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Author: Jack Bickerton

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An insidious violation of the mind:  
Should family courts remove children from the 'home' due to  
'radicalisation'?

*Jack Bickerton*

Taking a child away from her family is a momentous step... In a totalitarian society, uniformity and conformity are valued. Hence the totalitarian state tries to separate the child from her family and mould her to its own design... In a free and democratic society, we value the diversity and individuality that families nurture.

Baroness Hale of Richmond<sup>1</sup>

In the distant shadow of the 9/11 terror attacks and the 'War on Terror'<sup>2</sup> that has engulfed the western world, the concept of 'radicalisation' has come to the forefront of legal discussion. In the context of family law, this may be seen as a ubiquitous term lacking coherent meaning – yet, it is often used to describe children raised by parents who hold 'extremist' views. In recent years, cases involving local authorities bringing care proceedings in relation to children who are thought to be radicalised, or at risk of radicalisation, are becoming increasingly prevalent. Such cases have been described as a 'new facet of child protection',<sup>3</sup> and with any new legal problem comes legal uncertainty.

At present, the family's potential role in radicalisation lacks 'significant research attention'.<sup>4</sup> Yet, this is especially noteworthy in the legal dimension, for there is a need to understand the complexities of this pertinent and contemporary legal problem so that children can be protected. There is no consensus regarding how the family court should deal with the radicalisation of children. Whilst needing protection, it is uncertain how this can be proportionately achieved. This paper evaluates the removal of children under section 31 of the Children Act 1989<sup>5</sup> as a method of dealing with this new facet of child protection. The

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<sup>1</sup> *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [20] Hale LJ.

<sup>2</sup> BBC News, 'Full text: State of the Union address', *BBC News* (London, 30 January 2002) <<http://news.bbc.co.uk/1/hi/world/americas/1790537.stm>> accessed 14 January 2018.

<sup>3</sup> *London Borough of Tower Hamlets v B* [2015] EWHC 2491 (Fam), [2016] 2 FLR 877, [6] Hayden J.

<sup>4</sup> Basia Spalek, 'Radicalisation, de-radicalisation and counter-radicalisation in relation to families: Key challenges for research, policy and practice' (2016) 29 *Security Journal* 39, 39.

<sup>5</sup> Hereinafter, 'CA 1989'.

aim is to establish whether removing the child is a proportionate action for a contemporary legal problem. The first section investigates definitions of radicalisation, illustrates the concept's confusion and, from a psychological perspective, the child's vulnerability to it. The second section analyses recent cases and applies the concept to the notion of 'significant harm' within the definition of the CA 1989 to establish whether radicalisation is harm in child law. The third section examines the right to privacy, traumatic aspects of the order and illustrates the disproportionate nature of the order through concentration on the child's welfare. Finally, in cases where the court must be seen to act, this paper's fourth section proposes supervision orders and wardship as alternatives to removal that could be utilised by family courts to protect children.

Although radicalisation cases manifest differently, this article focuses on scenarios where parents 'who hold extremist ideologies... may be indoctrinating children into those beliefs, placing them at risk of emotional and psychological harm'.<sup>6</sup> Undoubtedly, this topic involves an unavoidable overlapping between child protection, privacy and national security and so it is of momentous sensitivity. Yet, it is vital to note that as per statute, the child's welfare is paramount and should not be obscured by extraneous concerns.

#### 1. A child's vulnerability to radicalisation: a matter worthy of safeguarding

In years to come, the current zeitgeist might be remembered as one involving a turbulent time of terrorism with the term 'radicalisation' being of frequent political use. The concept's prevalence infers its meaning is understood, even though defining it legally remain an arduous task. This section explores possible definitions and demonstrates that radicalisation is ill-defined and adheres to a problematic terrorism nexus. Furthermore, through examination of Jean Piaget's theory of cognitive development,<sup>7</sup> it is argued children are extremely vulnerable to radicalisation, rendering it a matter for safeguarding. Ultimately, the confusion surrounding radicalisation is illustrated, setting the scene for the difficulties in protecting children from it. Whilst remedying such confusion is not within this dissertation's capacity, it must be acknowledged in order to understand the complexities of these child protection cases.

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<sup>6</sup> Sarah Williams, 'Radicalisation: a proportionate response', (2015) (Family Law Week) <[www.familylawweek.co.uk/site.aspx?i=ed149997](http://www.familylawweek.co.uk/site.aspx?i=ed149997)> accessed 24<sup>th</sup> October 2017.

<sup>7</sup> Jean Piaget, 'Development and Learning' (1964), in Mary Gauvain and Michael Cole (eds), *Readings on the Development of Children* (2<sup>nd</sup> Edition, W H Freeman, 1997).

## 1.1 What is radicalisation?

Radicalisation is not a new phenomenon,<sup>8</sup> though following the events of '9/11' definitions tend to link it to terrorism.<sup>9</sup> Antecedent to the rise of globalised terrorism, radicalisation did not necessarily allude to 'what goes on before the bomb goes off'.<sup>10</sup> It was rarely used in the political sense as it is today, though was 'occasionally used in academia'.<sup>11</sup> For example, it was used to describe the mentality of the British working-class during the industrial strikes of the early 1900s,<sup>12</sup> and the rise of feminism in New Zealand's education system.<sup>13</sup> Indeed, such classes of people may have been radical in their views, but none engaged in what would today be described as terrorism. Essentially, the concept is culturally relative and 'in the eyes of the beholder: one man's radical is another man's freedom fighter'.<sup>14</sup>

The lack of objective consensus as to 'who is radical', and 'what is radicalisation', has led to some commentators to erroneously describe the concept as 'myth'.<sup>15</sup> Adopting such a view denies the far-reaching harms associated with child radicalisation. Rather, this paper contends it is appropriate to suggest the concept is 'fluid',<sup>16</sup> and lacks a single definition.<sup>17</sup> Both these factors have contributed to the difficulty in applying it to the context of child protection in the family court. The current conception is not 'a secure enough foundation for the operation of the court's powers under child protection legislation'.<sup>18</sup> Nevertheless, it is used in the family court and is indeed a new facet of child protection. A failure to protect children simply due to a lack of a consistent definition is reprehensible.

*Prevent*, the United Kingdom's<sup>19</sup> counter-terrorism strategy, defines radicalisation as 'the process by which a person comes to support terrorism and forms of extremism leading to

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<sup>8</sup> Alexandra Sewell and Halit Hulusi, 'Preventing radicalisation to extreme positions in children and young people. What does the literature tell us, and should educational psychology respond?' (2016) 32 *Educational Psychology in Practice* 343, 343.

<sup>9</sup> Rachel Taylor, 'Religion as harm? Radicalisation, extremism and child protection' (2018) 30 *Child and Family Law Quarterly* 43.

<sup>10</sup> Mark Sedgwick, 'The Concept of Radicalization as a Source of Confusion' (2010) 22 *Terrorism and Political Violence* 479, 479.

<sup>11</sup> *ibid* 480.

<sup>12</sup> John Foster, 'Strike Action and Working-Class Politics on Clydeside 1914 – 1919' (1990) 35 *International Review of Social History* 33.

<sup>13</sup> See Sue Middleton, 'Schooling and Radicalisation: life histories of New Zealand feminist teachers' (1987) 8(2) *British Journal of Sociology of Education* 169.

<sup>14</sup> Peter Neumann, 'The trouble with radicalization' (2013) 89 *International Affairs* 873, 878.

<sup>15</sup> Andrew Hoskins and Ben O'Loughlin, 'Media and the myth of radicalisation' (2009) 2 *Media, War and Conflict* 107, 107.

<sup>16</sup> Taylor (n 9) 42.

<sup>17</sup> Neumann (n 14) 874.

<sup>18</sup> Taylor (n 9) 42.

<sup>19</sup> Hereinafter, 'UK'.

terrorism'.<sup>20</sup> Despite its vague nature, this remains the most commonly used definition by the courts; though a more extensive definition is found in case law:

Radicalising is a vague and non-specific word which different people may use to mean different things... (Such as), 'negatively influencing (a child) with radical fundamentalist thought, which is associated with terrorism'... If any child is being indoctrinated or infected with thoughts involving the possibility of terrorism... then that is potentially very abusive indeed.<sup>21</sup>

Both definitions are consistently referred to in radicalisation cases and most explicitly linked to terrorism.<sup>22</sup> Whilst Holman J's perspective above is detailed, it offers little explanation and perhaps is unintentionally considered a definition.<sup>23</sup> This lack of explanation only reinforces Taylor's concern that the court is unable to efficiently apply the concept in child protection cases.<sup>24</sup> It is the terrorism nexus that is problematic, as radicalisation need not be violent.

From a sociological perspective, Spalek expands upon this, suggesting radicalisation as dangerous even when indirectly linked to violence.<sup>25</sup> Moreover, Taylor specified radicalisation as potentially harmful regardless of likelihood of future violence.<sup>26</sup> Whilst violent radicalisation is the most referred in law, non-violent radicalisation appears the most prominent in relation to children, and so a distinction must be drawn. The idea that radicalisation is what happens before the bomb goes off may be true for modern-day terrorists, for after all the terrorist is presumed to be radical, yet the 'the radical is not presumed to be a terrorist'.<sup>27</sup> It is unlikely a radicalised child in the UK would engage in violent terrorism at such a young age; 11 out of 127 terrorist-related convictions associated with Al Qa'ida were committed by 15 – 19 year olds, and not all would materialise violently.<sup>28</sup> When considering the radicalisation of children, the danger is distinct from terrorism. The danger is that the child will become so absorbed in extremism that their psychological development will be significantly harmed. The indoctrination of extremist beliefs likely causes a radicalised non-violent thought-process, which is as equally damaging as violent radicalisation. Direct action should not be a specific criterion within a radicalisation definition.

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<sup>20</sup> Home Office, *Prevent Strategy*, (Cm 8092, 2011) 108.

<sup>21</sup> *Re M (Children)* [2014] EWHC 667 (Fam) [23] Holman J.

<sup>22</sup> Neumann (n 14) 875.

<sup>23</sup> Taylor (n 9) 52.

<sup>24</sup> *ibid* 42.

<sup>25</sup> Spalek (n 4) 39.

<sup>26</sup> Taylor (n 9) 51.

<sup>27</sup> Sedgwick (n 10) 483.

<sup>28</sup> Home Office (n 20) para 10.29.

Despite being central to any definition of radicalisation,<sup>29</sup> further confusion arises in relation to extremism; it is the ambiguous aspect of the concept.<sup>30</sup> In *Prevent*, extremism is defined as a ‘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>31</sup> It is defined extremely broadly,<sup>32</sup> which only fuels such ambiguity. It is unclear when ideology constitutes extremism. For example, would orthodox Catholics be considered extremist and radicalised due to their views on homosexuality? Extremism, like radicalisation, remains culturally relative, as exemplified by free speech being considered radical in North Korea, but a mainstream belief in Western countries.<sup>33</sup> Notwithstanding, the extremely broad nature of the definitions is all the courts have to work with and thus what is extremist ultimately falls to their discretion.

The crux of these definitions is that radicalisation is a process. This is generally agreed upon, individuals do not become extremists overnight, nor is radicalisation caused by a single influence.<sup>34</sup> Whilst this paper focuses on parents radicalising their children, other factors that contribute to radicalisation are worth acknowledging such as peer-pressure, isolation and the ‘suspect community’.<sup>35</sup> The latter, for example, alienates the most vulnerable which may reinforce extremist thought.<sup>36</sup> But, these concerns lie outside this paper’s remit, and will not be addressed.

Overall, the terrorism nexus and the confusion surrounding extremism renders the concept ‘inherently context dependent’.<sup>37</sup> However, for the purposes of this work, ‘radicalisation’ will be interpreted as a process by which a child comes to learn and support extremist views which are psychologically damaging; though this is no definition. The concept in the current zeitgeist remains too difficult to define. Most research relies on the ‘relative meaning’ or assumes it as understood.<sup>38</sup> This may seem oversimplified, but it appears to be the judicial approach. As Hayden J stated, radicalisation and extremism are so prevalent in contemporary society, ‘they scarcely need definition’.<sup>39</sup> However, such definitional concerns are not within the scope of this work’s remit either, as the focus will be the current law.

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<sup>29</sup> Sedgwick (n 10) 483.

<sup>30</sup> Neumann (n 14) 874.

<sup>31</sup> Home Office (n 20) 108.

<sup>32</sup> Taylor (n 9) 44.

<sup>33</sup> Neumann (n 14) 876.

<sup>34</sup> *ibid* 874.

<sup>35</sup> Paddy Hillyard, *Suspect Community: People’s Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press, 1993).

<sup>36</sup> *ibid*.

<sup>37</sup> Neumann (n 14) 878.

<sup>38</sup> Sedgwick (n 10) 483.

<sup>39</sup> *Re K (Children)* [2016] EWHC 1606 (Fam), [15] Hayden J.

## 1.2 The child's vulnerability to radicalisation

As radicalisation is a process, it can be inferred as one of learning. Children learn extremist thought and are thus at risk of psychological harm, which indeed renders this 'a matter of safeguarding'.<sup>40</sup> Through examination of how children learn, their vulnerability to radicalisation is illustrated. For one, an infamous Jesuit proverb describes this: 'Give me the child until he is seven and I will give you the man'.<sup>41</sup> Furthermore, Plato considered children as objects 'to be moulded',<sup>42</sup> a principle which in some ways remains true. Throughout their development, 'children begin to recognise mental states in themselves and others; they come to recognise beliefs as beliefs, desires as desires, and intentions as intentions'.<sup>43</sup> This cognitive developmental process is a catalyst for the radicalisation process.

The child's learning constantly develops with the most dramatic changes occurring 'in prenatal development, infancy and childhood'.<sup>44</sup> The 'most influential'<sup>45</sup> theory demonstrating this is presented by Piaget, who identified four stages of cognitive development: the sensorimotor stage, the pre-operational stage, the concrete operational stage, and the formal operational stage.<sup>46</sup> Applying radicalisation to this exemplifies the vulnerability of children.

The first stage consists of the development of practical knowledge through sensory learning. Here, the radicalisation risk is minimal as children lack coherent thought-processes. Indeed, the child may observe extremism, but would have no understanding. The pre-operational stage includes 'the beginnings of language, of the symbolic function, and therefore of thought or representation'.<sup>47</sup> Affecting those from the ages of two – seven, the child is able to communicate, think and retain knowledge. Returning to the Jesuit proverb, perhaps this is a significant stage for the beginnings of radicalisation: the extremist seed can be planted which will grow throughout the process. The concrete operational stage 'marks the onset of genuine logical problem solving'<sup>48</sup> as the child is able to understand 'the fundamental operations of elementary logic of classes and relations', though is unable to operate on 'verbally expressed

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<sup>40</sup> Sewell and Hulusi (n 8) 343.

<sup>41</sup> Colin Pritchard, *The Child Abusers*, (Open University Press, 2004), 1, citing Ignatius Loyola.

<sup>42</sup> The Hon Mr Justice MacDonald, 'The Weight of Memory – Children's Rights in a Changing World', (November 2017), 3, (Citing Plato, *Republic*, 369a – 376b and 503b – 505d) <[www.judiciary.gov.uk/wp-content/uploads/2017/11/macdonald-j-childrens-rights-in-a-changing-world-alc-conference-20171127.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2017/11/macdonald-j-childrens-rights-in-a-changing-world-alc-conference-20171127.pdf)> accessed 9 February 2018.

<sup>43</sup> Janet Astington, Paul Harris and David Olson (eds) *Developing Theories of Mind* (Cambridge University Press, 1990) 1.

<sup>44</sup> Peter Smith, Helen Cowie and Mark Blades, *Understanding Children's Developments* (Blackwell Publishing, 2003) 5.

<sup>45</sup> Benjamin D Garber, *Developmental Psychology for Family Law Professionals: Theory, Application, and the Best Interests of the Child* (Springer Publishing, 2010) 45.

<sup>46</sup> Piaget (n 7) 20.

<sup>47</sup> *ibid* 21.

<sup>48</sup> Garber (n 45) 47.

hypotheses'.<sup>49</sup> The final stage, impacting those eleven and above, introduces hypothetical reasoning into the child's thought-processes.<sup>50</sup> The child's intellectual development renders the ability to understand and retain knowledge to be more profound than the previous stage.

Through examining these stages, the child's vulnerability to radicalisation is exposed. The child is particularly susceptible to radicalisation in the latter two stages. The introduction of hypothetical reasoning could suggest a decrease in vulnerability as the child could question 'Why?', though the cumulative exposure to extremism throughout cognitive development presents deviation from the indoctrinated ideology unlikely. For example, in the penultimate stage, the inability to operate on verbally expressed hypotheses means the child lacks critical thought in learning, allowing extremism to take hold in the mind. That is, then, consolidated in the final stage where the child is able to hypothetically reason, the understanding of the parental reasoning for the belief. Considering children 'follow a trajectory' of their parents' path due to their 'influence and teachings',<sup>51</sup> the exposure to extremism throughout Piaget's stages may result in radicalisation and subsequent harm. The fact the child's cognitive development has been infected with dangerous extremist thought renders this a matter of safeguarding. The 'mis-socialisation' stimulates engagement in 'destructive, antisocial behaviour', thus detrimentally impacting both psychological and social development.<sup>52</sup>

It is also crucial that in the context of the parent-child relationship radicalisation need not be intentional. Indoctrination, which can be suggested as central to the radicalisation process, is inevitable in the parent-child relationship and is perhaps justified as the child learns through mere observation of the parent.<sup>53</sup> Parental pedagogy has been suggested as being modelled on the parental desire to transmit their characteristics and beliefs onto their children.<sup>54</sup> The child's learning from the parent is inevitable, but this may be as innocuous as learning 'correct eating habits, habits of cleanliness (or bodily care)'.<sup>55</sup> It is when this teaching becomes pejorative and founded on extremism when the harmful non-violent radicalisation procures. The parent, being the child's primary source of learning, is most influential to the child's education, and observational learning is a significant contributor to the child's development. Therefore, when a parent actively teaches or passively presents extremism to a child, the radicalisation process is fuelled, which is potentially harmful.

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<sup>49</sup> Piaget (n 7) 21.

<sup>50</sup> *ibid.*

<sup>51</sup> Tony Stanley and Surinder Guru, 'Childhood Radicalisation Risk: An Emerging Practice Issue' (2015) 27 *Practice: Social Work in Action* 353, 360.

<sup>52</sup> Brigid Daniel, Sally Wassell and Robbie Gilligan, *Child Development for Child Care and Protection Workers (2<sup>nd</sup> Edition)* (Jessica Kingsley Publishers, 2010) 120.

<sup>53</sup> Willis Moore, 'Indoctrination as a Normative Conception' (1966) 4 *Studies in Philosophy and Education* 396, 403.

<sup>54</sup> Gill Epstein, 'Extremism within the family' (2006) 20 *Journal of Population Economics* 707, 707.

<sup>55</sup> Blanche Scoggin, 'Indoctrination?' (1958) 33 *The Clearing House* 162, 162.



This chapter, through portraying the discrepancies in defining radicalisation, illustrates a problematic misunderstanding. It is difficult to apply current conceptions to children, especially due to the terrorism nexus. For children, radicalisation is a process whereby extremist views are adopted, which pose risk of *psychological harm*. Whilst other risks inevitably arise in relation to radicalisation, such as security risks, this paper specifically focuses on the psychological harm suffered by children exposed to radicalisation. There should be no stringent requirement for violence or direct action. In understanding the redundancy of the terrorism nexus, a better understanding of the harms caused to children is obtainable. The child's unequivocal vulnerability to radicalisation has been established, especially in the catalyst that is the family home. In accepting the mis-socialisation arising from radicalisation as harmful—the view taken in this analysis—it must now be questioned whether this satisfies harm in child law.

## 2. Does 'radicalisation' constitute 'significant harm'?

If radicalisation is to be considered a matter of safeguarding,<sup>56</sup> the question must then be asked whether it is significant harm. This section discusses the significant harm threshold and questions whether radicalisation satisfies this. Through critical analysis of recent radicalisation cases, the discrepancies involved are distinctly conveyed. Whilst there are cases where radicalisation results in significant harm, the court's reluctance in making such a finding and moreover, in apportioning credibility to speculative arguments, is seemingly problematic. Ultimately, there is no consistency in radicalisation satisfying significant harm, which exacerbates the concept's complexity.

### 2.1 *The significant harm threshold*

Section 31 CA 1989 empowers the court to make care orders. These orders remove children from their family and places them in the care of the local authority.<sup>57</sup> To do this, the court must be satisfied the significant harm threshold is met through evidence the child 'is suffering, or is likely to suffer, significant harm'.<sup>58</sup> In examining the threshold, firstly harm must be defined. Section 31(9) CA 1989 defines it as 'ill-treatment or the impairment of health or development'.<sup>59</sup> Furthermore, the concepts within that definition are explained: 'development' being 'physical, intellectual, emotional, social or behavioural' – 'health' including both 'physical or mental' – and 'ill-treatment', including 'forms of ill-treatment which are not physical'.<sup>60</sup> The radicalisation of children concerns the developmental aspect, though appreciating the other conceptions of harm conveys a rather wide definition. 'Like

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<sup>56</sup> Sewell and Hulusi (n 8) 343.

<sup>57</sup> Children Act 1989, s 31(1)(a).

<sup>58</sup> *ibid* s 31(2)(a).

<sup>59</sup> *ibid* s 31(9).

<sup>60</sup> *ibid*.

the sub-division of the roots of a plant',<sup>61</sup> the CA 1989 provides subcategories within the standard categories of physical and mental abuse, allowing for a wide conception of harm encompassing all types.

The parliamentary rationale for such an 'extremely wide'<sup>62</sup> conception of harm 'is to provide a legal framework which protects children from suffering serious abuse'.<sup>63</sup> Establishing harm itself is relatively simple, for example failing to send a child to school is identified as harm.<sup>64</sup> Whilst the rationale appears to be achieved, the statute omits to define 'significant', which is problematic as this determines the threshold. In attempting to find a definition, Booth used a dictionary definition: the harm should be 'considerable, noteworthy or important'.<sup>65</sup> These semantics offer little clarity and so the greatest hurdle of the threshold remains mostly undefined. However, this is not to criticise the inclusion of significant; it is a 'safeguard' within the requirements for invoking a care order.<sup>66</sup> The gravity necessitated by the 'significant' requirement ensures children are not removed for trivial harms – it safeguards against the implementation of a draconian and traumatic order. The threshold's existence remains imperative and modification of it could do more harm than good. Yet, unfortunately, application of it is problematic in radicalisation cases due to uncertainty as to whether the harms arising satisfy the stringent test.

## 2.2 Does radicalisation satisfy the threshold?

As established, the threshold is the minimum criteria before a court can even consider a care order.<sup>67</sup> However, there remains 'considerable legal uncertainty as to whether belief can constitute harm to children, even if it takes form of radicalised belief'.<sup>68</sup> The key case which exemplifies radicalisation satisfying the threshold is *Tower Hamlets v B* where a sixteen-year-old was removed from her family home.<sup>69</sup> B was found to be radicalised and subjected to, inter alia, what Hayden J described as 'radicalising material', including videos of beheadings and photographs of smiling corpses.<sup>70</sup> In establishing the presence of 'significant harm', Hayden J compared radicalisation to sexual abuse: '[T]he violation contemplated here is not to the body, but it is to the mind. It is every bit as insidious... it involves harm of a similar

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<sup>61</sup> Rt Hon Sir Andrew McFarlane, 'Holding the risk: the balance between child protection and the right to family life' [2017] Fam Law 610, 611.

<sup>62</sup> Catherine Copley and Nigel Lowe, 'The statutory "threshold" under section 31 of the Children Act 1989 – time to take stock' (2011) 127 LQR 399, 399.

<sup>63</sup> Mary Hayes, 'The Supreme Court's failure to protect vulnerable children: *Re J (Children)*' [2013] Fam Law 1015, 1015.

<sup>64</sup> *Re O (A Minor) (Care Order: Education: Procedure)* [1992] 2 FLR 7.

<sup>65</sup> *Humberside County Council v B* [1993] 1 FLR 257, [263 A – B] Booth J.

<sup>66</sup> Copley and Lowe (n 62) 399.

<sup>67</sup> *ibid.*

<sup>68</sup> Taylor (n 9) 42.

<sup>69</sup> *Tower Hamlets v B* (n 3).

<sup>70</sup> *ibid* [14] (Hayden J).

magnitude and complexion'.<sup>71</sup> This case demonstrates radicalisation is capable of satisfying significant harm; though not all cases follow this interpretation. Both *Re X*<sup>72</sup> and *Re A*<sup>73</sup> are useful in illustrating the current approach. In *Re X* two children were detained in Turkey due to suspicions of potential travel to Syria. The local authority brought the case to examine whether the children were radicalised. Whilst there was no evidence the children were radicalised, there was 'sufficient evidence' of radicalisation risk, 'which cannot be ignored'.<sup>74</sup> However, the former President of the Family Division of the High Court, Munby, considered the risk was 'so small that it is counter-balanced by the children's welfare needs to be returned to the parental care',<sup>75</sup> and so the threshold was not satisfied. *Re A* is somewhat different as it involves a far-right ideology, though it is useful in illustrating the stringent approach in allegations of morally reprehensible ideologies, and whether the court will consider this harmful. Care proceedings were brought in relation to a one-year-old on the basis, inter alia, the father was a member of the English Defence League.<sup>76</sup> The case social worker recommended the child 'should not reside within an environment whereby violence is openly condoned, supported and practiced'.<sup>77</sup> However, Munby P did not consider this to satisfy the threshold: 'Membership of an extremist group, such as the EDL, is not, without more, any basis for care proceedings'.<sup>78</sup>

Examining these cases exemplifies the uncertainty surrounding radicalisation and significant harm in child protection. In *Re A*, the least serious of the three, two differentiating views can be adopted. First, the child is at an oblique risk of radicalisation considering he is being raised by a father who holds extremist views that are potentially damaging should the child be in his continued care. Alternatively, the second view is that due to the lack of tangible evidence of radicalisation—just the presence of extremism alone—the threshold was not met. It is unsurprising that the threshold was not satisfied, as the risk of future harm was seen to be 'minor' and, considering the child's age, the sensorimotor stage of learning rendered a detrimental impact arising from the presence of the ideology unlikely. In *Tower Hamlets v B*, however, the child was sixteen and thus would fall into one of the latter of Piaget's stages, rendering her extremely vulnerable to radicalisation. Ultimately, the *Re A* judgment appears correct as significant harm cannot be ascertained on the mere presence of extremism; it would be irrational to remove a child on such a premise.

Comparisons drawn between *Re X* and *Tower Hamlets v B* are far more fruitful in analysing whether radicalisation satisfies the threshold. In *Re X* the children were not removed from

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<sup>71</sup> *ibid* [29] (Hayden J).

<sup>72</sup> *Re X (Children) (Risk of Removal to Syria)* [2015] EWHC 2265 [2015] 2 FLR 1487 (Fam).

<sup>73</sup> *Re A (A Child)* [2015] EWFC 11 [2016] 1 FLR 1.

<sup>74</sup> *Re X* (n 72) [32] Munby P.

<sup>75</sup> *ibid* [89] Munby P.

<sup>76</sup> Hereinafter, 'EDL'.

<sup>77</sup> *Re A* (n 73) [69].

<sup>78</sup> *ibid* [71] Munby P.

the family home due to welfare considerations, despite evidential radicalisation risk in that there was risk of flight to Syria. Whilst the welfare of the child is paramount,<sup>79</sup> there seems to be inconsistency in justifying the decision due to small risk, as ‘a comparatively *small risk of really serious harm* can justify action, while even the virtual certainty of slight harm might not’.<sup>80</sup> Evidently then, in *Re X* radicalisation was not considered to be ‘really serious harm’ as, if it were, action would be justified due to the ‘small risk’ of its occurrence. This exemplifies unpredictability as the judicial authority in *Tower Hamlets v B* stated that the harm arising from radicalisation is as serious as sexual abuse. This suggests the children in *Re X* to not be at the same risk of harm – despite such risk being ascertained. Yet, perhaps this is explained through the evidence in *Tower Hamlets v B* being more comprehensive in that tangible evidence—that being the mentioned radicalised material—could be ascertained. As Hayden J stated in his reasoning for removing B: ‘I can see no way in which her psychological, emotional and intellectual integrity can be protected by her remaining in this household’.<sup>81</sup> Indeed, B’s harm was exorbitant radicalisation, thus leading to such an assertion, but does the small risk of this happening to the children in *Re X* not justify similar action? It seems not: whilst travelling to Syria was a notable issue in both cases, and it has been suggested this would clearly satisfy the threshold,<sup>82</sup> no finding of significant harm was made. In comparing these cases, clear discrepancies are noted, and it seems that for significant harm to be ascertainable, the child needs to already be radicalised.

What is particularly confusing is that the legislation provides where a child is *likely* to suffer significant harm, the threshold is met. The court is seemingly reluctant to consider the likelihood of harm materialising as future radicalisation to meet this. Whilst foresight of radicalisation purports risk of significant harm, such an assertion is problematic due to the speculation on which it is based. In the third hearing of *Re X*, it was said ‘suspicion... surmise (and) speculation’ were not enough to establish significant harm in radicalisation cases.<sup>83</sup> Furthermore, in *HB and MB*, MacDonald J stated: ‘(The fact this case) involves alleged risk of harm to a child consequent upon alleged risk of radicalisation, alleged extremist beliefs, or alleged risk of removal to Syria, does not change the fundamental legal principles that must be applied’.<sup>84</sup> It can be suggested the family court is ostensibly adhering to principles such as the child’s welfare, but are failing to consider the principle of ‘likely to suffer’ enshrined in section 31 of the CA 1989. As clarified in the first section, this may be due to a lack of understanding of radicalisation.

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<sup>79</sup> As will be discussed further in the third section.

<sup>80</sup> *Re C and B (Children) (Care Order: Future Harm)* [2000] 2 FCR 614 [28] Hale LJ.

<sup>81</sup> *Tower Hamlets v B* (n 3) [28] (Hayden J).

<sup>82</sup> Chris Barnes, ‘Radicalisation cases in the Family Courts: Part 4: Three-year review’ [2018] Fam Law 197, 198.

<sup>83</sup> *Re X (Children) (No 3)* [2015] EWHC 3651 (Fam), [2017] 1 FLR 172 [110] (Munby P).

<sup>84</sup> *A Local Authority v HB and MB* [2017] EWHC 1437, [2018] 1 FLR 625, [69] (MacDonald J).

According to Taylor, ‘a particular problem for child protection is that the available research has primarily been concerned with combatting the threat of terrorism’ with very little empirical research concerning children.<sup>85</sup> This gap in the literature breeds uncertainty and in some ways undermines the credibility of speculative arguments. There can be little doubt that further empirical study would allow us to better understand harms of radicalisation and how it occurs. Likewise, court would be better placed to understand how the risk of radicalisation arise. At present, children may go unprotected and insufficient weight is apportioned to risk of becoming radicalised. Ultimately, acquiescing to such grievances may result in children returning to court in a worse state. But, if no action is taken, the child will remain subjected to extremism and thus the radicalisation itself will perhaps be intensified. So, whilst fundamental legal principles must be followed, leniency in judgements ought to be present offer adequate protection for children who face a likely risk.

A final and important consideration is the case *Re K*.<sup>86</sup> Three children were residing in a family home where there were ongoing criminal investigations alleging the mother had ‘disseminated on social media information which glorifies the actions of terrorists’.<sup>87</sup> Whilst the local authority initially sought a care order, they withdrew proceedings as they ultimately considered the parents to be loving and merely observant Muslims. With some reluctance, Hayden J granted the withdrawal, though stated ‘it might be axiomatic that a child brought up by radicalised parents... is by virtue of that fact alone at an unacceptable risk of significant harm’.<sup>88</sup> Had care proceedings continued, perhaps *Re K* would have resulted in a care order; after all, there was ‘a very real prospect the threshold might (have been) met’.<sup>89</sup> *Re K* suggests ‘that parental radicalisation is not only capable of constituting significant harm but that such a finding may be *almost inevitable*, even if there is no evidence that the children have adopted extremist views’.<sup>90</sup> Hayden J’s assertion that risk of significant harm arises by the mere presence of radicalised parents is potentially problematic.

Ascertaining risk of harm by virtue of radicalised parents suggests that evidence of direct risk of harm to the child may not be necessary – the parents may be loving and caring, yet carry extremist views which are perceived as posing risk of significant harm. Interestingly, the case implies movement toward recognition of significant harm where the parents are radicalised—let alone the children—which only exacerbates the confusion as to whether radicalisation satisfies significant harm. Moreover, it exemplifies the importance of the primary question explored by this work: If the courts are to identify significant harm by

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<sup>85</sup> Taylor (n 9) 56.

<sup>86</sup> *Re K* (n 39).

<sup>87</sup> *ibid* [6] (Hayden J).

<sup>88</sup> *ibid* [13] (Hayden J).

<sup>89</sup> *ibid* [22] (Hayden J).

<sup>90</sup> Taylor (n 9) 48.

virtue of radical parents, is removal really going to assist in their wellbeing if they are being cared for by radical, yet loving parents?

*Tower Hamlets v B* is the only case where radicalisation in and of itself can truly be seen as satisfying significant harm. Indeed, the apparent psychological harm suffered by B was unequivocally more serious as compared to the other cases and moreover, no evidence was speculative. Indeed, the severity of this psychological harm was compared to the physical harm associated with sexual violence. However, in omitting to remove children—especially in *Re X*—the family court seems to be failing to adhere to the CA 1989’s key rationale: to provide the utmost protection for children suffering abuse. Failure to establish radicalisation risk overlooks the likelihood of harm, which seems erroneous considering radicalisation is a process. This is not to advocate for the removal of children without sufficient certainty, rather it is argued any radicalisation risk must be acknowledged in order to provide protection. The child returning to court in a worsened state cannot come to fruition. Returning to the suggestion that ‘significant’ is a ‘safeguard’,<sup>91</sup> it appears this is paradoxically so. The threshold prevents the removal of children where the harm is insignificant, for example, based on moral reprehensibility, but the lack of weight given to the risk of harm in radicalisation is potentially jeopardising children. Notwithstanding this, Harwin and Madge are correct to suggest ‘the concept of significant harm has largely stood the test of time’ and despite lack of ‘unitary meaning’, its use over two-decades illustrates its adequate function.<sup>92</sup>

Conclusively, when questioning whether radicalisation satisfies the threshold, there is no clear answer as the necessary yardstick to measure such harm is absent. This is partly due to lack of empirical evidence and definition surrounding the radicalisation of children. Perhaps better protection could be had by the identification of significant harm on less tangible evidence—harm cannot only be identified on the sight of bruises though; such a solution poses risk of disproportionate action. A better understanding of radicalisation should procure better protection and allow for a ‘robust evidential basis’<sup>93</sup> to be viable in court. Nonetheless, the law in its current state, through providing ‘likely to suffer’, suggests radicalisation risk should be sufficient to satisfy the threshold.

### 3. Removing the child: A step too far?

Whilst in some cases radicalisation will be significant harm, in others it will not. Assuming for the purposes of this section that significant harm is ascertained in a given case, this begs the question of whether removal is a proportionate response. The third section forms the

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<sup>91</sup> Cobley and Lowe (n 62) 399.

<sup>92</sup> Judith Harwin and Nicola Madge, ‘The concept of significant harm in law and practice’ (2010) 5 *Journal of Children’s Services* 73, 80.

<sup>93</sup> Taylor (n 9) 51.

lynchpin of this paper's overarching question. It explores whether it is correct to remove children from their home due to radicalisation. Lady Hale's words quoted at the beginning of this paper<sup>94</sup> highlight several key issues: the removal of children on the basis of moral reprehensibility and extremist ideology is invasive, potentially fascist and traumatic. After examining the argument in favour of removal, this section demonstrates that removal is disproportionate through the right to privacy and the child's welfare. Ultimately, it becomes evident removal is a step too far in dealing with radicalisation in the family court.

### 3.1 *Remove the child – Protect the child?*

Despite the palpable lack of judicial and academic support proposing the removal of children, some non-lawyers and non-academics advocate for it. For example, Boris Johnson, the Mayor of London at the time, stated:

The law should obviously treat radicalisation as a form of child abuse... those children who are being turned into potential killers or suicide bombers can be removed into care – for their own safety and for the safety of the public.<sup>95</sup>

Furthermore, the incumbent Counter-Terrorism Chief at Scotland Yard, Mark Rowley, suggested where there is a strong risk of radicalisation to children, and their parents are 'convicted of terrorist-related offences', removal should be the response.<sup>96</sup> He argued children exposed to extremism were in an 'equally wicked' situation as those in sexually abusive environments,<sup>97</sup> and went as far to suggest: 'I wonder if we need more parity between protecting children from paedophile and terrorist parents'.<sup>98</sup> The resemblance between this and Hayden J's sexual abuse comparator is rather profound; there is clearly some shared interdisciplinary perspective on the harms arising through radicalisation. The suggestion for more parity also seems credible, it would be surprising if a care order was not triggered through evidence of paedophilia. The crux of Rowley's proposition is the requirement of a terrorist-related offence, in essence, requiring solid justification and evidential basis, which Johnson's argument omits. Terrorist-related offences are not necessarily the commission of acts of terror, they include less serious offences such as the glorification of terrorism,<sup>99</sup> or supporting a proscribed terrorist organisation.<sup>100</sup> Thus, as the continued care of children by a convicted paedophile would be thwarted, similar

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<sup>94</sup> *Re B (n 1)* [20] (Hale SCJ).

<sup>95</sup> Boris Johnson, 'The Children Taught at Home about Murder and Bombings', *The Telegraph*, 2 March 2014.

<sup>96</sup> Fiona Hamilton, 'Extremists should lose access to their children, says Scotland Yard chief', *The Times* (London, 27 February 2018).

<sup>97</sup> Martin Evans, 'Terrorists should be treated like paedophiles and have their children removed, top cop suggests' *The Telegraph* (London, 26 February 2018).

<sup>98</sup> Fiona Hamilton, 'Extremists should lose access to their children, says Scotland Yard chief', *The Times* (London, 27 February 2018).

<sup>99</sup> Terrorism Act 2006, s 1.

<sup>100</sup> Terrorism Act 2000, s 12.

considerations should apply to children raised by parents convicted of terrorist-related offences.

*Re K* proves useful in examining such a proposition; recall the mother being accused of disseminating terrorist propaganda. Whilst the mother was not convicted, should she have been, would the children have been removed? Hayden J's reasoning in the case ostensibly supports Rowley as he suggested significant harm may have been caused through the mother's actions. Whilst no order was made in *Re K*—which perhaps suggests failure to protect the children from potential psychological harm—it appears to be common sense to remove children where there is proven radicalisation, or indeed radicalisation risk. Would this not provide the utmost protection? As said the palpable lack of support for care orders as the standard solution captures the difficulties inherent in such an approach. The following sections illustrate such difficulties, and by revisiting *Tower Hamlets v B*, these difficulties are exemplified. Whilst it initially seems abhorrent to allow children to become radicalised, a care order does not seem to be the appropriate remedy.

### 3.2 Privacy or Protection: Parental Autonomy and Article 8

The balancing act with regard to the right to privacy and the provision of protection is a prominent conflict in family law. 'The traditional liberal position' is that some areas of life 'are so intimate that it is inappropriate for the state to intervene'.<sup>101</sup> The privacy of the family sphere is enshrined in our fundamental human rights. Article 8 of the European Convention<sup>102</sup> stipulates: 'Everyone has the right to respect for his private and family life'.<sup>103</sup> As Delahunty and Barnes rightly advise, 'it is critically important for all practitioners to be aware' of the protections conferred by Article 8 when dealing with radicalisation cases.<sup>104</sup> Thus, when contemplating care orders, the court must perform this balancing act and question whether removal encroaches too far upon this Convention right.<sup>105</sup>

In radicalisation cases specifically, the right to privacy could lead to parents raising an argument based on parental autonomy. According to Herring, this 'means that (the court) should respect individual's decisions regarding their family life', such as how to raise children.<sup>106</sup> Perhaps this confers a right to the parent to hold the extremist ideology, to teach that ideology to their children, and arguably therefore, to radicalise their children. Indeed, families are bestowed special protection through modern human rights instruments, but to suggest this bestows a right to radicalise children is erroneous. Nevertheless, the family court's approach is liberating in regard to parenting and significant weight is apportioned to

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<sup>101</sup> Jonathan Herring, *Family Law* (7<sup>th</sup> ed, Pearson Education Limited, 2015) 21.

<sup>102</sup> Hereinafter, 'ECHR'.

<sup>103</sup> European Convention on Human Rights and Fundamental Freedoms (1950), Art 8(1).

<sup>104</sup> Jo Delahunty QC and Chris Barnes, 'Radicalisation cases in the family courts: Part 1: An introduction' [2016] *Fam Law* 183, 186.

<sup>105</sup> Human Rights Act 1998, s 3.

<sup>106</sup> Herring (n 101) 26.



it. For example, Hedley J stated: ‘Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent’.<sup>107</sup> This laissez-faire approach is not new, in *Re B & G*, a parent—who was a devout Scientologist—attempted to indoctrinate his children through controversial methods renowned in the belief.<sup>108</sup> Latey J, two-decades prior to Hedley J, reflected the assertion: ‘[I]n an open society such as ours people can believe what they want to and band together to promulgate their beliefs. If people believe that the Earth is flat there is nothing to stop them believing so, saying so, and joining together to persuade others’.<sup>109</sup>

Indeed, the right to privacy is ‘a defining feature of child law’.<sup>110</sup> The above judicial authority can hardly be criticised, it respects diversity, autonomy and democracy. Notwithstanding, a laissez-faire approach is incapable of adhering to the key rationale of protecting children and moreover, no statement advocates for the justification of harm based on the right to privacy. Baroness Hale has asserted extra-judicially that ‘the notion is developing that inculcating certain religious beliefs can be harmful enough to justify intervention in family life’.<sup>111</sup> Article 8 is a conditional right; it can be interfered with where ‘necessary in a democratic society, in the interests of national security... (or) for the prevention of disorder or crime, for the protection of health or morals’.<sup>112</sup> The right to privacy is thus not absolute and if harm arises through the execution of the right, the state can interfere. So, whilst parents could object to a care order by asserting a right to privacy, the court may restrict the right through consideration of the child’s risk of harm. Strasbourg jurisprudence confirms this: ‘[W]here maintenance of family ties would harm the child’s health and development, a parent is not entitled under Article 8 to insist that such ties be maintained’.<sup>113</sup> Therefore, where the child’s development may be harmed due to radicalisation, the right to privacy can be limited in the interests of protection and welfare.

This leads us to the question of whether family law and the radicalisation of children is really a private matter. There are millions of families in the UK, each adopting their own idiosyncratic methods of raising children. Family law, in upholding the rule of law, equally impacts each of these families. When grievances arise within the family—such as child abuse—the repercussions of it can reach further than the family involved. As Herring suggests, ‘child abuse takes place within the home (but) consequences of it can affect all of society’.<sup>114</sup> This is especially relevant in the radicalisation context as it is a matter of national

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<sup>107</sup> *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 [50] (Hedley J).

<sup>108</sup> *Re B & G (Minors) (Custody)* [1985] 1 FLR 134, 158 (Latey J).

<sup>109</sup> *ibid* 139 (Latey J).

<sup>110</sup> Taylor (n 9) 54.

<sup>111</sup> Brenda Hale, ‘Freedom of Religion and Freedom from Religion’, (2017) *Ecclesiastical Law Journal* 19, 3 – 13, 13.

<sup>112</sup> ECHR (n 103) art 8(2).

<sup>113</sup> *YC v United Kingdom* (2012) 55 EHRR 33 [134].

<sup>114</sup> Herring (n 101) 22.

security which obviously would fall into the prescribed limitations associated with the right to privacy under Article 8. Perhaps Boris Johnson is correct to suggest greater weight should be apportioned to protection over privacy and the child should be removed to protect not only them, but society holistically. However, when considering the proceeding section on welfare, such a perspective is rebutted. Whilst Article 8 suggests that the State should not interfere with parental rights, privacy can be restricted in the interests of child protection.

### 3.3 *The paramount consideration of welfare*

In most analyses involving children, the welfare principle is considered to be the most vital issue. Specified in the CA 1989, ‘the child’s welfare shall be the paramount consideration’,<sup>115</sup> and when a care order is contemplated, this principle must be borne in mind. Despite not defining welfare, the Act provides a ‘welfare checklist’, which must be referred to in all decision-making regarding children.<sup>116</sup> In radicalisation cases, considerations other than the child’s welfare may prima facie carry equal importance, such as national security. This creates an ‘uncomfortable juxtaposition’ as children become ‘victims vulnerable to radicalisation’ and also ‘a threat, creating security risks’.<sup>117</sup> However, Lord Judge Munby rebuts this—and Johnson’s argument<sup>118</sup>—reinforcing that welfare ‘cannot be eclipsed by wider considerations of counter-terrorism policy’.<sup>119</sup> Therefore, despite such considerations being deeply integrated in radicalisation cases, the approach is that welfare comes before all else, which correctly adheres to parliamentary intention. As Hale stated in *Re B*, ‘the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child’s welfare’ will the court remove the child.<sup>120</sup>

Whilst not being a radicalisation case and being criticised for merely ‘stating the law’,<sup>121</sup> *Re B* epitomises the necessity and current usage of the welfare principle and how this poses the greatest obstacle in removing children. One consideration in the welfare checklist, which was also notable in *Re B*, is that the court must consider all possibilities when making a decision.<sup>122</sup> To ensure the best outcome adhering to welfare, ‘a care order should be a last resort’,<sup>123</sup> and such an approach appears consistent with the cases discussed. Whilst this observes parliamentary intention, and ensures decisions are made within the child’s best interests, the argument remains that by not making a care order, the courts are potentially failing to protect

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<sup>115</sup> Children Act 1989 (n 57) s1(1).

<sup>116</sup> *ibid* s 1(3).

<sup>117</sup> Taylor (n 9) 45.

<sup>118</sup> Johnson (n 95).

<sup>119</sup> Sir James Munby P, ‘President’s Guidance: Radicalisation Cases in the Family Courts [2015] Fam Law 1527, 1529 [12], citing London Borough of Tower Hamlets v M [2015] EWHC 869 (Fam) [18] (Hayden J).

<sup>120</sup> *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 [198] (Hale LJ).

<sup>121</sup> The Rt. Hon Sir Andrew MacFarlane, ‘Nothing else will do’ [2016] Fam Law 1403, 1405.

<sup>122</sup> Children Act 1989 (n 57) s 1(3)(g).

<sup>123</sup> *Re B* (n 123) [77] (Neuberger SCJ).

children and are perpetuating the radicalisation process. *Re B* corroborates that the relationship with the natural parents should 'be maintained unless no other course was possible in (the child's) interest'<sup>124</sup> – where 'nothing else will do'.<sup>125</sup>

The following section expands upon the paramountcy of welfare in questioning the extent that care orders are draconian and whether such an interventionist approach results in higher risks of harm.<sup>126</sup> Prior to this, however, the long-standing criticism of the welfare principle must be acknowledged. For example, some suggest the welfare principle is unjust on the basis that it neglects parental welfare.<sup>127</sup> Such a critique has led to calls for reform, though this analysis rejects this. As conveyed in the previous section, parental rights – such as privacy – will not undermine the child's welfare; it is parliament's intention that it will be paramount. Furthermore, to suggest parental welfare should undermine that of a child's is reprehensible as the child is the more vulnerable party. There are further critiques to this, but these lie outside the scope of this paper. Instead, the next section explains the views taken by Eekelaar: 'it is easier to criticise the principle than to come up with an alternative'.<sup>128</sup> Even if the welfare principle were to be reformed, its core rationale would remain in ensuring the child's best interests.

### 3.4 *A traumatic order?*

To truly convey the extent to which care orders are outside the child's welfare, the harms resulting from removal must be explored. Barnes rationally suggested 'there is always a risk of harm, and even significant harm' by removing children.<sup>129</sup> As will become apparent, detaching children from their natural parents is traumatic, dangerous and extreme; but in some cases, necessary. From examining *Re B*, and indeed the other cases referred to, the care order remains a last resort and thus is only invoked when nothing else will do. Removing children from their families on the basis of moral reprehensibility is not only traumatic but could be perceived as paternalistic if not borderline fascistic. It is not unreasonable to envisage a totalitarian state which removes children on the basis that they disagree with the ideology of a particular family. It is irrational and imprudent for the government and judiciary to become tyrants and remove children based on the reprehensibility of ideology.

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<sup>124</sup> *ibid.*

<sup>125</sup> *ibid* [215] (Hale LJ).

<sup>126</sup> Barnes (n 84) 201.

<sup>127</sup> Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' [1996] *Current Legal Problems* 267.

<sup>128</sup> John Eekelaar, 'Beyond the welfare principle', [2002] *Child and Family Law Quarterly* 237, 237.

<sup>129</sup> Barnes (n 82) 201.

Research suggests that ‘removing a child from the home causes serious trauma’<sup>130</sup> and heightens ‘vulnerability... to psychiatric disorder’.<sup>131</sup> Bowlby’s attachment theory is particularly useful in its causal link between removal and trauma. The theory postulates that throughout a child’s life, a strong emotional attachment is formed between child and parent.<sup>132</sup> The attachment provides the child with ‘safety, security and protection’.<sup>133</sup> When this attachment is severed, the consequences can be severe: ‘states of anxiety and depression’ and psychopathy can materialise in adulthood.<sup>134</sup> Prior and Glaser asserted a need for this attachment as it is ‘paramount in infancy and childhood when the developing individual is immature and vulnerable’.<sup>135</sup> As mentioned in the first section, the child’s vulnerability to radicalisation perhaps renders contact with their parent indispensable. Whilst the removal of children can be necessitous and result in a better quality of life, Liebmann suggests separation remains detrimental both emotionally and physically upon the child.<sup>136</sup> Such detriments may materialise as a lack of caregiving relationships—as the child may not emotionally attach to the new caregiver—and also negative behavioural patterns, which leads to impact on social and emotional development.<sup>137</sup> There is evidence that children entering local authority care become at risk of involvement in ‘substance misuse, antisocial behaviour, (and) crime’, as well as being more likely to carry such behaviours into adulthood and to serve custodial sentences.<sup>138</sup>

Ultimately, does the likely risk of radicalisation outweigh the likely risk of such harms arising through care orders? It seems such negative repercussions overshadow the care order’s desirability. It is argued that the radicalisation risk to which the family court should be protecting would in fact be immensely exacerbated due to the care order. The potential traumas associated with the imposition of a care order may result in a more vulnerable state whereby radicalisation is more conducive to the child. Additionally, where the child is young and lacks understanding, or more importantly, where the child does not wish to be removed, they may reject any subsequent caregivers and potentially regard them as imposters on their

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<sup>130</sup> Noah Barish, ‘Using the Harm of Removal and Placement to Advocate for Parents’, (2010) Youth, Rights & Justice, Juvenile Rights Project < <http://www.youthrightsjustice.org/media/3844/xxharmandreplacement.pdf> > accessed 19 March 2018.

<sup>131</sup> Catherine Lawrence, Elizabeth Carlson and Byron Egeland, ‘The impact of foster care on development’ (2006) 18 *Development and Psychopathology* 58.

<sup>132</sup> See John Bowlby, *Attachment and loss, Vol 1: Attachment*, (London: The Hogarth Press, 1969).

<sup>133</sup> Vivien Prior and Danya Glaser, *Understanding Attachment and Attachment Disorders: Theory, Evidence and Practice*, (Jessica Kingsley Publishers, 2006) 15.

<sup>134</sup> John Bowlby, *Attachment and loss, Vol II: Separation: Anxiety and Anger*, (London: The Hogarth Press, 1973) 5.

<sup>135</sup> Prior and Glaser (n 134) 15.

<sup>136</sup> Theo Liebmann, ‘What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards’, (2006) 28 *Hamline J Pub L Poly* 141, 161-162.

<sup>137</sup> Lawrence, Carlson and Egeland (n 132) 58.

<sup>138</sup> Matt Dryden, ‘Radicalisation: The Last Taboo in Safeguarding and Child Protection? Assessing Practitioner Preparedness in Preventing the Radicalisation of Looked-After Children’ (2017) 13 *Journal for Deradicalization* 101, 111.

family life. Considering welfare and trauma, it is postulated that where the child could remain with the parent, this should, so far as is possible, be upheld.

### 3.5 *A step too far? Revisiting Tower Hamlets v B*

Recalling *Tower Hamlets v B*, Hayden J justified making a care order on the basis of the insidious nature of the harm caused by radicalisation and the fact the child's emotional and intellectual integrity could not be maintained whilst remaining in the family home. Hayden J's intention was to expose B to the world and give her the opportunity to meet new people and 'be stimulated by new ideas, activities and philosophies'.<sup>139</sup> However, such intentions were unachieved; B 'spent considerable time in isolation rather than engaging in wider activities and education',<sup>140</sup> she was 'sad and lonely' and desperate to return home.<sup>141</sup> Hayden J's objective failed, and B was returned home. Perhaps in being 16-years-old, and thereby being in the formal operational stage of Piaget's developmental theory, the use of the care order was ineffective for the radicalised mindset to which was already too ingrained for it to be ameliorated through removal from the family home. This raises a question as to whether removal would be more effective where the child is younger and is possibly more conducive to positive changes in being removed from the potentially extremist family home. This would likely need to be prior to the pre-operational stage of Piaget's theory (children aged two to seven).

B's suffering personifies the trauma previously discussed; the utilisation of a care order may exacerbate radicalisation. As previously suggested, the trauma associated with removal may place a child in a more vulnerable state whereby they become more conducive to radicalisation. Perhaps the child, especially in the teenage years, would become hostile towards the system that removed them from their parents, thereby consolidating extremist thought whereby Western culture is perceived as the enemy. The isolating and unstable home environment may actually be conducive to the radicalisation process. Returning to attachment theory, alienation may lead to complete deprivation of the safety, security and protection the parental attachment confers and moreover, 'may entirely cripple the capacity (of the child) to make connections with other people'.<sup>142</sup> Whilst the care order is made with the intention of protection and promotion of welfare, the plucking of a child from their (potentially) secure environment with little understanding as to why, may actually detrimentally intensify their state. As Barnes notes, 'the parenting offered by those involved in proceedings concerning extremism tends, other than the specific concerns, to be viewed positively'.<sup>143</sup> In *Tower Hamlets v B*, the second hearing brought to light that the parents had

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<sup>139</sup> *London Borough of Tower Hamlets v B* [2016] EWHC 1707 (Fam) [2016] 2 FLR 887 [142] (Hayden J).

<sup>140</sup> Taylor (n 9) 50.

<sup>141</sup> *Tower Hamlets v B* (n 140) [148] (Hayden J).

<sup>142</sup> John Bowlby, *Child Care and the Growth of Love* (Penguin Books, 1953) 14.

<sup>143</sup> Barnes (n 82) 203.

not ‘directly caused her radicalisation’, which supports Barnes’ assertion.<sup>144</sup> Occasionally, the parenting in question is in fact sufficient and possibly even as loving as any other family. The child may feel stable, loved and cared for despite the radicalisation risk.

Overall, this analysis determines that a care order is a step too far. *Tower Hamlets v B* demonstrates the difficulties ‘in using the care system to address radicalisation’.<sup>145</sup> Ultimately, the deliberation is to weigh the potential trauma associated with the order, against the radicalisation risk concurrent with maintaining the parental relationship. Whilst indeed being age-dependent, it has been argued that children are ‘immature in the mind and body’ and cannot cope with the traumas associated with parental separation.<sup>146</sup> Whilst this would potentially appear more relevant to younger children who are indeed immature, older children—despite their maturity—may still be suggested as unable to cope, as evidenced by the views of B when she was subject to a care order. Therefore, both options lead to their own significant harms. The questions remain: which is worse, and which is the preferred route? It seems, neither. The care order appears to do more harm than good, and yet the failure to act poses the risk of perpetuating and aggravating the radicalisation. If the family court is to adequately protect children, some action must be taken. Where the child rejects the care order, it seems its effectiveness will be inadequate. The child’s wishes should, so far as is possible, be accommodated. Indeed, a radicalised child whose wishes are potentially manipulated by way of the psychological harm suffered may not be within their best interests, which problematises this view. However, it would seem that removal should still remain only a last resort where children express the wish to stay with their families. Where there are viable alternatives—considered in the following section—these alternatives should be considered to bring about the best protection. Whilst removal may *prima facie* seem to offer the most protection, if the child does not accept it, perhaps less invasive mechanisms will be symbiotic; the court will protect the child and the child will be protected.

#### 4. Alternatives to removal

Having established the care order as a step too far, this paper reiterates that some action must be taken if the family court is to uphold the child’s welfare, adhere to parliamentary intention and overall, adequately protect children. The family court cannot acquiesce and omit to act in radicalisation cases. Thus, this section examines two possible alternatives to removal: supervision orders and wardship. The latter is potentially useful due to its flexibility; it can be as mild or draconian as the court sees fit. Alternatively, the former is important as it is contained in the same section as the care order, though provides a wholly different approach to child protection. In doing so, the aim is not to recommend adequate alternatives, rather

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<sup>144</sup> Taylor (n 9) 50.

<sup>145</sup> *ibid* 51.

<sup>146</sup> Bowlby (n 143) 14.

this section proposes less traumatic methods of dealing with this new facet of child protection. As viable as they may appear, it cannot be said with sufficient certainty — owing to lack of academic and judicial discussion — that either would be productive responses until they have been tested in the family court.

#### 4.1 Supervision Orders

Section 31 of the CA 1989 specifies that the child can be placed ‘under the supervision’ of the local authority.<sup>147</sup> The effect is to ‘require the supervised child to comply with any directions given... by the supervisor’,<sup>148</sup> which includes living arrangements,<sup>149</sup> contact arrangements,<sup>150</sup> and participation in specified activities.<sup>151</sup> Throughout the order, the supervisor is under a duty ‘to advise, assist and befriend the supervised child’.<sup>152</sup> The order lasts only one year,<sup>153</sup> but can be extended for up to three years from the date it was originally made.<sup>154</sup> The criteria for making the supervision order is equivalent to the care order and the threshold must be met. However, it would be incorrect to suggest the two orders as equals. Coningsby QC advised that the orders are ‘wholly and utterly different’ despite ‘the threshold criteria coming into operation of the two is the same’.<sup>155</sup>

Perhaps then, a supervision order could be a useful alternative in radicalisation cases. They do not ‘vest parental control in the local authority’,<sup>156</sup> and subsequently ‘do not give local authorities the same degree of control over parents as do care orders’.<sup>157</sup> Supervision orders seem far less exorbitant as children remain with their parents; the trauma arising from removal will not come to fruition as no attachments will be severed. Where a child is at risk of radicalisation, the supervision order could offer protection as an appointed supervisor would be able to monitor and—in accordance with their duty—befriend the child, consequently advising and assisting them through the radicalisation process. This is not to suggest the supervisor should ‘de-radicalise’ the child—a concept which has been described as ‘repelling’<sup>158</sup>—rather, it suggests supporting the child and attempting to mitigate any harm that may have arisen or will arise.

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<sup>147</sup> Children Act 1989 (n 57) s 31(1)(b).

<sup>148</sup> *ibid* sch 3, s 2(1).

<sup>149</sup> *ibid* sch 3, s 2(1)(a).

<sup>150</sup> *ibid* sch 3, s 2(1)(b).

<sup>151</sup> *ibid* sch 3, s 2(1)(c).

<sup>152</sup> *ibid* s 35(1)(a).

<sup>153</sup> *ibid* sch 3, s 6(1).

<sup>154</sup> *ibid* sch 3 s 6(4).

<sup>155</sup> *Re S (J) (A Minor) (Care or Supervision Order)* [1993] 2 FLR 919 [950] (Coningsby QC).

<sup>156</sup> Nigel Lowe and Gillian Douglas, *Bromley’s Family Law (11<sup>th</sup> Edition)* (Oxford University Press, 2015), 633.

<sup>157</sup> *ibid* 632.

<sup>158</sup> *Tower Hamlets v B* (n 140) [142] (Hayden J).

Returning to *Tower Hamlets v B*, a supervision order may have achieved Hayden J's objectives in invoking the care order. As outlined in the third section, Hayden J aimed to expose B to new philosophies and ideas, which perhaps could be achieved through the supervision order. The supervisor would have been able to guide B and enlighten her on such new ideas and philosophies. This appears more efficacious; B would not have been left to her own devices and, after all, the statute mandates the child to partake in prescribed activities.<sup>159</sup> Accordingly, the supervision order appears significantly more desirable, but only where the threshold is established. It could be useful in preventing the perpetuation of the radicalisation process and exacerbating the radicalisation itself. Furthermore, a year-long supervision for a child at risk of radicalisation is beneficial as evidence could be gathered as to the state of the child's radicalisation. This could consequently be presented to the court when the order is to be reviewed, allowing the court a detailed insight into any likelihood of harm. In essence, the supervision order safeguards the child and provides them with support whilst continuing the parental care. What is more, rather than immediately imposing a care order, the supervision order may enable for more evidence to be gathered which would suggest removal as the most appropriate order. Where radicalisation risk is noted in the first instance, it may be useful to gain a better understanding by virtue of supervision before removing the child.

Whilst speculative, it seems a supervision order could have achieved Hayden J's aims in *Tower Hamlets v B*. If this had been attempted, a clearer image of the supervision order's efficacy would be had. It appears that care proceedings are most commonly brought in relation to radicalised children, though this should not be a barrier. The court is able to declare a supervision order as an alternative to the care order on its discretion and so such flexibility could be utilised.<sup>160</sup> There is evidence to suggest supervision orders are used in place of care orders pertaining to the draconian nature of the latter and where the parents are cooperative in the case itself.<sup>161</sup> Despite this, Lowe and Douglas assert, 'temptation to regard supervision as a less invasive form of a care order should be resisted'.<sup>162</sup> To some extent, this is true as there is an invasive element of the order – it breaks the privacy of the family sphere. Though, returning to the analysis regarding privacy and parental autonomy, the family sphere should be penetrated in order to offer the utmost child protection. The invasiveness of the supervision order is necessary for it to achieve its aim. Nevertheless, the supervision order remains far less traumatic in its maintenance of family ties and the harm reducing nature of it. In sum, as an alternative, the supervision order *prima facie* has much to offer, though ultimately it must be tested first.

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<sup>159</sup> Children Act 1989 (n 57) sch 3 s 2(1)(c).

<sup>160</sup> Children Act 1989 (n 57) s 31(5)(a).

<sup>161</sup> *Oxfordshire County Council v L (Care or Supervision Order)* [1998] 1 FLR 70.

<sup>162</sup> Lowe and Douglas (n 157) 635.



#### 4.2 Wardship

Where radicalisation fails to meet the threshold, which is possible as seen in the second section, it is unclear how children can be protected due to lack of reasonable alternatives. The High Court's ancient prerogative of wardship, whilst potentially being considered obsolete following the inception of the CA 1989, could operate as a measure in tackling radicalisation cases. As Lowe and Douglas assert, 'the residual inherent powers remain useful, particularly when the statutory system offers no suitable remedy'.<sup>163</sup> Where radicalisation is not recognised as significant harm, there is no suitable remedy through a care or supervision order, which leads to the suggestion of wardship as an alternative method. It ensures 'no important step' is taken in the child's life without the court's consent.<sup>164</sup> This includes decisions such as medical treatment and marriage but can also prevent the child leaving the jurisdiction and moreover, can be used to make 'material changes in a ward's education'.<sup>165</sup> Essentially, wardship transfers parental responsibility to the court, rather than the local authority. This initially seems as draconian as a care order, but the flexible nature of the inherent powers renders it less so:

(Wardship has) a flexibility to it that enables it to make interventions into the lives of children which can, when required, have a lightness of touch, and equally when required can have a very draconian reach indeed, for after all it removes parental responsibility from either parent or local authority and places it in the hands of the High Court.<sup>166</sup>

The inherent power, however, has limitations in its use. Under section 100 of the CA 1989, the High Court cannot use wardship to place the child in the care of a local authority<sup>167</sup>—for that would require a care order—nor to require the child to be accommodated by a local authority,<sup>168</sup> nor to make a child already subject to a care order a ward.<sup>169</sup> As, 'the inherent jurisdiction is there to deal with lacunae in statute, not as an alternative to the court's statutory powers',<sup>170</sup> the court cannot opt for wardship out of preference where a care or supervision order is viable. Nevertheless, the prospect of using wardship is not necessarily impaired as such limitations would not arise in cases where the significant harm threshold has not been met, and that is where wardship would be most useful. It seems if significant harm is not found, the court should lean toward wardship due to its flexibility. In its current usage, wardship is focused on cases where the child in question has attempted, or there is

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<sup>163</sup> *ibid* 741.

<sup>164</sup> *Re S (Infants)* [1967] 1 WLR 396 [407] (Cross J).

<sup>165</sup> Lowe and Douglas (n 157) 745.

<sup>166</sup> *Brighton and Hove City Council v The Mother, Y* [2015] EWHC 2099 (Fam), [2016] 2 FLR 229, [17] (Hayden J).

<sup>167</sup> Children Act 1989 (n 57) s 100(2)(a).

<sup>168</sup> *ibid* s 100(2)(b).

<sup>169</sup> *ibid* s 100(2)(c).

<sup>170</sup> Jill Black and others, *A Practical Approach to Family Law* (10<sup>th</sup> ed, Oxford University Press, 2012) 256.

evidence they will attempt, to travel to Syria.<sup>171</sup> This seems an irrational use of the inherent power. Whilst useful in preventing flight from the jurisdiction, it could be used as a method of protection in the radicalisation process holistically. For example, the court's control over education could be used to enlighten the child on fundamental British values, similar to the supervision order. Overall, wardship appears to be another reasonable solution, but mainly where the threshold is not satisfied.

Whilst being viable alternatives, it remains unclear whether they would be productive in their use. This section proposes both options as potential considerations in protecting children from this contemporary harm. The supervision order is available where the threshold is passed; wardship is available where it is not. The court cannot fail to act and must do something to protect children. However, a true analysis of the adequacy of both options cannot productively be had until they have been used in radicalisation cases

### Conclusion

Children are not abstract concepts to be theoretically discussed in the course of legal analysis. Whilst the care order may initially appear common sense to ensure best protection, this is an inappropriate suggestion in light of the paramount welfare consideration mandated by the CA 1989. This paper has established that whilst there are difficulties in defining radicalisation and applying it to the law itself, the crux of the problem is the trauma surrounding the care order and how considerations of the child's welfare go against invoking it. It would be both irrational and imprudent to remove each and every child who comes before the family court due to radicalisation as it appears counterproductive, as illustrated by *Tower Hamlets v B*. In essence, the removal of children is only workable where some certainty can be derived from the child's welfare. Although, a judge can never be unequivocally certain of the right answer for children in care proceedings.<sup>172</sup> This paper recommends where the child is of age and capacity to portray wishes and feelings to be removed – which after all is enshrined in the welfare principle itself<sup>173</sup> – then a care order can be invoked with sufficient certainty. Whilst children's wishes are a consideration, achieving a remedy that is in their best interests is the primary aim. This is exemplified in a recent radicalisation case where children positively assured the court they wish to be removed; thus, rendering a care order proportionate in that case.<sup>174</sup>

To truly deal with the radicalisation phenomenon, the first task is to develop a robust definition directly linked to children. The misconception of the terrorism nexus needs to be

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<sup>171</sup> See *Re M (Children) (Wardship: Jurisdiction and Powers)* [2015] EWHC 1433 (Fam), for example.

<sup>172</sup> Julie Doughty, 'Care proceedings – is there a better way?' (2014) 26 *Child and Family Law Quarterly* 113, 129.

<sup>173</sup> Children Act 1989 (n 57) s 1(3)(a).

<sup>174</sup> *Re X, Y and Z* [2018] EWHC 645 (Fam).

eradicated as, whilst the definition of radicalisation is fluid, culturally relative and unclear, the extent to which it causes significant harm cannot be further disputed. Indeed, in cases such as *Re A* where there is a mere presence of extremism, proposing this as significant harm is futile – especially when the child is so young. Though in cases such as *Re X*, findings of significant harm are fundamental if the court is to provide adequate protection. And whilst care orders are inappropriate, wardship and supervision orders may prove to be more useful measures. If the court perceives the ‘conventional safeguarding principles’ to ‘afford the best protection’,<sup>175</sup> then they must use them. However, whilst the challenges faced in radicalisation cases have also been suggested as conventional,<sup>176</sup> this analysis quite evidently suggests they are not, and so perhaps conventional safeguarding principles are inadequate. Such a conclusion cannot be had until alternative measures are tried and tested. Radicalisation cases involve child protection, welfare and invasive orders – all predictable challenges in child law – though the issue of radicalisation is too contemporary to be considered conventional.

Conclusively, whilst the welfare principle is disputed, this article has disregarded such critique on the basis that welfare is paramount in current law and believes it should remain so. Therefore, in questioning whether the family court should remove children owing to radicalisation, the answer is no. Indeed, ‘the courts are not in the business of social engineering’,<sup>177</sup> or of policing beliefs,<sup>178</sup> but they are in the business of protecting children – that much is defined and clear. The privacy of the family sphere can be pierced to protect radicalised children. Nonetheless, in dealing with the radicalisation of children, there must be an improved understanding of radicalisation itself by government and society. Such an understanding will come with further study, research and attention to the ever-changing delineations of the concept. Empirical research will help establish how radicalisation harms children both in the present, and the future. Indeed, the care system appears to be no place for those children involved in radicalisation and so better alternatives must be sought. With a better understanding – and perhaps statutory definitions in relation to child protection – the family court will be better equipped to protect children and deal with this new facet of child protection. In the end, the key issue at heart, must and should be the protection of children and their welfare.

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<sup>175</sup> *London Borough of Tower Hamlets v M* [2015] EWHC 869 (Fam), [2016] 1 All ER 182 [51] (Hayden J).

<sup>176</sup> Jo Delahunty and Chris Barnes, ‘Radicalisation cases in the Family Courts: Part 3: Threshold’ [2016] Fam Law 773, 738.

<sup>177</sup> *North East Lincolnshire Council v G & L* [2014] EWCC B77 (Fam) [3] (Jack J).

<sup>178</sup> *Tower Hamlets v B* (n 140) [103] (Hayden J).