenile and adult non-violent offences prior to index offence, marital status; meets DSM-III criteria for schizophrenia; victim injury for index offence; history of alcohol problem; age at index offence; female victim (negatively related).</p>	<p>Demographic studies indicate that many Islamic terrorist acts committed outside one's home country, are perpetrated by young, middle-class family men aged 17-26, who are high achievers, well-educated in modern sciences, and have university degrees.<sup>56</sup> However, consider a study of 250 West German terrorists reporting high incidents of fragmented families, severe conflict, especially with parents, and convictions in juvenile court.<sup>57</sup> Nevertheless, extremists are often found to be largely middle-class, educated men from caring, stable and religious families, with strong positive values of religion and community.<sup>58</sup></p>
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*Note: The factors listed under each of the tools in the chart above were extracted from Hy Bloom & Richard D Schneider, Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals (Toronto: Irwin Law, 2006).*

As can be gleaned from the chart, structured instruments, like the ones above, rely a great deal on criminal antecedents and a history of violence to predict future violence and risk. However, as research on terrorism and extremism suggests, many of these criminogenic indicators are unlikely to be found in the background of an extremist offender convicted of terrorism offences.

For example, the PCL-R score infers traits from criminal behaviour, and tries to explain them using a scoring system that assesses whether the individual has psychopathic tendencies.<sup>59</sup> It is predicated on the “tool’s ability to capture past behavior and antagonistic traits more so than its ability to assess emotional detachment”<sup>60</sup>. Meanwhile, none of the common overlapping dimensions of risk, such as “criminal history, an

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Jihadi Radicalization” (2008) 5(1) European Journal of Criminology 99 and Jeff Victoroff, “The Mind of the Terrorist: A Review and Critique of Psychological Approaches” (2005) 49(1) Journal of Conflict Resolution 3.

<sup>56</sup> *Ibid* at p 146.

<sup>57</sup> *Leisted*, supra note 52 at p 22.

<sup>58</sup> *Pressman*, supra note 7 at p 7 citing Sageman (2004).

<sup>59</sup> John F Edens, Jennifer L Skeem, and Patrick J Kennealy, “The Psychopathy Checklist in the Courtroom: Consensus and Controversies” in Jennifer L Skeem, Kevin S Douglas and Scott O Lilienfeld, eds, *Psychological Science in the Courtroom* (New York: Guilford Press, 2009) at p 181 [*Psychological Science in the Courtroom*].

<sup>60</sup> *Ibid* at p 191.

irresponsible lifestyle, psychopathy and criminal attitudes and substance abuse – characterize those who commit violent terrorism”.<sup>61</sup>

Similarly, the HCR-20 relies heavily on historical data, which is considered a robust predictor of violence in risk assessment.<sup>62</sup> Meanwhile, Pressman writes that “historical data for violent extremism has not been demonstrated” and thus, “historical items applicable to violent extremists will differ from those used for general criminality due to the different historical realities”.<sup>63</sup> She further concludes that there are four risk factors in the HCR-20 that are not identified in the literature: (1) 40% of the historical items are weighted on mental illness, while no relationship between it and terrorism has been found; (2) the probability of future crime typically increases with prior criminal acts, whereas no such correlation has been established for terrorists; (3) terrorists have not experienced problems with education, unemployment or unstable childhoods; and (4) terrorists have not been observed as aggressive or impulsive prior to committing terrorist acts.<sup>64</sup> Perhaps this is attributable to the fact that the population used to develop the HCR-20 was drawn from the criminal and forensic sectors,<sup>65</sup> which suggests that it should be cautiously administered when applied outside this context.

Likewise, some research rejects the preconception that extremists are necessarily psychopaths. Some scholars suggest that “although terrorists often commit heinous acts, they would rarely be considered psychopaths”, noting that “psychopaths do not sacrifice themselves for the community”.<sup>66</sup> Terrorism has also been identified as a group enterprise that is designed to maintain cohesion and focus, rather than individuality.<sup>67</sup> This type of “mutual commitment and trust” is inconsistent with the terrorist

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<sup>61</sup> *Monahan*, supra note 5 at p 179.

<sup>62</sup> *Pressman*, supra note 7 at p 13.

<sup>63</sup> *Ibid* at p 13.

<sup>64</sup> *Ibid* at pp 16 and 17.

<sup>65</sup> *Ibid* at p 16.

<sup>66</sup> *Monahan*, supra note 5 at p 178.

<sup>67</sup> *Leisted*, supra note 52 at p 22.

personality.<sup>68</sup> While it might be attractive to suggest that extremists are psychopaths, evidence of the correlation or causation between the two is scant, and hotly contested.<sup>69</sup>

These findings dovetail with the absence of mental illness as a causal or correlating factor in research on the psychology of terrorism. John Monahan writes that “[t]he lack of any relationship between major mental illnesses such as schizophrenia or bipolar disorder and terrorism may be the most frequently and uniformly replicated finding in the field”.<sup>70</sup> His findings are corroborated by a study released in 2015, which suggests that categorizing violent individuals as either a rational extremist or an irrational and unstable individual, might represent a false dichotomy.<sup>71</sup> In that study, Corner and Gill suggest that by viewing extremists in this way, “literature becomes stagnant and prevention methods are not as effective as possible”.<sup>72</sup> Furthermore, in 2004, one study of 172 Salafi jihadists found no evidence of psychiatric pathology.<sup>73</sup> These can be squared with what Pressman identifies, namely that “there is consensus today that no common profile exists for terrorists and studies that have sought mental dysfunctions or personality disorders as an explanation of terrorist behaviour have failed”.<sup>74</sup> Indeed, some researchers have found that carefully planned and executed behaviour is indicative of rational, rather than irrational thinking, and is not indicative of mental illness.<sup>75</sup>

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<sup>68</sup> *Monahan*, supra note 5 at p 178.

<sup>69</sup> John Horgan, “The Search for the Terrorist Personality” in Andrew Silke, ed, *Terrorist's, Victims and Society: Psychological Perspectives on Terrorism and its Consequences* (Chichester: John Wiley & Sons Ltd., 2003) at p 6.

<sup>70</sup> *Monahan*, supra note 5 at p 177. At p 175, he also warns that the empirical studies were only studied in the Islamic context.

<sup>71</sup> Emily Corner & Paul Gill, “A False Dichotomy? Mental Illness and Lonely-Actor Terrorism” (2015) 39(1) *Law and Human Behaviour* 23 at pp 23-24 [*Corner & Gill*]. Consider how this relates to this news release: Gary Dimmock, “Mentally ill drug addict or terrorist? Gonyou-Mclean released from jail” (07 January 2017) *Ottawa Citizen*, online: *Ottawa Citizen* <<http://ottawacitizen.com/news/local-news/0107-tevis>>.

<sup>72</sup> *Corner & Gill*, supra note 71 at p 26.

<sup>73</sup> *Pressman*, supra note 7 at p 7.

<sup>74</sup> *Ibid* at p 8. See also James Khalil, “Radical Beliefs and Violent Actions are not Synonymous: How to Place the Key Disjuncture Between Attitudes and Behaviours at the Heart of Our Research into Political Violence” 37(2) *Studies in Conflict and Terrorism* 198.

<sup>75</sup> *Loza*, supra note 55 at p 150.



Importantly, these findings do not eliminate the potential that mental illness might play some role in terrorist organizations, or with lone-wolf actors.<sup>76</sup> Some studies suggest that lone assassins are more likely to be “psychologically disturbed”, demonstrating a higher occurrence of mental illness than a group-based terrorist.<sup>77</sup> In a 2014 study of 119 lone-actor terrorists by Gill et. al, 31% had a history of mental illness.<sup>78</sup> Similarly, a 2013 study found that lone offenders had a higher rate of mental illness than group-offenders (40% vs. 7.6%).<sup>79</sup> To the best of my knowledge, there are no studies which provide data sets on the mental health of lone actors in Canada, although recent events might spawn concerted research in this area.<sup>80</sup>

As such, results regarding the role of mental illness remain mixed, and psychopathological correlation and causation differs between different types of terrorists.<sup>81</sup> Studies purporting conclusive findings on the role of mental health in extremism should be taken with a grain of salt. As suggested above, population samples are often limited, particularly in terrorism where the base rate of the behaviour is low, rendering their reliability suspect. In some studies, researchers identified some methodological and conceptual challenges with gathering reliable data on risk assessment in terrorism cases, which include: (1) whether the subject will be honest with the assessor;<sup>82</sup> (2) whether the heterogeneity of groups renders the research futile in its application to different terrorist groups;<sup>83</sup> and (3) that it is difficult to access convicted terrorists who have been incarcerated and/or are willing to be involved in research studies.<sup>84</sup> Perhaps these issues might explain why literature on the psychological makeup

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<sup>76</sup> *Prisons, Terrorism and Extremism*, supra note 43 at p 125. Note also that risk factors in lone-wolf actors are said to differ from those in group-based terrorism (Monahan at p 16)

<sup>77</sup> *Corner & Gill*, supra note 71 at p 24.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> See *R v Nuttall*, 2016 BCSC 1404 in which Justice C.J. Bruce acquitted co-accused Marie Korody and John Nuttall in the Victoria Day bomb plot in British Columbia.

<sup>81</sup> *Corner & Gill*, supra note 71 at p 24.

<sup>82</sup> *Monahan*, supra note 5 at p 180.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* at p 193-194.



of terrorists, their belief systems, thinking, personality dynamics and motivations remains unclear.<sup>85</sup>

In view of the foregoing, it is not surprising that there is no universally accepted violence risk assessment tool for extremists. In fact, Monahan specifically notes that there is no personality test or psychological instrument that has “reliably shown to produce scores for any psychological trait that significantly differentiates – either predictively or postdictively – people in a given population who engage in terrorist acts from people in the same population who do not”.<sup>86</sup> These problems are attributable to the fact that not enough extremists “have been psychiatrically examined to generate firm findings”.<sup>87</sup> This means, as Pressman & Flockton suggest, that “[i]t is essential for the risk assessment protocol for terrorists and violent extremists not be the same as those known as ‘psychiatric risk assessments’”.<sup>88</sup> Thus, a review of alternative assessment tools is warranted.

## **PART II: A REVIEW OF MODERN PSYCHIATRIC MODELS USED TO ASSESS RISK IN THE FORM OF EXTREMISM**

In my independent research, I discovered that only seven reported terrorism cases in Canada involved mental health expert witnesses who assessed extremist offenders, typically for their future risk.<sup>89</sup> Some relied on traditional tools explained in Part I. However, researchers explain that comparison between general criminal violence research and terrorism necessitates the development of an SPJ tool specific to the latter.<sup>90</sup> Some of the new tools developed specifically for these offenders respond to gaps

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<sup>85</sup> *Loza*, supra note 55 at p 152.

<sup>86</sup> *Monahan*, supra note 5 at pp 178 and 179.

<sup>87</sup> *Haroun*, supra note 54 at p 336.

<sup>88</sup> *Prisons, Terrorism and Extremism*, supra note 43 at p 122.

<sup>89</sup> See *R v Esseghaier*, [2015] OJ No 4922 (Ont SCJ); *R v Abdelbaleem*, [2011] OJ No 6691 (Ont SCJ); *R v Amara*, 2010 ONSC 251; *R v Ahmed*, 2014 ONSC 6153; *R v Khalid*, 2010 ONCA 861; *R v Chand*, 2010 ONSC 6538; *R v Gaya*, 2010 ONCA 860. This research was conducted up to and including April 10, 2017. It does not purport to be exhaustive, as there may be unreported cases that involved mental health expertise.

<sup>90</sup> J Reid Meloy & Paul Gill, “The Lone-Actor Terrorist and the TRAP-18” (2016) 3(1) *Journal of Threat Assessment and Management* 37 at p 38 [*Meloy & Gill*].

identified in Part I concerning traditional risk assessment tools derived from general offender populations. In this section, I focus primarily on two violence risk assessment tools, the Violence Extremist Risk Assessment (the “VERA”), and the Terrorist Radicalization Assessment Protocol (the “TRAP-18”).<sup>91</sup> An important distinction is that the TRAP-18 is limited in its application to lone terrorists, while the VERA can be applied in populations affiliated with terrorist movements. The table below captures the items scored in both tools.

**Figure 2: Cross-Comparison of Items on the VERA and the TRAP-18**

VERA	TRAP-18
<p><b>Attitudes/Mental Perspective Items</b></p> <ul style="list-style-type: none"> <li>• Attachment to ideology justifying violence</li> <li>• Significant view of injustice and grievances</li> <li>• Identified target of injustice</li> <li>• Dehumanization of identified target</li> <li>• Internalized martyrdom to die for cause</li> <li>• Rejection of society and values/alienation</li> <li>• High level anger, frustration and persecution</li> <li>• Need for group bonding and belonging</li> <li>• Identity problems</li> <li>• Low empathy of those outside own group</li> </ul> <p><b>Contextual Items</b></p> <ul style="list-style-type: none"> <li>• User of extremist websites</li> </ul>	<p><b>Warning Behaviours</b></p> <ul style="list-style-type: none"> <li>• Pathway warning behaviour (research, planning, preparation or implementation of attack)</li> <li>• Fixation and preoccupation with a person or cause, accompanied by deterioration in social and occupational life</li> <li>• Identification of psychological desire to be a pseudocommando, or have a warrior mentality</li> <li>• Novel aggression</li> <li>• Energy burst: increase in frequency or variety of activities related to the target</li> <li>• Leakage: communication to a third party of intent to do harm</li> <li>• Last resort: evidence of a violent action imperative and time imperative</li> </ul>

<sup>91</sup> See also the Assessment and Treatment of Radicalization Scale (ATRS), formerly known as the Belief Diversity Scale (BDS), developed by Dr. Wagdy Loza in Canada. The ATRS, formerly the BDS, studies the prevalence of extremist middle-eastern ideologies of immigrants coming to Canada, and whether they differ from Christians coming to Canada from similar regions. It is not a violence risk assessment tool. Instead, it is a self-report questionnaire that is designed to detect extremist views. It allows participants to agree or disagree with 33 items on six content scales which assess: attitudes towards Israel, political views, attitudes towards women, attitudes towards western culture, religiosity, condoning fighting, and whether participants misunderstood the items, answered carelessly, or attempted to conceal true answers (*Loza et al.*, supra note 21 at pp 156-158). Consider also the Multi-level Guidelines for the Assessment and Management of Group-Based Violence (MLG; Cook et al., 2013) and the Extremism Risk Guidelines (ERG 22+; Lloyd & Dean, 2015) as cited in *Meloy & Gill*, supra note 90 at p 38.

<ul style="list-style-type: none"> <li>• Community support for violent action</li> <li>• Direct contact with violent extremists</li> <li>• Anger at political decisions, actions of country</li> </ul> <p><b>Historical Items</b></p> <ul style="list-style-type: none"> <li>• Early exposure to violence in home</li> <li>• Family involvement in violent action</li> <li>• <b><u>Prior criminal violence</u></b></li> <li>• State-sponsored military, paramilitary training/fighting</li> <li>• Glorification of violent action</li> </ul> <p><b>Protective Items</b></p> <ul style="list-style-type: none"> <li>• Shift in ideology</li> <li>• <b><u>Rejection of violence to obtain goals</u></b></li> <li>• Change of vision of enemy</li> <li>• Interest in constructive political involvement</li> <li>• <b><u>Significant other/community support</u></b></li> </ul>	<ul style="list-style-type: none"> <li>• Directly communicate threat warning behaviour: communication to target or law enforcement</li> </ul> <p><b>Distal Characteristics</b></p> <ul style="list-style-type: none"> <li>• Personal grievance and moral outrage in personal life and historical, religious, or political events</li> <li>• Framed by an ideology: presence of beliefs justifying intent to act (e.g., religion)</li> <li>• Failure to affiliate with an extremist group: actual rejection of lone actor from terrorist group</li> <li>• Dependence on virtual community (e.g., social media chatrooms, emails, tweeting, listservs, etc.)</li> <li>• Thwarting of occupational goal (e.g., academic)</li> <li>• Changes in thinking and emotion when expression becomes strident, simplistic and absolute</li> <li>• Failure of sexual intimate pair bonding</li> <li>• Mental disorder historically or presently</li> <li>• Greater creativity and thinking</li> <li>• Criminal violence in the past</li> </ul>
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[a] The VERA

Developed by Pressman, the VERA is a Canadian SPJ tool designed for use with persons that have a history of extremist violence or have been convicted of terrorism-type offences.<sup>92</sup> The items in the VERA are scored as low, moderate or high, with the final risk estimate relying on informed clinical judgment, rather than combined or summed scores.<sup>93</sup> While the VERA was modeled after, *inter alia*, the HCR-20 (Version 2), it was

<sup>92</sup> Pressman, supra note 7 at p i.

<sup>93</sup> Monahan, supra note 5 at p 184.

created to account for the variables that reflect the literature on terrorism and extremism. To my knowledge, it has only been used by one expert in a Canadian terrorism case.<sup>94</sup>

In her study on the efficacy of the VERA as compared to the HCR-20, Pressman found that 75% of the items scored in the HCR-20 were found to have little to no relationship to risk factors identified with radical extremists.<sup>95</sup> Furthermore, her analysis provides that,

Items on the VERA have been supported by the results of research undertaken in the area of radicalization and terrorism, are based on previous work undertaken in collaboration with RCMP personnel having operational experience with criminal violent extremists, have followed from discussions with professionals in the security and intelligence fields and have used relevant information obtained from interviews and self-report questionnaire data on radicalization.<sup>96</sup> [emphasis added]

Indeed, existing literature supports many of the items in the VERA, such as prior criminal history. For example, while the PCL-R bases its “predictive utility for violence and recidivism from the assessment of past criminal behavior”,<sup>97</sup> past criminal violence constitutes one item on the VERA scale. Monahan observes a study on suicidal terrorists in which no evidence of major criminal behaviour was identified.<sup>98</sup> He reports no known studies of past terrorism as a risk factor for future terrorism, likely because offenders are incarcerated for such a long time, and not given the opportunity to recidivate.<sup>99</sup> Meanwhile, a 2004 report demonstrated that 25% of Al-Qaeda terrorists were involved in petty criminal activities such as forgery, credit card frauds, marijuana, and the like,

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<sup>94</sup> See *R v Ahmed*, 2014 ONSC 6153 where Dr. Wagdy Loza found that Mr. Ahmed scored low in the subscales of the test. Both the Crown and Mr. Ahmed appealed the 12-year sentence, but the Ontario Court of Appeal left it unaltered (2017 ONCA 76). In *R v Amara*, 2010 ONSC 251, the VERA was discovered after the offender was assessed, but some of the factors itemized were assessed.

<sup>95</sup> *Pressman*, supra note 7 at p 17.

<sup>96</sup> *Ibid* at p 21.

<sup>97</sup> *Psychological Science in the Courtroom*, supra note 59 at p 180.

<sup>98</sup> *Monahan*, supra note 5 at p 177.

<sup>99</sup> *Ibid*.

committed for the purpose of financing their organizations.<sup>100</sup> While these findings should not be construed as generalities, they are nevertheless noteworthy.

Moreover, the VERA aptly accounts for variables extracted from empirical literature on terrorism, identifying risk factors like ideology, grievances, affiliations, and moral emotions.<sup>101</sup> For example, it identifies the presence or absence of beliefs that justify violence, shifts in them, martyrdom, and interests in constructive political involvement, each being expressions of ideological beliefs. With respect to grievances, it assesses the presence or absence of viewpoints about injustices, and anger at political decisions on a macro-level. In terms of affiliations, the presence of a significant other, the use of extremist websites, the degree of community support, direct contact with other violent extremists, and state-sponsored training or fighting are all factored into the analysis. Finally, the identification of anger towards political decisions and as a prevailing attitude, a change of vision or viewpoint about who the enemy is, and whether the individual rejects violence to obtain goals, all contribute to the assessment of one's moral emotions.

[b] *The TRAP-18*

In 2016, J. Reid Meloy developed the TRAP-18, the most recently designed SPJ tool used to assess risk in extremists. It was created after sampling “111 lone actors from the United States and Europe who engaged in, or planned to engage in acts of lone-actor terrorism, and were convicted for their actions or died during the commission of their offences”.<sup>102</sup> This tool highlights an effort to counter violence by distinguishing those who have extreme beliefs from those who intend to act violently on their beliefs.<sup>103</sup> Furthermore, it is a risk assessment template for lone-actor extremists based on literature in relation to

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<sup>100</sup> *Loza*, supra note 55 at p 150. E. Bakker, “Characteristics of Jihadi Terrorists in Europe (2001-2009) in Coolsaet, ed. *Jihadi Terrorism and the Radicalisation Challenge* (Surrey: Ashgate, 2011), pp. 131-144.

<sup>101</sup> *Monahan*, supra note 5 at p 186.

<sup>102</sup> *Meloy & Gill*, supra note 90 at p 41.

<sup>103</sup> *Ibid* at p 37.

warning behaviours of targeted violence, and the distal characteristics of lone-actors.<sup>104</sup> It is exceptional in that it focuses on purposeful, targeted violence rather than violence in general.<sup>105</sup>

The TRAP-18 consists of two sets of indicia: warning behaviours and distal characteristics. Eight warning behaviours were developed “to identify patterns of proximal risk for intended or targeted violence, in contrast to the more common mode of violence which is typically impulsive or reactive”.<sup>106</sup> Ten distal characteristics account for empirical and theoretical research on terrorism, some of which come from Dr. Meloy’s assessment of foreign and domestic lone “terrorists” throughout the last 20 years.<sup>107</sup> These characteristics define the more “chronic and distal aspects of the lone-actor terrorist that may prompt further intelligence gathering and monitoring, but may stop short of, or ignore, active risk management”.<sup>108</sup>

Like the VERA, the TRAP-18 also considers the four indicators of violence in extremist offenders. Firstly, it tests for the presence or absence of an ideology used to justify conduct, which includes, but is not limited to religion. Secondly, it tests for a range of grievances, personal, historical, religious or moral in nature. In that sense, it captures events, isolated issues, or broader political matters that might incite moral outrage. Thirdly, it is sensitive to the presence of affiliations, personal or collective, which might embody warning behaviours or distal characteristics. These include the failure to affiliate with an extremist group, dependence on a virtual community, and a failure to intimately bond with another person. Fourthly, some of the items under the warning behaviour subcategory reflect moral emotional characteristics such as novel aggression, energy bursts, and anger. It is noteworthy that aggression is qualified by the word “novel”, which suggests that the lone-actor has not acted out aggressively before.

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<sup>104</sup> *Ibid* at p 38.

<sup>105</sup> *Ibid* at p 39.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*.

The dual nature of the TRAP-18, which incorporates both warning behaviours and distal characteristics, suggests that the instrument is robust, capturing factors relevant to the historic antecedents of the subject, along with grievances, frustrations, ideological leanings and behaviour that suggest the mobilization of their threat. By separating the two, the instrument distinguishes between watching and warning - distal characteristics compel active monitoring, while proximal, warning characteristics compel active risk management and watching.<sup>109</sup> Perhaps this explains why items under both behavioural subsets were prevalent indicators in the offender population. Offenders studied in the TRAP-18 study demonstrated several of the indicators, including but not limited to the following:

- 70% of the lone actors demonstrated at least half of the indicators in the TRAP-18;
- 100% were framed by an ideology;
- 88% displayed changes in thinking and emotion;
- 85% made a communication to a third party in which they threatened harm;
- 78% presented a personal grievance and moral outrage;
- 41% displayed the presence of a mental disorder;
- 85% displayed signs of leakage, which covers a range of behaviour including whether the individual produced public statements about their ideology prior to the event, made verbal statements to a wider audience about their intent to act, let others know about their grievances, ideology or intent, and whether they desired to hurt others.<sup>110</sup>

Outside of the sentencing and parole stages, this instrument might be useful in tailoring the appropriate conditions of release in a terrorism peace bond. Terrorism peace bonds are recognizances issued by a provincial court pursuant to section 83.3 of the *Criminal Code* if a peace officer believes or suspects, on reasonable grounds, that a terrorist attack may be carried out.<sup>111</sup> Peace bonds are not criminal charges. However, by breaching the

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<sup>109</sup> *Ibid* at p 46.

<sup>110</sup> *Ibid* at p 45.

<sup>111</sup> Section 83.3(1) requires the Attorney General's consent before an information is laid against a suspect. Section 83.3(2) reads "Subject to subsection (1), a peace officers may lay an information before a provincial court judge if the peace officer: (a) believes on reasonable grounds that a terrorist activity may be carried out; and (b) suspects on reasonable



terms of a peace bond, one may incur criminal charges. Conditions associated with the peace bond might include active monitoring such as wearing a GPS ankle-bracelet, reporting regularly to probation, and participating in programming tailored to the needs of the offender.<sup>112</sup>

The TRAP-18 is a strong predictor of violence where lone-actors have leaked information about their intent to carry out an act, which is how individuals come to the attention of police before becoming the subject of a terrorism recognizance. Some of the warning behaviours that law enforcement identify prior to arrest are captured by it, which may assist with the prediction of violent risk. To balance the assessment, the distal characteristics transcend immediate warning signals, providing the court with background information about the characteristic makeup of the offender. In that way, the TRAP-18 might assist courts in fashioning more appropriate conditions of release, in addition to treatment.

However, courts should be mindful that there is some authority for the proposition that involuntary participation in a treatment program violates the *Charter*. In *Canada (Attorney General) v Driver*, 2016 MBPC 3, Rolston P.J. declared that mandatory participation in a treatment program, as required by Mr. Driver's recognizance conditions, violated his section 7 rights under the *Charter*.<sup>113</sup> However, the decision did not receive appellate scrutiny. It is important to note that this is the only decision of its kind. It can only carry persuasive value, and does not constitute binding authority. Therefore, the use of the TRAP-18 for interventions at the release stage, peace bond or otherwise, is not foreclosed in Canadian law.

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grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is likely to prevent the carrying of the terrorist activity.”

<sup>112</sup> See for example *Canada (Attorney General) v Driver*, 2016 MBPC 3 as an example of the extent to which programming might be ordered [*Driver*]. For other examples of peace bond conditions, see Stewart Bell, “Ottawa man who said he wanted to join ISIL signs terrorism peace bond, agrees to wear GPS ankle bracelet” (26 January 2017) National Post online: National Post <<http://news.nationalpost.com/news/canada/ottawa-man-who-said-he-wanted-to-join-isil-signs-terrorism-peace-bond-agrees-to-wear-gps-ankle-bracelet>>.

<sup>113</sup> *Driver*, supra note 112 at para 52.



It is noteworthy that the VERA and the TRAP-18 are embryonic in their application and predictive validity. They have not been sufficiently employed in Canadian courts to generate a constructive statistical track record from which we can trust their efficacy. Nevertheless, each tool captures risk items that are absent in more traditional violence risk assessment frameworks by drawing on clinical experience and research from literature studying extremist psychology. Notwithstanding these features, clinicians should be mindful of the heterogeneity of collective terrorist organizations, and the various factors that incite individuals to act on their extreme beliefs. Furthermore, clinicians have a duty to be mindful of the differences between lone actors and collective organizations, especially when recommending treatment plans to courts. Taken together, clinical discretion, awareness of cultural variance in behaviour, restraint towards diagnosis, and the employment of these tools, might improve the process of predicting dangerousness.

### **PART III: RECOMMENDATIONS FOR REFORM AND TRIAL PRACTICE**

As the studies above warn, violence risk assessment warrants meticulous clinical assessment with careful consideration of the cultural, historical and characterological traits of the offender. Presuming that generic risk assessment tools can be superimposed on the extremist offender does a disservice to the correctional facility responsible for assessing parole, and more importantly, the offender whose liberty might be further compromised by high scores on inaccurate assessment tools. Although there is a general consensus among clinicians that actuarial instruments predict with greater accuracy than clinical analysis alone, assessors should appreciate that these instruments are not infallible.

As prison radicalisation increases around the world,<sup>114</sup> the accuracy of violence risk assessment tools is critical to ensure that future risk is mitigated through comprehensive programming. While less than 1 percent of offenders in federal penitentiaries in Canada are considered violent extremists,<sup>115</sup> differences among radicalized offenders are still as large as those among offenders in general,<sup>116</sup> making the identification of risk of radicalisation a difficult endeavour. Therefore, SPJ tools that are tailored to extremist offenders, which account for factors that inform violent conduct, both intrinsic and extrinsic to the offender, call for greater attention in the context of sentencing and parole. Against this backdrop, I make two recommendations – one in the context of legislative reform, and another for trial counsel dealing with these assessments.

*[a] The Use of a Specialized Form for Offenders Charged with Terrorism Offences*

Few options are available to counsel seeking a psychiatric assessment of their client with a view to rehabilitative programming and treatment. In this section, I recommend the development of a *Criminal Code* assessment specifically for extremist offenders.

Typically, the only opportunity for counsel to arrange for a psychiatric assessment is by way of an assessment order for fitness or criminal responsibility.<sup>117</sup> In the terrorism context, these are infrequently requested,<sup>118</sup> which may be attributable to the fact that terrorism offences often attract a great deal of planning and deliberation prior to their execution,<sup>119</sup> which disqualifies them from NCR (Not Criminally Responsible) and fitness

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<sup>114</sup> DB Skillicorn et. al., “Structural differences of violent extremist offenders in correctional settings” (2015) 16(3) *Global Crime* 1 at p 2.

<sup>115</sup> *Ibid* at p 4.

<sup>116</sup> *Ibid* at p 17.

<sup>117</sup> *Code*, supra note 35 at s 672.11 which provides for the opportunity to arrange for an assessment order if there are reasonable grounds to believe that it is necessary to determine, *inter alia*, whether the accused is unfit to stand trial or was suffering from a mental disorder at the time of committing the offence, among many things. Section 16 of the Code allows for NCR (not criminally responsible) findings. It reads: “No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.”

<sup>118</sup> See, however, *R v Esseghbaeir*, [2015] OJ No 4922 (Ont SCJ) where a fitness assessment was ordered.

<sup>119</sup> While I do not suggest that all offenders are highly sophisticated actors, there is a degree of truth to this proposition given the studies canvassed in this paper.

assessments. Similarly, resort to a pre-sentence report [“PSR”]<sup>120</sup> minimally assists the court in identifying the psychological/psychiatric needs of the offender and the corollary treatment plans required.

In considering what type of reform may benefit the accused in this area, I turned to the *Youth Criminal Justice Act*. The Act, capturing young offenders aged 12-17, provides counsel with an opportunity to order a comprehensive mental health assessment under section 34.<sup>121</sup> Section 34 reports require a qualified medical or psychiatric expert<sup>122</sup> to conduct an “objective assessment of the young person’s risk; psychological, psychiatric, educational, or medical needs; and responsiveness to treatment”, adding accuracy to the court’s attempt to rehabilitate youth.<sup>123</sup> In that sense, they are more expansive than a PSR. Uniquely, section 34 reports can be ordered at any time during the proceedings, including the bail stage.<sup>124</sup>

For offenders convicted of terrorism offences, I recommend the codification of an assessment form similar to a section 34 report, to specifically incorporate the items listed in the VERA and TRAP-18 tools. While clinicians should be left to their own devices to select and apply violence risk assessment tools, instruments like the VERA and TRAP-18 should not be overlooked. I suggest that a standardized template be codified to ensure that clinicians assess offenders’ affiliations with extremist organizations, their grievances, moral outrage, and ideology, which are captured by both instruments. Recognizing the value of clinical discretion, I suggest that the form also include a section for qualitative,

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<sup>120</sup> *Code*, supra note 35, at s 721(1) which provides that, upon request, probation officers are to complete a PSR, which provides a snapshot of the offender’s background to assist the court in fashioning a sentence.

<sup>121</sup> *Youth Criminal Justice Act*, SC 2002, c 1 at s 34, which provides that “A youth justice court may, at any stage of the proceedings, against a young person, require that the young person be assessed by a qualified person who is required to report the results in writing to the Court”.

<sup>122</sup> The assessor must be a “qualified person” within the meaning of section 34(14) of the *YCJA* (*Ibid*).

<sup>123</sup> Brock Jones, “YCJA Section 34: Medical and Psychological Reports” Crown Law Office Criminal (09 December 2014) at pp 8-9, online:

<[http://carrieresantementale.ca/Resource%20Library/Children%20and%20Youth/BJones\\_Best%20Practices%20Guidelines%20-%20YCJA%20Section%2034%20Reports%20-%20Dec%2009%202014.pdf](http://carrieresantementale.ca/Resource%20Library/Children%20and%20Youth/BJones_Best%20Practices%20Guidelines%20-%20YCJA%20Section%2034%20Reports%20-%20Dec%2009%202014.pdf)>.

<sup>124</sup> *Ibid* at p 4. See also *YCJA*, supra note 121.

independent clinical assessment. The qualitative aspect of the form should encourage clinicians to draw on the most recently developed literature in this area, instead of only applying SPJ tools. This type of blended template has the potential to fill in some of the gaps in the availability of mental health assessments in the *Criminal Code*, particularly given the limited scope of PSRs, which do not include psychiatric assessments, and the low frequency with which fitness and criminal responsibility assessments are requested.

[b] *The Role of Trial Counsel*

In addition to the foregoing, counsel should review existing literature on the reliability of generic violence risk assessment tools when dealing with terrorism cases, particularly at the post-conviction stage. Trial lawyers have a duty to test the expertise of the clinician, and ensure the reliability of the evidence adduced.<sup>125</sup> For example, if a clinician has not considered the most recent research developments on violence risk assessment for extremist offenders, counsel has an obligation to cross-examine experts to assess their understanding of the reliability of tools in this area.<sup>126</sup>

In addition to understanding his or her obligations to the court,<sup>127</sup> counsel should scrutinize the reliability of the violence risk assessment tools used for offenders with extremist backgrounds. While far from exhaustive, the following questions are worth considering before cross-examining a mental health expert:

- How much time has the clinician spent with the offender?
- Which assessment tools did the clinician use and why?
- Has the clinician considered other assessment methodologies?
- Did the clinician properly apply the risk assessment tools?

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<sup>125</sup> I owe this idea to Brian Greenspan, to whom I posed a question about testing actuarial versus clinical assessments during a lecture provided at the University of Toronto on March 15, 2017 in a seminar course on Mental Health and the Law.

<sup>126</sup> Experts are expected to be well-read in the literature over which they purport expertise. This was recently highlighted by Justice Anne Molloy of the Ontario Superior Court in *Christie Blatchford*, “Judge slams Ontario’s revered chief forensic pathologist over testimony in boy’s death” (12 April 2017) National Post, online: National Post: <<http://news.nationalpost.com/news/canada/judge-slams-ontarios-chief-forensic-pathologist-over-testimony-in-boys-death>>.

<sup>127</sup> See *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at paras 34 and 40 on the fact that independence and impartiality of the expert directly impact the admissibility of the evidence, and not simply its weight.

- Can the clinician identify shortcomings of violence risk assessment predictions?
- Does the clinician know about the degree of reliability in standard violence risk assessment tools as they apply to different offenders?
- Did the clinician consider the reliability and accuracy of the tools when measured against the cultural background of the subject?
- Does the clinician have special training to conduct violence risk assessments? If so, when was that training received, and has it been updated since?
- Does the clinician have special training in violence risk assessments as it applies to extremists?
- Has the clinician conducted violence risk assessments for extremists in the past?
- Does the clinician have an independent understanding of literature on extremist ideologies and psychological states?
- If the clinician rejects the use of SPJ tools for terrorism offences, why is that the case?

## CONCLUSION

At the outset of this paper, I drew on the work of Michel Foucault, who avidly critiqued psychiatric knowledge,<sup>128</sup> to support the proposition that risk assessments are prospective, fallible exercises. While some SPJ instruments may seem reliable and trustworthy on their face, they should not be applied as truths in predicting the future of violence or risk.

In formulating my argument, I identified some of the shortcomings of traditional violence risk assessment tools, which were established using offender populations with mental health issues, and criminal antecedents. I examined literature which suggests that many so-called “terrorists” are not mentally ill, and do not come from broken socio-economic backgrounds. My rationale for doing so was to emphasize that many diagnostic tools, including some of the most reliable, might not account for cultural differences in a small contingency of non-traditional cases involving terrorism. More importantly, none of the existing assessment tools have been subjected to a litmus test for their reliability or

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<sup>128</sup> See also *Aggarwal*, supra note 36 at p 385.

accuracy.<sup>129</sup> This proves troublesome, particularly as more inmates convicted for terrorism offences are institutionalized. While I identified more recent SPJ tools that target the ideological features of extremists, their efficacy is not guaranteed. The VERA is used to assess extremism in an affiliated population, while the TRAP-18 is designed to assess a lone operator. With only seven terrorism cases in Canada involving assessments mental health experts, it is not clear how some of these tools will fare in the future.

While I do not purport to have medical expertise, the underpinning principle of my findings suggest that extremists are not the average run-of-the-mill offenders with mental health issues and/or violent pasts. Extremists are often driven, motivated, calculated, and highly sophisticated individuals with an ideological lens and a grievance informing the rationale for their conduct. While lone actors are more likely to have mental health issues, this does not mean that traditional mental health assessments are a panacea for accurate predictions of violent extremism. A more contextual, holistic and comprehensive assessment is warranted. Some of the tools developed specifically to assess extremists increase the accuracy of violence risk assessments in this way. Without a shift in medical culture on the use of these assessments, the utility of programming in the post-conviction phase risks becoming diluted. Without targeted programming for radicalized offenders, our criminal justice system risks contributing to hardened extremist ideologies in prison populations.

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<sup>129</sup> Proposal White Paper, “Testing the Reliability, Validity and Equity of Terrorism Assessment Tools,” Paul Gill, Lorne Dawson, and David Hoffman, Community Resilience Fund, Centre for Community Engagement and the Prevention of Violence, Public Safety Canada (2017).