WHAT'S TERRORISM GOT TO DO WITH IT? THE PERILS OF PROSECUTORIAL MISUSE OF TERRORISM OFFENSES

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ABSTRACT

State and federal statutes contain many criminal prohibitions that are commonly perceived as terrorism-related crimes. These statutes, however, do not make the definition of terrorism -- a term whose components legislatures do not agree upon -- an element of the crime. Instead, the terrorism classification is merely inferred based on features that typically characterize crimes of terrorism. These include the scope of the harm intended or inflicted, the nature of the technical measures used to carry out the attack, or the aid provided to terrorist organizations. These statutes, however, are too broad, covering a wide variety of crimes above and beyond the terrorism context.

The Article suggests that one direct implication of the failure to accurately define terrorism and make it an element of terrorism crimes is that the distinction between terrorism and “ordinary” crime becomes ambiguous. The Article identifies an unexplored problem in the criminal law against terrorism: unlimited prosecutorial discretion enables prosecutors to misuse terrorism-related offenses in cases that are unrelated to terrorism as this term is commonly understood. The Article examines the risks and unintended consequences of this prosecutorial practice, ranging from treating similarly situated defendants differently to potentially opening the door to additional applications of terrorism-related offenses in contexts such as drug trafficking.

To remedy the above problems, the Article proposes legislative reform concerning the elements of terrorism offenses by making specific intent to coerce governments to change their actions and policies the required mental state for conviction.

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INTRODUCTION

When Carol Anne Bond discovered that her husband had impregnated her best friend Myrlinda Haynes, she sought revenge. Bond, a trained microbiologist employed by a chemical manufacturer, stole a supply of toxic chemicals from her employer and purchased more over the Internet. Over several months, Bond attempted to harm Haynes by spreading these chemicals in her house, on her car door handles, and in her mailbox. Haynes complained to local law enforcement, but they did not further pursue her complaint. After the matter was referred to the U.S. Postal Inspection Service, and following a federal investigation, federal prosecutors charged Bond with possessing and using a chemical weapon, in violation of 18 U.S.C. § 229. Bond pleaded guilty to the charges and was sentenced to six years in prison.

The case reached the U.S Supreme Court after Bond contended the offense she was charged with was unconstitutional because the power to prosecute crimes was reserved to the states and thus the prohibition violated principles of federalism embodied in the Constitution, and the fair notice requirements of its Due Process Clause. The Third Circuit held that as a private party attempting to claim a violation of state sovereignty under the Tenth Amendment, Bond lacked standing. The question before the Supreme Court was whether a criminal defendant convicted of use of a chemical weapon under 18 U.S.C. § 229 may challenge her conviction on the grounds that the statute is beyond the federal government’s enumerated powers thus violating the Tenth Amendment.

The Court rejected the Government’s position, holding that there was no basis either in precedent or principle to deny Bond’s standing to raise her claim that the statute

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2 Bond, 581 F.3d 128, 132
3 18 U.S.C. §§229(a); 229F(1); (7); (8) (West, 2011)
she was charged with was beyond Congress’s constitutional authority to enact. The Court expressed no view on the merits of Bond’s challenge to the statute’s validity, which are to be considered by the Court of Appeals on remand.

Rather than ponder the decision’s constitutional aspects, this Article focuses on the case’s implications for criminal law in general, and on the enforcement of terrorism offenses in particular. As the Court’s decision does not address any substantive issues arising out of the decision to charge the defendant with a terrorism crime, a central question emerges: How did this purely local crime, motivated by rage and jealousy and perpetrated by a single defendant, result in severe federal charges under a criminal statute directed to combat politically-motivated terrorism?

This Article is not about the prosecution of actual crimes of terrorism. Instead, its focal point is the prosecutorial misclassification of terrorism offenses in cases involving “ordinary” crimes, unrelated to terrorism. The Article examines whether charging defendants with terrorism offenses necessarily requires the conduct in question to involve terrorist acts, as the term “terrorism” is commonly understood.

The Bond case highlights some critical, yet unresolved, questions concerning the definition and classification of terrorism for the purposes of enforcing the criminal law against terrorism. In Bond, prosecutors misused a prohibition enacted by Congress to meet American obligations under an international treaty to charge a defendant with crimes not markedly different in nature, effect and defining characteristics from other types of “ordinary” crime normally dealt with by the criminal justice system. The case demonstrates law’s failure to provide an accurate legal boundary between prosecution of terrorists and prosecution of defendants who employ methods capable of inflicting massive harm and that typically characterize terrorism.

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4 Bond v. U.S. 131 S. Ct. 2355, at 2366-67, No. 09-1227 (holding that where a litigant is party to a justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of the government).
5 In this Article I use the term “terrorism offenses” to discuss terrorism-related prohibitions. While these offenses do not use the term terrorism itself, they are commonly understood to proscribe conduct that typically characterizes terrorism.
The decision to charge Bond with a terrorism offense stems from a combination of two features that characterize the criminal law against terrorism: the first is a doctrinal problem of definition: the definition of terrorism is not made an element of terrorism offenses. The second is an institutional problem of classification: in the absence of legislative guidelines, enormous prosecutorial discretion provides prosecutors with the authority to misclassify “ordinary” crimes as terrorism. Accurately defining terrorism, as this Article sets out to do, and making it an element of terrorism offenses is critical for distinguishing between terrorism and “ordinary” crime, due to the risks and unintended consequences of prosecutorial misclassification of “ordinary” crimes as “terrorism”.

While federal and state law adopts various definitions of terrorism, the offenses themselves do not make terrorism an element the crime. Instead, various offenses prohibit different forms of crimes that typically – though not necessarily-- characterize terrorist acts. Terrorism offenses are broadly worded, covering a wide array of crimes. While these provisions are commonly understood to be “terrorism offenses”, their language creates ambiguity about which features ought to determine the terrorism categorization, and ultimately inform the prosecutorial decision regarding what crimes to charge a defendant with: the means used to carry out the attack, the intent to coerce the government by intimidating civilians, the scope of the harm intended or inflicted, or the affiliation with a terrorist organization? These crucial questions remain mostly unresolved under current law.

Despite the seeming breadth of the law’s response to terrorism following the 9/11 terrorist attacks, legal reforms within the criminal justice system have been concerned primarily with process, such as the expansive government authority to obtain private information under the PATRIOT ACT, and the presidential authority to detain individuals without trial. Rather than define the substantive elements of the criminal prohibitions, the statutory definitions of terrorism impact mainly procedural, investigation authorization or punishment enhancement. The majority of terrorism offenses remained intact since the

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7 See, Norman Abrams, Anti-Terrorism and Criminal Enforcement, at 93-96 (2nd, ed. 2008) (hereinafter: Anti-Terrorism) (noting that neither the word terrorism nor any of its variants appears in the definition of 18 U.S.C section 2332)
8 See, Erwin Chemerinsky, Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement, 51 UCLA L. Rev. 1619, at 1623, 1627 (2004) (noting that the PATRIOT ACT gives the government powers that traditionally have only been used in foreign countries or for foreign intelligence gathering in the U.S).
comprehensive legislative amendments of 1986 and 1996, and the legislative amendments that followed 9/11 made almost no changes in substantive criminal law. Most scholarship on the criminal law against terrorism thus focuses on criticizing the investigatory and procedural aspects of prosecuting terrorism.

This Article suggests that such critique typically overlooks the implications of the failure to make terrorism definition an element of terrorism crime on the scope of substantive criminal law. Consequently, the question of distinguishing “ordinary” crime from terrorism largely remains unexplored in current legal scholarship. This Article attempts to fill this gap by examining some of the implications of the substantive prohibitions on the scope of the criminal law against terrorism. It contends that the criminal justice system must clearly define terrorism and explicitly make it an element of terrorism crimes in order to unambiguously distinguish between “ordinary” crimes, such as mass or serial killings, and crimes of terrorism. It further argues that current terrorism statutes contain no internal mechanism to restrict the application of the broadly worded provisions only to terrorism prosecutions. The criminal justice system’s failure to clearly define what types of crime amount to terrorism results in blurring the line between “ordinary” crime and terrorism.

The institutional problem of classification is equally critical in the area of terrorism offenses: Since the distinction between terrorism and “ordinary” crime is not legislatively guided, the authority to make these classifications remains solely in the hands of the criminal justice system’s main institutional actors: prosecutors. A main feature of the American criminal justice system is the enormous discretion wielded by prosecutors. The failure to make terrorism an element of the crime provides prosecutors with broad authority to classify what crimes ought to be prosecuted as terrorism, enabling them to invoke the terrorism theory in cases unrelated to terrorism, and consequently to practically shape the substantive contours

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10 See, e.g., Robert Chesney and Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 Stan. L. Rev. 1079, 1108 (2008) (discussing two competing models for detention: the military detention and the civilian criminal trial model, noting that the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has established capacity of convicting terrorists based on criteria that come close to associational status.
11 See, generally, William Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 506 (2001) (hereinafter: Pathological Politics) (noting that the role that the definition of crimes and defenses play is to empower prosecutors, who are the criminal justice system’s real lawmakers).
of antiterrorism law. The perils of this unconstrained prosecutorial discretion include granting prosecutors the power to enhance the severity of the crime and the penalty of “ordinary” crimes, interfering with the balance between federal and local law enforcement, and opening a door to expanding the reach of terrorism offenses to additional contexts.

Furthermore, terrorism statutes do not provide any mechanism of restraint for how prosecutors exercise their authority, thereby increasing the risk that these provisions might be wrongly applied. An unintended consequence of providing law enforcement with too much leeway in charging defendants with terrorism offenses is prosecutorial misuse of these prohibitions. Unlimited prosecutorial discretion leaves prosecutors free to invoke creative theories by charging defendants with terrorism crimes in cases unrelated to terrorism.

This Article proceeds as follows: Part I traces the source of prosecutorial misuse of terrorism statutes by pointing out the anomaly that characterizes the criminal law against terrorism: While federal law adopts various definitions of terrorism, the criminal prohibitions themselves do not make terrorism an element of the crime. Instead, the terrorist nature of the crimes is merely implied from their features such as the technical means used to carry out the attacks or the scope of the harm inflicted. Part II examines the practical implications of the above anomaly by considering court decisions in which the prosecution relied on a different feature that typically characterizes terrorist acts to invoke the terrorism theory. The cases demonstrate that while the defendants were charged with terrorism offenses, most of these offenses could have been prosecuted under general criminal laws. Part III describes the risks and unintended consequences of prosecutorial misuse of antiterrorism provisions in light of the defining features that characterize the American criminal justice system, including unconstrained prosecutorial discretion, the rule of plea bargains, the local and decentralized nature of the criminal law enforcement and the political dimension of the legal system. It further contends that this prosecutorial practice is unwarranted, resulting in law enforcement shaping the contours of substantive criminal law and taking over the role of legislatures. Part IV proposes legislative reform designed to remedy the above shortcomings. The proposal aims to constrain prosecutorial discretion by limiting the use of terrorism offenses only to crimes of terrorism and to make the specific intent to coerce governments to change their policies or actions an element of terrorism crimes.
I. THE DEFINITIONAL PROBLEM

The first part of this Article traces the source of the problem of legal ambiguity concerning what type of conduct constitutes terrorism by laying out the theoretical foundation that frames the subsequent discussion. The point of departure for evaluating whether terrorism offenses are used only in terrorism cases begins with the scholarly debate attempting to define terrorism for the purpose of bringing criminal charges.

A. The Conceptual Framework: Defining Terrorism

The definition of terrorism is controversial and contentious: Voluminous scholarship addresses the term from multidisciplinary aspects including political theory, foreign relationships, philosophy and international law. This Article focuses solely on the implications of defining terrorism for the purposes of enforcing domestic criminal law, an area characterized by significant ambiguity regarding not only what terrorism is, but also how it should be reflected in legal provisions.

1. The Scholarly Debate: What Is Terrorism?

Leading terrorism scholar Martha Crenshaw argues that: “certain essential elements of the definition of terrorism are…situational constants. It is a method or system used by a revolutionary organization for specific political purposes. Therefore, neither one isolated act nor a series of random acts is terrorism.” Other scholars also endorse this excluding feature, noting that a single violent act against a political leader does not constitute terrorism. After attempting to distinguish terrorists from other criminals, Bruce Hoffman defines terrorism as

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13 See, Bruce Ackerman, BEFORE THE NEXT ATTACK: Preserving Civil Liberties in an Age of Terrorism, at 13 Yale University Press (2006) (noting that: “Terrorism is simply the name of a technique: intentional attacks on innocent civilians”), See, also, Abrams, supra note 7, at 62-75 (noting that there is no unanimous definition of terrorism and the definitions of terrorism differ in what they include).
14 See, Crenshaw, supra note 12, at 22.
15 See, Philip Heymann, TERRORISM AND AMERICA (1998), at 6 (hereinafter: Heymann) (noting that the assassination of Israeli prime minister Itzhak Rabin does not qualify as terrorism).
“the deliberate creation and exploitation of fear through violence or the threat of violence in pursuit of political change.”16

Other scholars agree that political motivation is an essential factor in defining terrorism. 17 Leading legal scholar Philip Heymann describes terrorism as: “violence conducted as a political strategy by a substantial group or secret agents of a foreign state.”18 Heymann further notes that: “terrorism falls into the category of violent ways of pursuing political ends, a category that includes war between states, civil war, guerilla warfare and coup d’état.”19

Many scholars understand terrorism to incorporate political motivation (distinguishing terrorism from “ordinary” crime, typically motivated by greed, anger, and desire for domination) and organizational affiliation, which distinguishes terrorist acts committed on behalf of a group from those of a lone serial killer or perpetrator who engages in a massive shooting spree.20 But perhaps the most critical feature distinguishing terrorism from “ordinary” crime is the targeting of civilians on the basis of their group identity, rather than individual behavior or personal characteristics.21 This feature distinguishes acts of terrorism from ordinary crime where the targets are specific individuals rather than members of a nation. However, the indirect and more critical targets of terrorism are governments, whose citizens are attacked as a pretext for demanding political change.22 Terrorists thus commit acts of terrorism with specific intent: to bring about political change by coercing governments to change their actions or policies.

While the above features distinguish terrorism from “ordinary” crime, none of them,
in itself, determines the terrorism classification. Because understanding terrorism involves the cumulative effect of several distinct features\(^23\), the lack of one of these defining features casts doubt on the accuracy of the classification of the crime as terrorism. This scholarly understanding, however, is not reflected in the criminal justice system, resulting in a substantial gap between the scholarship on terrorism and terrorism offenses.

2. Different Statutory Definitions of Terrorism

Since 9/11, the American criminal justice system has rested on the premise that terrorism is the most significant national security threat. A Department of Justice document, “Goals and Objectives: for Fiscal Years 2007 – 2012,” states as one of its objectives: “to prosecute those who have committed or intend to commit terrorist acts in the U.S.” Implied in declaring the prosecution of terrorists a main objective is a preliminary premise that the term “terrorism” operates by a single definition that applies to all terrorism offenses.

Considering the various statutory definitions of terrorism casts doubt on the accuracy of this premise. Federal antiterrorism legislation adopts many definitions of terrorism, each focusing on different features of this term.\(^24\) Take for example, the following provisions:

18 U.S.C. § 2332 stipulates that “domestic terrorism” must: “(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any other state… (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.”

Erwin Chemerinsky criticizes this definition, contending that: “This is an incredibly broad definition… Many lawful protests might be seen as trying to coerce or intimidate government or civilian population. If they are large enough, they might even be seen as dangerous to human lives. An antiwar protest rally where windows are intentionally broken in a federal building could be prosecuted as terrorist activity. Most crimes, from assault to robbery to rape to kidnapping to extortion, are intended to coerce. The result is that the broad

\(^{23}\) Id., Schmid, at 403 (noting that acts of terrorism have a number of characteristic elements and that many of the elements enumerated in the list are present in most incidents).
\(^{24}\) See, Nicholas J. Perry, The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. Legis. 249, 256-261 (discussing various criminal codes definitions of terrorism).
powers granted to the government by the PATRIOT ACT are not limited to what common understanding would define as terrorism.”

Nora Demleitner notes that: “the hallmark of a terrorism offense is that it is politically motivated. However, precise definitions confusingly vary even within federal law.” Delmeitner further argues that: “The confusing array of definitions of “terrorism” have led to disagreement over what is categorized and prosecuted as a terrorist event, and why.”

The U.S. Department of State designates a “foreign terrorist organization” based on three criteria: that it is a foreign organization, that it engages in “terrorist activity”, and that its terrorist activity threatens the safety of U.S. nationals or the national security of the U.S. The term “terrorist activity” is defined in 22 U.S.C. § 2656 (f) as: “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” This definition makes political motivation an inherent part of terrorist activity, which most legal provisions do not address and requires an organizational affiliation, a feature typically lacking from other statutory definitions.

These examples demonstrate that no unanimous definition of terrorism exists. The definition of “domestic terrorism offers three separate alternatives regarding the terrorism intent: either intimidating or coercing civilian population, or influencing the policy of a government by intimidation or coercion or affecting the conduct of a government by mass destruction, assassination or kidnapping.” Recall that while scholars agree that the cumulative effect of several features defines terrorism, the statutory definitions of terrorism make them

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25 See, Chemerinsky, supra note 8, at, 1623-4 (suggesting that the broad definitions of terrorism are able to cover a variety of factual contexts unrelated to terrorism).
26 See, Nora Demleitner, How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions, 16 FED. SENT. REP 38 (2003) (noting that some charged under anti-terrorism statutes do not appear to fit the picture of terrorists, and that federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorist cases. Demleitner further suggests that one explanation for the need for increased terrorism prosecution might be for individual U.S. Attorneys' Offices to appear “tough on terrorism”, which presumably leads to commendations and rewards. Another explanation might lie in the Congressional budget process which holds potential financial rewards for a Department of Justice focused on terrorism cases, which have after all turned into a national frenzy).
27 Id, Demleitner.
alternative, rather than cumulative, requirements. This position adopts broader definitions of terrorism, which cover a wide array of crimes. 

Were a definition adopted that incorporates all the distinct features of terrorism, the result would be a much-limited number of crimes falling under the terrorism categorization. The legal definitions therefore fail to provide clear guidance on what types of crimes amount to terrorism.

B. The Doctrinal Problem: Terrorism is not an Element of the Offenses

While the criminal statutes against terrorism contain different definitions of the term, these definitions do not play a significant role in the criminal justice system, because the actual use of the term “terrorism” in the criminal prohibitions themselves is very limited. Federal and state law adopts broad prohibitions aimed at fighting terrorism without requiring the prosecution to bring evidence to establish the terrorism connection beyond a reasonable doubt. The majority of terrorism prohibitions do not make terrorism an element of the crime. Moreover, neither federal nor state criminal law contains explicit “terrorism” offenses per se.

Instead, various provisions criminalize a wide variety of crimes that typically characterize terrorism. The terrorism classification is not legislatively guided, but implicit, as it may be inferred from these features. Eric Luna notes the ambiguity of terrorism offenses by asking: “What makes an individual a terrorist: Is it the severity of his acts such as the infliction of massive indiscriminate harm or is it targeting innocent civilians?” In each of the following federal terrorism prohibitions, a different feature that typically characterizes terrorist acts serves to classify the offense as a crime of terrorism.

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30 See, Abrams, supra note 7, at 75-76 (providing examples of factual contexts in which applying the terrorism definition results in ambiguity as to whether the conduct qualifies as terrorism).
32 See, Norman Abrams and Sara Sun Beale, Federal Criminal Law and its Enforcement, Supplement (2004) at 89 (noting that: “Despite the fact that a number of different definitions of terrorism or a terrorism purpose can be found in the federal criminal laws, it is difficult to find a federal criminal statute that makes terrorism or a terrorism purpose an element of a federal crime.”)
33 See, McCormack, supra note 31, at 58.
34 See, Eric Luna, Criminal Justice and the Public Imagination, 7 Ohio State Journal of Criminal Law 71, 110 (2009)
1. The Nature of the Technical Measures and the Scope of the Harm

Title 18 of the U.S. Code provides a chapter entitled “Terrorism” that includes offenses such as homicide and use of biological or nuclear weapons. However, nothing in the definition of these offenses necessarily ties them to terrorism. The following offenses offer examples in which the means to carry out the attack determines the classification of the crime as terrorism, based on the enormous scope of the harm typically inflicted. The prohibition against the use of chemical weapons was adopted by the federal government to comply with the requirements of an international treaty, and its language closely adheres to the language of the Chemical Weapons Convention. The offense proscribes any form of use, threat to use or attempt to use chemical weapons with “chemical weapon” defined as a “toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.” The prohibition further defines “toxic chemical” as “any chemical, which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” Another example in that category proscribes “delivering, placing, discharging or detonating explosives in public places.”

These criminal provisions neither make terrorism an element of the offense nor state that these offenses constitute terrorism. Rather, the scope of the harm intended, along with the nature of the technical measures used to carry out the attacks—typically weapons that cause massive harm—determine the common classification of the offense as “terrorism.”

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35 18 U.S.C. (West 2011)
36 18 U.S.C §229 (West, 2011)
37 18 U.S.C. § 229 states in relevant part that: ...(b), it shall be unlawful for any person knowingly- (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).
38 18 U.S.C § 229F(1)(A) (West, 2011)
39 18 U.S.C § 229F(8)(A) (West, 2011)
40 18 U.S.C §2332f (West, 2011) (proscribes the following: “Whoever unlawfully delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility (A) with the intent to cause death or serious bodily injury, (B) with the intent to cause extensive destruction of such a place, facility or system...
Acknowledging that the concept is too contested, legislatures avoid making terrorism itself an element of the crime while having a political incentive to expand the scope of the crime by allowing for the prohibitions to cover broader factual contexts.

At first glance, the plain text suggests that these offenses may also be used to prosecute other types of crimes unrelated to terrorism. While terrorists typically use these technical measures, it is not always the case, as the statutory language does not require the terrorism connection. If neither the prohibitions themselves nor the headers limit the use of the offenses to the terrorism context, then terrorism is not a necessary requirement for using these prohibitions. Under this theory, any conduct involving the use of technical measures that inflict substantial harm falls under the prohibition, irrespective of the perpetrator’s motive, intent or connection to a terrorist organization. Moreover, open-ended phrases such as “intent to intimidate or coerce” offer broad criminal prohibitions, which allow for a wide variety of activities to fall within their scope. For example, this theory would enable using the “bombing of public places” prohibition to prosecute a case in which explosives are used as part of a drug-trafficking operation.41

However, despite the lack of explicit statutory language, it can be argued that these prohibitions do in fact constitute terrorism offenses. One possible theory is that launching chemical weapons and weapons of mass destruction should always be considered an act of terrorism. Therefore, classifying certain crimes as terrorism may be logically inferred from the technical measures used to carry out the attack. Moreover, the nature of the harm that flows from these activities -- massive injuries, to a large number of victims -- further supports the assertion that these are indeed terrorism crimes. Furthermore, the legislative history, along with the location of the prohibitions -- subsequent to the terrorism definitions in §2331 -- demonstrate that these prohibitions intended to combat terrorism were designed to cover only crimes of terrorism.42

41 See, Abrams, supra note 7 at 76 (discussing several applications of terrorism definitions to demonstrate the ambiguities concerning what conduct qualifies as terrorism).
42 Id, Abrams, at 8-21 (describing the legislative history leading to the amendment of terrorism offenses).
2. Assistance to a Terrorist Organization

Should facilitating the activities of a terrorist organization determine the nature of the crime as a terrorism offense? The Federal legislature answers this question in the positive: Under the “material support” offense the prosecution can obtain a conviction based on facilitation liability.\(^{43}\) Providing any type of assistance to terrorists, rather than to acts of terrorism, renders these offenses “crimes of terrorism.” Federal law contains two prohibitions against providing material support to terrorists: §2339A is considered to be a narrow prohibition, which is a type of aiding-and-abetting statute.\(^{44}\) It prohibits the provision of material support or resources to anyone, regardless of the identity of the recipient, so long as the provider “know[s] or intend[s] that [the aid is] to be used in preparation for, or in carrying out, a violation” of any of more than two dozen crimes of violence specified in the statute.\(^{45}\) The statute is rather limited in scope, and is unable to prevent support to terrorist organizations in situations, which the government could not prove the donor knew the aid would facilitate the commission of a particular enumerated crime.\(^{46}\)

Section 2339B is much broader in scope and considered to be the government’s main tool for enforcing domestic criminal law against terrorism.\(^{47}\) It criminalizes knowingly providing material support or resources to a foreign terrorist organization, or attempting to do so. While §2339B appears narrower than § 2339A, applying only to aid given to “designated foreign terrorist organizations,” substantively, §2339B is a much broader prohibition. §2339A forbids aid only when the provider knows it will be used to commit one of the crimes specified in the statute, whereas § 2339B prohibits the provision of the same kinds of aid under any circumstances.\(^{48}\) A defendant is guilty of facilitating terrorism when he knowingly

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\(^{44}\) See, Robert Chesney, The Sleeper Scenario, Harvard Journal on Legislation 1 (2005), at 12-13 (noting that the narrow scope of §2339A, compared to the broader legislative intent).

\(^{45}\) 18 U.S.C §2339A

\(^{46}\) See, Cheseny, supra note 44 at 13 (noting critics’ claims that the prohibition would not prevent the flow of support to terrorist organizations in situations in which the government could not prove the donor’s intent to facilitate the commission of a particular crime).

\(^{47}\) Id., Cheseny, at 15-18 (noting the breadth of §2339B and its unique features).

\(^{48}\) Id., Cheseny.
renders aid to terrorists even without knowing the manner in which the aid will be used.\textsuperscript{49} The conviction entered is not for terrorist activities directly, but rather for the distinct, independent facilitation offense.

Notably, the law banning the provision of material support or resources to a designated terrorist organization does not make terrorism itself, or one of its defining features, an element of the offense.\textsuperscript{50} The elements of the prohibition do not require the prosecution to prove that the defendant actually engaged in terrorist acts. Instead, the required connection is through providing any form of assistance to the terrorist organization. What amounts to “material support” is broad in scope, ranging from providing financial aid to expert advice, assistance and transportation.\textsuperscript{51} Furthermore, the direct object of the support is not the terrorist act itself but rather a “terrorist organization.” Consequently, the prohibition may be invoked upon proving any type of support, aid, counseling, general assistance or advice to a designated terrorist organization. The prosecution does not need to prove that the assistance provided was either related to the organization’s criminal activity, or to prove the causal link between the assistance provided and the commission of crimes of terrorism.\textsuperscript{52}

Moreover, the mental state required for conviction also creates a low threshold: the prosecution needs only to establish the defendant’s knowledge of either the foreign group’s designation as a terrorist organization or its commission of terrorist acts. For example, providing transportation or shelter to a member of a terrorist organization may result in a conviction, even if the defendant did not have any specific knowledge about the terrorist’s intentions to carry out a terrorist act.

\textsuperscript{49} 18 U.S.C §2339B
\textsuperscript{50} 18 U.S.C §2339B
\textsuperscript{51} See, 2330A. (b) (definition: In this section, the term “material support or resources” means currency or monetary or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, transportation, and other physical assets, except medicine or religious materials. The definition applies both to 2339A and 2339B).
\textsuperscript{52} Holder v. Humanitarian Project, 130 S.Ct. 2705 (2010) (adopting an expansive interpretation of the prohibition against providing material support). See, infra, Part I. C., for further discussion of this decision.
C. Scholarly Critique of the Overbroad Prohibitions

The common thread that characterizes terrorism offenses is their overbroad nature. The broadly worded prohibitions are enormous in scope, and cover a wide array of crimes varying in severity and in their relation to terrorism.53 This type of critique, however, is not unique to antiterrorism law. Rather, the overbroad aspect of federal terrorism prohibitions is merely an example of larger problems in other areas of the federal criminal justice system.54

Many scholars have long criticized the overbroad nature of federal criminal prohibitions.55 In a series of papers, Sara Sun Beale elaborately addresses the over-breadth of federal criminal prohibitions, noting that too many federal offenses cover too much conduct and many individual offenses are overbroad and badly drafted.56 Beale further notes that the number of federal crimes has increased tremendously in recent years, with federal offenses covering a wide array of conduct already criminalized under state law.57 In a series of influential Articles, the late criminal law scholar William Stuntz argued that the constitutionalization of criminal procedure created a strong political incentive for legislatures to broaden the substantive criminal law to escape the stringent requirements of criminal procedure.58 Broader criminal codes, argued Stuntz, allow police and prosecutors to enjoy the benefits of criminal law enforcement techniques in a wider range of situations.59

53 See, Chemerinsky, supra note 8 at 1623-27 (noting the breadth of terrorism offenses and their ability to cover a wide variety of situations).
55 See, e.g., Peter Low, Federal Criminal Law, FEDERAL CRIMINAL LAW, second ed. at 5-7 (2004) (discussing the overlap of federal and state criminal laws).
57 See, Beale, The Many Faces of Over-Criminalization, supra note 56 at 754 (noting that as a result of recent legislation, the bulk of federal criminal provisions now deals with conduct also subject to the states’ general police powers).
59 See, Stuntz, Pathological Politics, supra note 11 at 509 (noting that as criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors).
The federal prohibitions on terrorism offer a particularized context in which the familiar problem of the enormous scope of federal prohibitions is further exacerbated. This problem becomes especially critical precisely because the terrorism definition is not made an element of these offenses, and therefore the necessary connection to the terrorism context is missing. Moreover, the lack of such a legislative constraint that would limit the application of these offenses only to acts of terrorism enables a variety of crimes to be covered by these overbroad provisions.

Several scholars have lodged criticism against the criminal prohibitions on terrorism, noting their overbroad nature and unlimited scope. Erwin Chemerinsky critiques the broad powers granted to the government under the PATRIOT ACT, attributing the problem to the broad definition of terrorism adopted in this statute. Chemerinsky notes that the experience with other broad statutes such as the federal Racketeer Influenced and Corrupt Organization Act law is that they often are used in contexts far beyond what their drafters intended. Similarly, argues Chemerinsky, the government uses the PATRIOT ACT’s provisions in cases that have nothing to do with terrorism under its commonly accepted meaning. Nora Demleitner also critiques the broad definition of terrorism offenses, suggesting that: “some charged under anti-terrorism statutes do not appear to fit the picture of these terrorists. Federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorist cases.”

The prohibition against providing material support to terrorist organizations has been a common target of scholarly critique: Norman Abrams contends that this offense expands criminal liability even further than conspiracy law’s vicarious liability. Under the material support offense a defendant can be convicted for knowingly supporting terrorists even without knowing the terrorists’ plans. Even generalized support for unspecified terrorist goals creates significant felony liability, marking a stark departure from personal or vicarious

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60 See, e.g., Chemerinsky, supra note 8 at 1623-4
61 Id, Chemerinsky.
62 See, Demleitner, supra note 26
64 See, e.g., Benjamin Priester, Who is a Terrorist: Drawing the Line Between Criminal Defendants and Military Enemies, 4 Utah L. Rev 1255, at 1266 (2008) (discussing the scope of the prohibition against providing material support to terrorist organizations).
liability, which requires proof of the defendant’s involvement in specified crimes. Scholars further note that the scope of the prohibition against providing material support is presumably larger than RICO’s, the federal law’s flagship in combating organized crime. While RICO criminalizes the aiding or abetting of a criminal organization, §2339B criminalizes any type of material support to a terrorist organization regardless of whether the support is linked to specific terrorist activity or not. Criminalization is not linked to aiding and abetting crimes but only to status: any association with a terrorist organization suffices.

D. The Dismissal of Constitutional Challenges

Could these prohibitions be attacked on constitutional grounds? Two important legality doctrines generally serve to limit the scope of overbroad criminal prohibitions: The vagueness doctrine “requires that…ordinarily legislative crime definition be meaningfully precise or at least that it not be meaninglessly indefinite.” A penal statute survives a void-for-vagueness challenge if it defines “the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” If there are uncertainties about to whom the statute applies, the conduct forbidden, or the penalty imposed, the statute will ultimately be held unconstitutional.

Another path to limit the broad scope of criminal prohibitions is the over-breadth

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65 Id, Priester.
66 See, Sun Beal and Abrams, supra note 32 at 100 (comparing between the prohibition against material support and the general federal prohibition against aiding and abetting under RICO).
67 Id
68 See, Chesney & Goldsmith, supra note 10 at 1101 (discussing cases in which the defendant is sought to be personally dangerous because of his association with terrorist groups or individuals but cannot be linked to any particular violent plan or act).
69 See, generally, Jonn Calvin Jeffries Jr. Legality, Vagueness and the Construction of Penal Statutes, 71 VA. L. Rev. 189, at 196 (1985) (noting the shortcomings of vagueness doctrine and the fact that there is no yardstick of impermissible indeterminacy).
71 See, e.g., Lanzetta v. New Jersey, 306 U.S. 451, 456-57 (1939) (holding that a statute criminalizing being a member of a “gang” was ambiguous as to whether actual or putative association is meant, what constitutes membership, and how one may join a “gang”). The Court provided that “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be in-formed as to what the State commands or forbids.” Id. at 453.
doctrine, which addresses the potential chilling effect of insufficiently tailored laws irrespective of their clarity.\textsuperscript{72} Over-breadth doctrine addresses the scenario in which a statute may be applied constitutionally in some instances, but is unconstitutional in others. For example, in the context of antiterrorism legislation, the material support law might apply to a range of regulable or proscribable conduct but nonetheless should be struck down because it also extends to protected activity under the First Amendment. Under an overbreadth challenge, the problem is not that the definition of “material support or resources” may be unclear, but that it may be too sweeping.\textsuperscript{73}

Scholars have long addressed the constitutional challenges arising out of the prohibition against providing materials support.\textsuperscript{74} Robert Chesney critiques this offense by noting a range of constitutional objections to the prohibition, including arguments that it denies due process, violates expressive and associational rights, and that it is vague and overbroad.\textsuperscript{75} Chesney further notes that these kinds of constitutional challenges are considered to be a strong remedy, thus they are difficult to successfully establish.\textsuperscript{76}

While various constitutional challenges have attempted to invalidate antiterrorism prohibitions, the constitutional boundaries of the material support prohibition have remained unclear until recently, with different Circuit Courts reaching conflicting conclusions.\textsuperscript{77} These constitutional challenges, including vagueness and first amendment claims, posed by the offense of providing material support, have ultimately been dismissed by courts, culminating in the 2010 U.S. Supreme Court decision in \textit{Holder v. Humanitarian Law Project}.\textsuperscript{78}

The Court’s decision, which ended a 12-year-long litigation, concerns the constitutionality of the criminal ban against advocacy provided to a designated terrorist

\begin{footnotesize}
\textsuperscript{72} See, Virginia v. Hicks, 539 U.S. 113, 118-120 (2003)

\textsuperscript{73} See, Chesney, The Sleeper Scenario, \textit{supra note} 44, at 48-49 (discussing the constitutional challenges to the prohibition against providing material support. In addition, Cheseny also critiques the terrorism support law from a national security perspective, arguing that they are too narrow and fail to account for emerging trends in the nature of terrorist threats).

\textsuperscript{74} Id.

\textsuperscript{75} Id., at 48-71 (2005) (discussing various constitutional claims against the prohibition of providing material support, including vagueness, over-breadth and first amendment challenges).

\textsuperscript{76} Id. at 71

\textsuperscript{77} Humanitarian Law Project v. Mukasey, 552 F. 3d 916, 933 (9th Cir. 2009).

\end{footnotesize}
organization. In 1997, the Secretary of State designated 30 organizations, including the “PKK” and the “LTTE” as foreign terrorist organizations. Concerned that their planned support for the allegedly lawful humanitarian and political activities of the PKK and the LTTE could be prosecuted under the material-support statute, the plaintiffs first filed suit in a federal court, in 1998. First, the plaintiffs claimed the statute violated their freedom of speech and association because it criminalized provision of material support to the PKK and LTTE without requiring proof of specific intent to further the unlawful ends of those organizations. Second, the plaintiffs argued that the statute's language was unconstitutionally vague, violating their due process rights. While the District Court rejected the First Amendment speech and association arguments, it accepted the due process claim, holding that the terms “training” and “personnel” were impermissibly vague. The Ninth Circuit affirmed.

In 2003, the plaintiffs filed a second suit, challenging the constitutionality of the amended term, as applied to them. The district court again accepted their claim that the term was also unconstitutionally vague. Following the 2004 amendments to the material support statute, which clarified that the term “service” includes not only training but also expert advice or assistance, the Ninth Circuit vacated its earlier decision and ordered the district court to reconsider the vagueness claims in light of these amendments.

After allowing the plaintiffs to challenge the new term “service,” the district court rejected their argument that due process required proof of specific intent to further the organization's unlawful aims before criminal liability could be imposed. The court reasoned it was sufficient for the amended statute to demand the government prove a defendant acted with knowledge of the organization's terrorist connections. The court also rejected the claim

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81 9 F.Supp. 2d at 1185-6  
82 Humanitarian Law Project v. Reno, 205 F. 3d 1130, 1137-8 (9th Cir. 2000) (holding that the terms “training” and “personnel” are unconstitutionally vague, since protected expressions might fall within the boundaries of these terms.)  
84 Humanitarian Law Project v. U.S. Dep’t of Justice, 393 F. 3d 902, 903 (9th Cir. 2004)  
85 Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1148 (C.D. Cal. 2005) (While several courts rejected the vagueness concern, a number of courts, led by the Ninth Circuit, have concluded that some terms in the prohibition against providing material support are unconstitutionally vague in light of the possibility that they could be construed to encompass constitutionally protected conduct such as advocacy.)  
86 380 F. Supp. 2d 1148
that the statute was overbroad because the protected speech it covered was insubstantial relative to the kind of conduct—aiding terrorism—it legitimately restricted. However, because the terms “training,” “expert advice or assistance,” and “service” encompassed protected speech and advocacy activities, thereby chilling the exercise of First Amendment freedoms, the district court held that they were unconstitutionally vague. The Ninth Circuit affirmed, and the issue reached the U.S Supreme Court.

The Supreme Court in the 2010 Humanitarian Law Project decision reversed the Ninth Circuit’s decision, holding that a criminal prohibition on advocacy performed in coordination with, or at the direction of, a foreign terrorist organization is not unconstitutional. The Court held that the Humanitarian Law Project was not allowed to provide legal support to the “PKK”, on how to follow and implement humanitarian and international law, even when this support impacts peaceful resolutions of disputes and the petitioning of various international bodies, such as the United Nations for relief. In addition, the Court held that the Humanitarian Law Project could not provide the “LTTE” with support in the form of training its members to present claims for tsunami-related aid to mediators and international bodies and/or negotiating peace agreements between its organization and the Sri Lankan government.

Writing for the Court, Chief Justice Roberts addressed the vagueness claim by holding that the Ninth Circuit had conflated its First Amendment and Fifth Amendment analyses and applied the wrong standard. The Court held that it did not matter if the statute was not clear in every possible application and that one could hypothesize if its terms were sufficiently clear in their application to the conduct proposed by the plaintiffs. In this case, the Court held, the terms that Congress had refined were clear enough to give the plaintiffs fair notice that their proposed activities—as opposed to activities hypothesized for the purpose of legal argument—were prohibited.

87 380 F. Supp. 2d 1134, at 1153
88 380 F. Supp. 2d 1134, at 1148-52
89 See, Humanitarian Law Project v. Mukasey, 552 F. 3d 916, 933 (9th Cir. 2009).
90 Holder, 130 S.Ct. 2705, 2719 (holding that the plaintiffs’ vagueness claim lack merit), and at 2730 (holding that the prohibitions against providing material support does not violate first amendment).
91 130 S.Ct. 2705, at 2710-2711
92 Id.
93 Holder, 130 S. Ct. 2705, at 2731 (after rejecting the plaintiffs’ vagueness argument, the Court further rejected their first amendment argument).
The Court’s decision endorses an expansive construction of the provision of material support, granting broad deference to Congress and to the Government’s national security considerations and judgments as to what conduct constitutes a threat of terrorism. Its significance lies in expanding the criminal ban on providing material support to advocacy, which is generally protected under First Amendment jurisprudence. Although the Humanitarian Law Project’s stated goals were presumably non-violent and peaceful, the Supreme Court held that the prohibition was constitutional. While the Humanitarian Law Project decision is a civil case, by upholding the ban on providing non-medical and non-religious assistance to terrorist organizations, the Court’s expansive holding enables prosecutors to charge defendants with terrorism offenses in the wrong cases. The decision therefore reshapes the substantive scope of the criminal law against terrorism by redefining not only what conduct amounts to crimes of terrorism but also which defendants are labeled “terrorists”.

II. THE CASE LAW: TERRORISM CHARGES IN VARIOUS CONTEXTS

While terrorism offenses pass constitutional muster, these prohibitions raise significant concerns that they may be used to prosecute various crimes that are unrelated in any meaningful way to actual crimes of terrorism. The following part examines the body of criminal case law that was prosecuted under terrorism prohibitions, by considering whether they were properly classified as crimes of terrorism.

A. The Technical Measures

Should the measures used to carry out a violent attack determine the nature of the crime as terrorism, given the easy accessibility of weapons associated with warfare or terrorism? While the use of weapons of mass destruction, including chemical weapons,

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95 130 S.Ct. 2705, at 2719, 1730
96 See, Abrams, supra note 7 at 95-6 (discussing the prohibition against weapons of mass destruction, raising doubts whether this prohibition is a terrorism offense in all of the possible factual contexts in which
typically characterizes terrorism, this is not always the case, as these technical measures are
sometimes used in other contexts.

1. U.S. v. Bond

In U.S. v. Bond, the case mentioned in the Introduction, Federal prosecutors placed
heavy premium on the technical measures used by the defendant -- chemical weapons -- by
charging her with a terrorism offense.97 Bond, who attempted to intoxicate her romantic rival,
was charged with unlawfully using chemical weapons for a localized crime that was not
different from any other “ordinary” crime. Moreover, the case was prosecuted under federal
law rather than under state law.

The Bond case, in which the defendant purchased the “chemical weapons” over the
internet, demonstrates why the means used to carry out the crime proves a wrong measure in
classifying a crime as terrorism. While the use of chemical weapons is typically associated
with terrorism, the same technical measures may also be used in other factual contexts.
Indeed, no one would seriously contend that a defendant’s attempt to intoxicate her romantic
rival amounts to an act of terrorism. However, the fact that the attempt to harm was carried
out through technical measures that typically characterize terrorism enabled prosecutors to
charge Bond with a terrorism offense.

In contrast, critical features were overlooked in the Bond prosecution. Recall that the
scholarly understanding of terrorism suggests that its defining characteristics incorporate the
indiscriminate nature of the attack, its political motivation, the organizational affiliation, and
the perpetrator’s intent to coerce governments to change their policies. These defining
characteristics are missing in the Bond scenario: Bond specifically targeted an identified
individual; her actions were motivated by personal rage and jealousy; she was not associated
with any terrorist organization; and her acts were not intended to influence governments.

During oral arguments in the U.S. Supreme Court, Justice Alito offered a hypothetical
illustrating the scope of antiterrorism legislation and its potential applications in cases
unrelated to terrorism. Justice Alito noted that given the breadth of the chemical weapons

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statute, under a plausible reading of the offense, if the defendant decided to retaliate against her friend by pouring a bottle of vinegar in her goldfish bowl, that conduct would be a violation of this statute, potentially punishable by life imprisonment, as vinegar causes toxic harm to animals and is capable of killing them. While this hypothetical may sound absurd, it demonstrates that the overbroad wording of the federal prohibition on the use of chemical weapons enables prosecutors to charge defendants in contexts unrelated to crimes of terrorism, such as the Bond case. Moreover, the factual background in this case suggests that federal law enforcement prosecuted this case simply because local law enforcement seemed uninterested in pursuing it, and the federal prohibition against the use of chemical weapons presented no legal obstacle in choosing this option. The use of chemical weapons here thus served as a pretext for federal prosecutors to exercise their authority and take over the state’s traditional role in enforcing criminal law through local law enforcement.

2. **U.S. v. Ghane**

The federal prosecution of Hessan Ghane demonstrates another example in which the severe federal prohibition against possessing and using chemical weapons was wrongly applied. Ghane, a naturalized United States citizen of Iranian descent, who holds a PhD in chemistry, was admitted to an emergency room after asking for help from a suicide hotline. He told a physician's assistant that he had suicidal thoughts because he was depressed and out of work, and that if killed himself, he would use cyanide. Ghane also told the physician assistant that he had cyanide in his apartment, and that he had acquired it during his work as a chemist. When asked if he would give up the cyanide he refused, stating that he “might want to use it later”. In a psychiatric evaluation, Gahne expressed anger toward unnamed government officials, and said to the psychiatrist: “you know I have access to chemicals.”

The hospital notified the police, and Ghane gave a written consent for the police to search his

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99 Bond v. U.S. 131 S. Ct. 2355, at 2360 (noting that before she started using the chemicals, Bond also engaged in harassing conduct of Hanes and for that she charged and convicted under state law with minor offenses).
apartment. During the search, a bottle half-filled with white powder was found under Ghane's kitchen sink. The powder was later determined to consist of 177 grams of seventy-five percent pure potassium cyanide.

Ghane was prosecuted for possession of chemical weapons, in violation of 18 U.S.C. §§ 229(a)(1) and 229A(a)(1). At trial, Ghane testified that he never intended to use the cyanide to harm anyone. He asserted that he suffered from severe depression, and that he wanted to have the cyanide in case he ever decided to commit suicide. After the court held that the defendant was competent to stand trial, the jury convicted him with criminal possession of potassium cyanide. Ghane filed motions for Judgment of Acquittal or in the alternative, a new trial, but the court overruled them.\textsuperscript{103} The court rejected, among others, the claims that section 229 was unconstitutionally vague and overbroad and that the jury instructions were erroneous because they enabled conviction even if the defendant intended to possess the cyanide for a peaceful purpose, but the type and quantity possessed is inconsistent with a peaceful purpose, and upheld the conviction.\textsuperscript{104}

The prosecution’s theory that Ghane’s conduct amounted to a crime of terrorism relied heavily on Ghane’s expression of anger toward unnamed government officials and on his statement that he had access to chemicals. While the unlawful conduct under section 229 also includes threatening to use chemical weapons, the defendant’s general statement above fell short of an actual threat to use the chemicals, since he did not specify any type of action that he might take against any particular individual. A defendant’s mere statement that he possessed chemicals does not meet the definition of a criminal threat.

In contrast with the \textit{Bond} case, in which the defendant had actually used the chemicals by attempting to harm the victim, \textit{Ghane} was charged with the severe federal offenses solely for possession of the chemicals. The evidence at trial demonstrates that not only that Ghane did not possess the chemicals for purposes other than peaceful, such as terrorism, but also that he had not intended to use the chemicals to harm anyone but himself. More importantly, in contrast with the \textit{Bond} case in which the defendant’s acts amounted to “ordinary” crimes, other than terrorism, Ghane’s possession of the cyanide could not have been prosecuted under any other criminal statute, had the terrorism offense not been used. In other words, invoking

\hspace{1cm} \textsuperscript{103} U.S. v. Ghane, 2011 WL 529645 at 1.
\hspace{1cm} \textsuperscript{104} U.S. v. Ghane, 2011 WL 529645 at 7
the terrorism theory in this case criminalized conduct that is not a crime at all under “ordinary” criminal law.

B. Aid and Assistance to Terrorist Organizations

Criminal charges against defendants supporting terrorist organizations without actually carrying out terrorist operations themselves are the most common types of terrorism prosecutions pursued by the U.S. since the 9/11 attacks.\footnote{105} The following case demonstrates one of the implications of an expansive judicial construction of the phrase “providing material support,” casting doubt on the justifications for characterizing the defendants’ acts as “terrorism” crimes.

1. U.S. v. Iqbal and Elahwal

On November 20, 2006 the U. S. Department of Justice announced an indictment against two U.S. citizens: Javed Iqbal (a.k.a/ John Iqbal), and Saleh Elahwal were charged with providing material support for a terrorist organization by helping broadcast Hezbollah’s T.V. station Al-Manar.\footnote{106} The indictment alleged that, through their Brooklyn-based company HDTV Ltd., Iqbal and Elahwal conspired to relay to HDTV customers the broadcasts of Al-Manar. In exchange, HDTV received thousands of dollars from Al-Manar.\footnote{107} On December 23, 2008 the Acting U.S. Attorney for the Southern District of New York announced that Iqbal had pled guilty to providing material support to Hezbollah and was later sentenced to 69 months in prison.\footnote{108} A few days later, Elahwal also pled guilty and on June 23, 2009 was sentenced to 17 months in prison. In addition, Elahwal was ordered to pay $7500, serve 200 hours of community service, and 3 years of supervised release.\footnote{109}

\footnote{105} 130 S. Ct. 2705, at 2717 (noting that the government states that it had charged over 150 persons with violating section 2339B)
\footnote{106} See, Press Release, Available on \url{http://www.usdoj.gov/usao/nys/pressrelease/November06/iqbalandelahwalindictmentpr.pdf}
\footnote{107} Id
\footnote{108} See, press release available at: \url{http://www.usdoj.gov/nys/pressrelease/April09/iqbaljavedsentencingpr.pdf}
\footnote{109} See, press release, available at \url{http://www.usdoj.gov/nys/pressrelease/June09/elahwalsalehsentencingpr.pdf}
The prosecution’s theory was based on the defendants providing a service to a designated terrorist organization.\textsuperscript{110} Under this theory, any technical support that facilitates the delivery of messages qualifies as “service”, thereby meeting the definition of providing material support. The court accepted this theory and convicted the defendants of providing material support to a terrorist organization. However, the court could not have addressed the broad implications of the prohibition on providing material support in this particular context because similar to the majority of criminal cases in the American justice system, the Iqbal and Elahwal indictments did not result in jury trials.\textsuperscript{111}

By convicting \textit{Iqbal} and \textit{Elahwal} with the catch all offense of providing material support for a terrorist organization, the criminal justice system adopted a broad theory under which any form of affiliation with a terrorist organization qualifies as “providing material support”, regardless of the defendants’ actual contribution to terrorist acts. Moreover, to obtain conviction the prosecution was not required to establish any causal link between the type of aid provided and the organization’s terrorist acts. Conviction of providing material support was established even if following the support, the organization did not engage in crimes of terrorism.

This judicial construction of the offense creates an unprecedented anomaly in substantive criminal law in two respects: first, imposing liability is based strictly on the organization’s status, rather than on its actual criminal acts. Second, while criminal liability is imposed for providing assistance to facilitate the organization’s future crimes, the underlying premise for conviction is based only on the organization’s past crimes. In these respects, liability for providing material support goes above and beyond liability under conspiracy offenses, which is based on facilitating the criminal organization’s future crimes, rather than on its current status.

\textsuperscript{110} See, Barak-Erez and Scharia, \textit{supra} note 94, at 17-19 (discussing the Iqbal prosecution and the various paths to criminalizing incitement-related speech).

C. The Scope of the Harm Intended or Inflicted

Criminal law theory rests on the assumption that the scope of the harm inflicted or intended by a defendant ought to determine his or her criminal liability.\textsuperscript{112} Under this theory, greater harm justifies placing greater criminal liability on the defendant.\textsuperscript{113} Recall, that one of the defining features of terrorism is its double-target: terrorism involves not only inflicting harm on several targets but also the intent to intimidate the public at large.\textsuperscript{114} The latter is thus an additional aspect of the harm inflicted by terrorism. Based on this rationale, the defendant’s intent to intimidate a large group of people justifies imposing greater criminal liability on the defendant.

In the context of terrorism prosecutions, the question is whether the scope of intended harm always determines the classification of a crime as terrorism. If so, where should the criminal justice system draw the legal boundary between crimes of mass killings and terrorist crimes? The prevailing paradigm is that serial killers are not usually considered terrorists.\textsuperscript{115} However, in several cases the prosecution has argued that indiscriminate shooting rampages amount to acts of terrorism. The prosecution of John Allen Muhammad provides one example in which the above paradigm has been challenged.

1. U.S. v. Muhammad

In \textit{Muhammad v. Commonwealth},\textsuperscript{116} -- commonly referred to as “the Beltway Snipers” case -- a Montgomery County Jury convicted Muhammad, the mastermind behind the shooting spree of six victims, of terrorism offenses under Virginia terrorism statute, in addition to convicting him with “ordinary” murder charges.\textsuperscript{117} Muhammad appealed his
conviction but the Maryland Court of Special Appeals upheld it. The minor co-perpetrator, 17 year-old Malvo, agreed to testify against Muhammad and entered a guilty plea to first-degree murders. Malvo’s testimony provided critical evidence in establishing Muhammad’s conviction, after the trial court found his testimony to be generally reliable.\textsuperscript{118}

The charges against \textit{Muhammad} exemplify a case in which the scope of the harm intended and inflicted, along with the defendants’ intent to intimidate the public at large, rendered the murders “terrorism.” The prosecution in this case invoked the theory that a massive shooting spree aimed at a large number of unidentified innocent victims qualifies as an act of terrorism.\textsuperscript{119} Revisiting the facts of this case, however, casts significant doubts on the accuracy of this account.\textsuperscript{120}

According to Malvo’s testimony, he was 15 years old when he first met Muhammad, and began living with him and studying the teachings of the Nation of Islam.\textsuperscript{121} Malvo testified that Muhammad often spoke about race and socioeconomic disparities, telling him that: "the white man is the devil." Muhammad trained Malvo in shooting high powered rifles, marksmanship and sniper tactics. When Muhammad learned that his wife and children were living in Maryland, he told Malvo that they were going to Washington, D.C. "to terrorize these people." Muhammad asserted that, notwithstanding a court order awarding custody to the wife, "no white man in a black world is going to tell him when and where and why he cannot see his children." Malvo described how they first conducted a surveillance of the home of Muhammad's wife and children and later traveled to Montgomery County, Maryland, which Muhammad chose as "the perfect area to terrorize" because "it was lower to upper middle class, well-off, mostly whites." The two scouted out spots for the shootings, measuring distances and looking for populated areas without surveillance cameras and hiding

\textsuperscript{118} 934 A. 2d 1059, at 1078 (noting that the only inconsistency in Malvo's statements concerns the detail of whether he or Muhammad had been the actual triggerman on various occasions).

\textsuperscript{119} Muhammad’s attorneys argued for dismissal of the terrorism charge on the ground that all potential jurors were alleged victims of the crime. The prosecution countered with an agreement to a change of venue outside the area of killings.

\textsuperscript{120} See, McCormack, \textit{supra note} 31, at 19 (suggesting that the \textit{Muhammad} prosecution exemplifies the potential for definition confusion).

\textsuperscript{121} 934 A. 2d 1059 at 1077
places where shots could be fired without witnesses. Malvo then proceeded to testify about each of the six murders that he and Muhammad committed in Montgomery County.\footnote{934 A. 2d 1059 (Muhammad’s and Malvo’s murder spree expanded to several jurisdictions, other than Montgomery county. However, the epicenter of the killings occurred in Montgomery county. The defendants also murdered 4 other victims in Virginia, Alabama and Washington DC, for which they were also convicted. See, Muhammad v. Commonwealth, 619 S.E. 2d 16 (VA, 2005).}

Malvo’s elaborate testimony sheds critical light on Muhammad’s plan and motive for the murders, and calls into question characterizing the shooting rampage as “terrorism”. Malvo’s testimony reveals that Muhammad chose the crime scene for two reasons: Montgomery county was predominantly populated by white affluent people, and Muhammad’s wife lived in the area. Malvo’s testimony therefore suggests that Muhammad’s killings were driven by a double motive: rage and revenge combined with racial hatred. Malvo’s testimony portrays Muhammad as a crazed perpetrator whose motives were personal, rather than political. All the evidence in Muhammad’s trial thus points to a personal act of rage as the critical factor in the shootings.

Interestingly, at Muhammad's trial the prosecution suggested that personal revenge motivated the shooting rampage, arguing that it was part of a plot to kill Muhammad’s ex-wife and regain custody of his children.\footnote{619 S.E. 2d 16, at 36-37 (VA, 2005) However, this theory was rejected by the judge, who ruled that there was insufficient evidence to support this argument. Defense attorneys for both sides also raised this argument but the court rejected them.} However, this theory was rejected by the judge, who ruled that there was insufficient evidence to support this argument. Defense attorneys for both sides also raised this argument but the court rejected them.\footnote{619 S.E. 2d, at 38}

Most importantly, nothing in Malvo’s testimony supports the prosecution’s theory that the killing rampage was in fact an act of terrorism. While Malvo’s testimony revealed that Muhammad was heavily influenced by Islam, there was no proof that Muhammad was affiliated with a terrorist organization or intended to coerce the government to change its actions or policies.

The facts of this case may, however, point to a hate crime. A hate crime requires the prosecution to establish that the victim was selected by reason of his/her race, color, religion, national origin or sexual orientation. A recurring theme in Malvo’s testimony is Muhammad’s racial motive in committing the murders, something the prosecution chose to ignore, placing instead a premium on Muhammad’s beliefs in Islam.
2. State v. Halder

Shooting rampages at schools offer another example in which prosecutors attempt to invoke the terrorism theory. However, in the case against Biswanath Halder, the state of Ohio’s reliance on the terrorism classification proved unsuccessful after the court rejected the prosecution’s theory.\textsuperscript{125} The case involved a shooting rampage at Case Western Reserve University on May 9, 2003. A video surveillance camera recorded Halder, a 62-year-old former student, carrying a Tech 9 semi-automatic machine style handgun and a Berretta nine-millimeter handgun into the University building. The video showed Halder shooting and killing the first person he encountered, then firing indiscriminately at the occupants and police, wounding two victims. Before surrendering to the police, Halder held 100 hostages for eight hours.

A Grand Jury handed down a 338-count indictment against Halder, including, three counts of aggravated murder with firearms, felony murder, mass murder, and terrorism.\textsuperscript{126} After the State presented its evidence, and before jury deliberations, the trial court dismissed the terrorism charge, holding that “the attack against a small, random group of people in the business school building did not constitute a terrorist attack as defined by Ohio law.”\textsuperscript{127} The jury subsequently found Halder guilty of several crimes including capital murder, aggravated murder, aggravated burglary, and kidnaping.

Ohio law defines terrorism as committing crimes with “a purpose to intimidate or coerce a civilian population.”\textsuperscript{128} The Halder prosecution thus attempted to invoke the


\textsuperscript{126} See, Halder indictment, \textit{id}, (The grand jury also indicted Halder on thirty-five counts of attempted murder with three and five year firearm specifications, and fourteen counts of aggravated burglary with firearm specifications. Prior to the commencement of trial, the trial court dismissed 136 counts of the indictment, leaving intact a 202-count indictment).


\textsuperscript{128} See, OHIO REV. CODE ANN. § 2909.21 (LexisNexis 2011), see, also, Ohio Revised Code, Ann §2909.24, (LexisNexis 2011). (Ohio’s law defines terrorism as follows: (A) “Act of terrorism” means an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense if committed in this state or constitutes an offense in any jurisdiction within or outside the territorial jurisdiction of the United States containing all of the essential elements of a specified offense, and that is intended to do one or more of the following: (1) Intimidate or coerce a civilian
terrorism theory by arguing that Halder’s shooting rampage was intended to intimidate or coerce a large group of people. Considering the evidence presented in Halder’s trial, however, characterizing the case as “terrorism” is erroneous: Halder was convinced that a University computer lab supervisor with whom he did not get along had hacked into his computer and deleted thousands of his work files. After the suit he filed against the employee was thrown out of court, Halder sought revenge by going on a shooting spree. Despite his diagnosed mental disorders and delusional beliefs, Halder was found competent to stand trial.

The evidence reveals that Halder’s motive for the shooting spree was purely personal: an act of revenge against the University committed by a troubled individual with severe mental disorders. Halder’s actions were clearly not politically motivated, and his victims were not randomly chosen qua civilians. A personal act of revenge committed by a delusional perpetrator does not meet the defining characteristic of terrorism.

The Halder case demonstrates that the element of “committing a crime with a purpose to intimidate a civilian population” cannot determine, in itself, the terrorism classification, as defining terrorism based on intent to intimidate civilians conflates the phenomenon of terrorism with the verb “terrorize,” which can be too broadly construed.


The Morales case demonstrates a prosecutorial attempt to use, for the first time, New York state’s antiterrorism law to prosecute a gang member who killed a 10-year-old in a gun battle over dominance in Mexican-American neighborhood in the Bronx. On August 18, 2002, a fight among members of rival gangs broke out following a party. In the course of the fighting, shots were fired, resulting in the death of a 10–year–old girl and the paralysis of a young man. Defendant Edgar Morales, a member of a gang of Mexican–American young adults and teenagers known as the St. James Boys (SJB), was ultimately charged with having

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129 People v. Morales 86 A.D. 3d 147, 924 N.Y.S 2d 62, N.Y. A.D 1 Dep. 2011
committed these shootings.

The Bronx District Attorney has chosen to prosecute Morales as a terrorist, charging him with first-degree manslaughter as crime of terrorism, second-degree attempted murder as crime of terrorism, second-degree criminal possession of weapon as crime of terrorism. In addition, Morales was charged with second-degree conspiracy. The prosecution’s theory was that the defendant committed the charged specified offenses as crimes of terrorism because he acted with the intent to further the alleged purpose of the SJB gang to “intimidate or coerce a civilian population.” The People alleged that the “civilian population” defendant and his gang targeted for intimidation comprised Mexican–Americans residing in the area of the Bronx in which the SJB sought to assert its dominance.

The jury convicted Morales of all charges, and he appealed. The Court of Appeals rejected the prosecution’s theory, by holding that the evidence was not legally sufficient to establish that the defendant acted with the requisite intent to render his offenses crimes of terrorism. Specifically, even assuming in the prosecution’s favor that the Mexican–American residents of the particular neighborhood may constitute “a civilian population” under New York State’s antiterrorism statute, the evidence was insufficient to support a finding that defendant committed his crimes with the intent to intimidate or coerce that “civilian population” generally, as opposed to the much more limited category of members of rival gangs. The Court reduced the convictions for crimes of terrorism to the corresponding specified crimes as lesser-included offenses and remitted for resentencing.

The significance of the Morales decision lies in thwarting the prosecutorial attempt to expand the scope of antiterrorism law to cover “ordinary” street crime. Unlike the majority of criminal cases, which resolve in plea bargains in which the defendants often waive their right to appeal, Morales was resolved in a jury trial, and ultimately in a reversal by the Court of Appeals. The result might have been different had Morales chosen to accept a plea bargain, barring an appellate court review. Upholding Morales conviction would have resulted in a significant expansion of antiterrorism law to include “ordinary” crimes, unrelated to terrorism, in particular those committed by large scale organized criminal groups.

130 Morales, 86 A.D. 3d 145, at 155
131 Morales, at 155
The Morales Court adopted a narrow construction of the open-ended term “intimidate or coerce a civilian population” a term which hypothetically could apply to any form of criminal activity, if broadly construed. First, the Court points out that to constitute a crime of terrorism, the “civilian population” that the actor intends to intimidate or coerce by committing the underlying specified offense must be some group of people other than the direct victims of the crime. The court further notes that: “If the term “with intent to intimidate or coerce a civilian population” included the intent to intimidate or coerce the direct victims of a particular crime, any specified offense involving intimidation or coercion of a group of people (such as a bank robbery) would constitute a crime of terrorism.”

Second, the Court held that the context of the antiterrorism statute weighs against stretching the meaning of the language to cover a narrowly defined subcategory of individuals. The court cites the legislative history of the statute to support this construction, noting that the legislature intended to address extraordinary criminal acts perpetrated for the purpose of intimidating a broad range of people, not a narrowly defined group of particular individuals whom the criminal actor happens to regard as adversaries. The court stressed that: “the term “to intimidate or coerce a civilian population,” in the context of the aforementioned legislative findings, implies an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class, such as a gender, race, nationality, ethnicity, or religion. The intention by a gang member to intimidate members of rival gangs, when not accompanied by an intention to send an intimidating or coercive message to the broader community, does not, in our view, meet the statutory standard”.


After the prosecution’s attempt to invoke New York State’s antiterrorism law to charge a gang member with crimes of terrorism was rejected in Morales, a second attempt to
use the New York antiterrorism statute and expand the scope of terrorism offenses was taken. On May 11, 2011 NYPD arrested Ahmed Farhani and Mohamad Mamdouh for conspiring to attack a Manhattan synagogue and for buying gun, ammunition and an inert grenade to carry out the attack.\(^{136}\) The arrest stemmed from a sting operation, after an undercover detective secretly recorded both suspects ranting about their hatred of Jews and discussing a synagogue attack.\(^{137}\) According to the court complaint, Farhani suggested disguising himself as an observant Jew so he could infiltrate a synagogue and leave a bomb inside.\(^{138}\)

The Manhattan district attorney’s office sought to charge Ferhani and Mamdouh with severe first-degree and second-degree charges, including conspiracy to commit terrorism and a hate crime; however, the grand jury indicted the defendants with lesser charges, based on the assertion that they had intended to attack the synagogue when it was empty. While the terrorism and hate-crime charges remained, the conspiracy charges were reduced to a fourth-degree offense.\(^{139}\)

This case brings to the forefront not only the issue of classification of crimes into terrorism and “ordinary” crimes but also the proper allocation of authority between local and federal law enforcement. While terrorism cases are typically pursued by federal law enforcement, this case was handled by local law enforcement. In New York the FBI-led Joint Terrorism Task Force has been a central player in terror cases following 9/11, and the U.S. Attorney's office is well-known for its successful prosecution of several high-profile terrorism cases. While Federal law enforcement was made aware of this investigation, they declined to pursue the case, and the Manhattan district attorney’s office brought charges, invoking New York’s state terrorism law for the first time.\(^{140}\)

The institutional allocation of authority between federal and local law enforcement in this case calls into question the New York Prosecutors’ classification of it as terrorism. Not only did the investigation fail to establish a connection between the defendants and a


\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) See, William K. Rashbaum and Colin Moyhihan, Most Serious Charges are Rejected in Terror Case, New York Times, June 16, 2011

\(^{140}\) See, e.g. New York Penal Law section 490.25 (criminilizing acts of terrorism. Following 9/11 many states, N.Y among them, adopted legislation that is modeled after federal terrorism crimes.)
specified terrorist organization, but the plot remained in its early stages, without crossing the line between preliminary planning and a criminal conspiracy.  

The common thread characterizing the prosecution’s theory in the above cases is its focus on the scope of the harm intended or inflicted or on the defendant’s specific intent to intimidate civilian population to classify the crimes as terrorism. This harm includes both injuries to the direct targets of the attacks as well as intimidating the public at large. The prosecutorial choice to focus on this feature, however, ignores the absence of other features that typically characterize terrorism, mainly the political motive and specific intent to coerce governments. These examples demonstrate that neither intent to intimidate civilians nor inflicting harm on a large number of victims is sufficient to distinguish terrorism from “ordinary” crime. In addition, prosecutorial attempts to invoke the terrorism theory conflate the narrow category of crimes of terrorism with acts of terrorizing. Terrorizing victims, however, is an inherent feature in most crimes, rather than a unique feature of crimes of terrorism. Conflating the two thus leads to unwarranted expansion of terrorism offenses to cover additional contexts, above and beyond the legislative intent.

III. PROSECUTORIAL DISCRETION: IMPLICATIONS OF MISCLASSIFICATION

The following section explores the institutional aspect of misclassifying “ordinary” crime as terrorism: overbroad, unchecked and essentially unlimited prosecutorial discretion. In the area of the criminal law against terrorism prosecutorial discretion goes too far, enabling prosecutors to misuse terrorism offenses by charging defendants with these offenses in a wide variety of contexts that are unrelated to terrorism, as this term is commonly understood. The following discussion focuses on the practical implications of accurate classification of terrorism offenses and the perils of prosecutorial misuse of these prohibitions.

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142 See, supra, Part I.
A. Unconstrained Prosecutorial Discretion in Charging Decisions in General

One of the defining characteristics of the American criminal justice system is the enormous prosecutorial discretion wielded by prosecutors. Scholars have noted that: “prosecutorial discretion however, is a necessary component in criminal justice administration because of the immense variety of factual situations faced at each stage and the complex interrelationship of the goals sought. The issue is not discretion versus no discretion, but rather how discretion should be confined, structured and checked.”

Constitutional constraints generally do not impede the enormous discretionary power of prosecutors in the criminal justice system. In particular, prosecutorial charging decisions are not subject to legal constraints, and legality doctrines such as vagueness and over-breadth typically have not served to constrain prosecutorial authority regarding charging decisions in general, and prosecutorial discretion in the context of antiterrorism law in particular. Reaching a constitutional level requires a showing of a due process violation or a discretionary decision that violates equal protection, such as a charging decision that used impermissible criteria such as race or religion. Terrorism prosecutions, however, do not reach that level.

The main issue, therefore, is not whether these prosecutorial decisions are lawless or unconstitutional, but whether they are wise, prudent and warranted. While misusing the overbroad prosecutorial discretion typically falls short of actual prosecutorial malfeasance, and thus does not amount to abuse of prosecutorial power, it is an warranted prosecutorial

143 See, e.g., Gerald E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, at 2123-4 (1998) (discussing the common critique of American criminal justice system that the prosecutor is the controlling figure in the typical criminal case).
144 See, Wayne R. LaFave, Jerold H. Israel, Nancy J. King, CRIMINAL PROCEDURE, Fourth Edition, at 683. See, also, kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L. J 1420, 1422-3 (discussing the range of prosecutorial discretion not to prosecute and the authority to prosecute). See, also, Josh Bowers, Legal Guilt, Normative Innocence and the equitable decision not to prosecute, 110 Columbia L. Rev. 1655.
145 Wayte v. U.S. 470, U.S. 598, 608 (1985) (holding that absent an impermissible standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime). See, also, U.S. v. Armstrong, 517 U.S. 546 (1996) (holding that a defendant is not entitled to a discovery claim for a selective prosecution argument).
146 Holder, 130 S. Ct. 2705
147 Connick v. Thomason, 130 S. Ct. 1880 (2010)
148 See, supra Part I.
practice with dangerous practical implications. Scholars have long critiqued the risks of overbroad prosecutorial discretion: Sara Sun Beale, for example, addresses the effects of over-breadth federal criminal offenses, noting that such legislation gives federal prosecutors too much unchecked, unreviewable and virtually unlimited discretion to select the few cases that will be prosecuted and which offenses to charge.150

In a landmark Article, the late prominent criminal law scholar William Stuntz argues that the power to define criminal law is in the hands of prosecutors, not legislatures.151 Stuntz challenges the prevailing assumption that substantive criminal law, as amended by legislatures, defines in advance the conduct punished by the state by arguing that the role played by the definition of crimes and defenses in the allocation of criminal penalties is smaller than we suppose, and generally targeted to empower prosecutors, who are the criminal justice system’s real lawmakers.152 Stuntz further contends that this broad prosecutorial discretion is especially sweeping in the context of federal law enforcement, due to the enormous number of federal crimes that prosecutors choose from, many which are broadly and vaguely defined.153 These prosecutorial choices are critically important because only a relatively small number of cases can be prosecuted in the federal system, and criminal law is mostly enforced on the local level.154 Stuntz suggests that since federal prosecutors are not bound by local law enforcement’s obligations and community pressure to prosecute “bread and butter” crimes, they are free to pursue prosecutions based on personal and political agendas.155 Federal prosecutors pursue particular cases because they find them interesting or because they believe that they would best advance their professional careers.156

150 See, Sun Beale, Is Corporate Criminal Liability Unique, supra note 56, at 1509 (noting that the overbreadth of the federal criminal code gives federal prosecutors too much unchecked discretion to select the few cases that will be prosecuted and which offenses to charge).
151 See, Stuntz, Pathological Politics, supra note 11, at 519 (noting that criminal law is defined by law enforcers, by prosecutors’ decisions to prosecute and police decision to arrest).
152 Id, at 506 (noting the role of prosecutors in the criminal justice system).
153 Id, at 533-34 (discussing the increased prosecutorial discretion of federal prosecutors).
154 Id, at 544 (noting that federal prosecutions amount to less that 5% of total prosecutions).
155 Id, at 543 (explaining how federal prosecutors are able to choose cases based on their personal and professional gain and growth).
156 Id, at 546 (suggesting that federal prosecutors are free to pursue high profile cases or other professionally rewarding cases).
B. The Heightened Role of Prosecutorial Discretion in Terrorism Cases

Arguably, many of the problems identified above are not necessarily unique to the terrorism context: In fact, they also characterize many other areas in criminal law enforcement, particularly federal criminal law. However, those general problems that characterize American criminal justice system are particularly exacerbated in the context of terrorism prosecutions, and the question of accurate classification takes on an added significance in this particular context.

The problem of overbroad prosecutorial discretion becomes especially critical in the terrorism context because of the unique role that prosecutors play in classifying crimes as either “ordinary” or crimes of terrorism. Conventional wisdom holds that these decisions should rest with legislatures whose role is to statutorily define crimes of terrorism. In stark contrast with “ordinary” crime, however, legislatures have not clearly defined what crimes qualify as terrorism, failing to reach an understanding about the scope of this term. Furthermore, prosecutors are neither the proper institutional actors to make these classifications nor well-equipped to carry out such a task: if legislatures cannot agree upon a definition of terrorism, why should prosecutors be more successful? Indeed, a recent report found that federal entities classifying cases agreed less than ten percent of the time that terrorism was involved in a given prosecution.\textsuperscript{157}

In the absence of statutory constraints restricting the application of terrorism offenses only to the context of terrorism, prosecutors are left with enormous discretion to make these critical classifications, resulting in the unchecked use of terrorism statutes against common criminals.\textsuperscript{158} Prosecutors invoke the terrorism characterization based on features they choose and are free to charge defendants with terrorism offenses without establishing a causal link between the defendant’s conduct and actual acts of terrorism. Given this leeway in making


\textsuperscript{158} See, Luna, Criminal Justice and the Public Imagination, supra note 34 at 114 (noting that: “law enforcement has been exercising its war-on-terror powers at an increasing rate, with agents across the country using terrorism provisions against seemingly common criminals”).
judgments, prosecutors decide not only which crimes fall under the “terrorism” category, but also who is considered a terrorist. Consequently, prosecutors are granted unwarranted authority to shape criminal law against terrorism by drawing the boundaries of terrorism crimes.

C. The Implications of Distinguishing Terrorism from “Ordinary” Crime

In most criminal cases in which terrorism charges are pursued, the question is not whether a conduct is indeed a crime but rather what kind of crime, namely, whether it is a crime of terrorism or merely “ordinary crime”. In addition, terrorists commit both terrorism-related crime as well as “ordinary” crime. This begs the following questions: Why does accurate classification matter for practical purposes and why is it important to distinguish between terrorism and “ordinary” crime as long as both are covered by existing criminal provisions? The significance of proper classification however, cannot be overstated because the implications of wrong prosecutorial classification are far-reaching, involving some of the following aspects.

1. Enhancing the Severity of the Crime and the Penalty

The most apparent implication of classifying a crime as terrorism concerns granting prosecutors the authority to increase the severity of both the crime and penalty. Scholars often criticize what has been famously described as the “one–way–ratchet-up” toward the enactment of additional crimes and the criminal justice system’s harsher criminal sanctions. Scholars further argue that the tendency towards being “tough on crime” is unwarranted and unjust, contending that it results in inequalities in the criminal justice system, since harsh penalties affect mainly minorities and underprivileged defendants.

The Bond prosecution aligns with this national trend of “getting tough-on-crime”. The case demonstrates how a relatively minor crime has morphed into a serious federal crime,

159 Id, Luna, at 114-115 (noting that “government officials sometimes employed sweeping definitions of “terrorism” in classifying cases”).
160 See, generally, Stuntz, Pathological Politics, supra note 11, at 509 (discussing the heavy-handed approach and the over-criminalization trend).
which carries a disproportionally severe penalty. It is indisputable that Bond committed several crimes, violating several Pennsylvania statutes, including statutes that criminalize simple assault, \(^ \text{162} \) aggravated assault \(^ \text{163} \) and harassment. \(^ \text{164} \) Federal prosecutors, however, chose to charge Bond with a serious terrorism offense, therefore significantly increasing the severity of the crime and the penalty.

Using the terrorism classification to increase the severity of punishment is legislatively guided: under the Sentencing Guidelines, terrorism serves to enhance the severity of the penalty. \(^ \text{165} \) The sentencing commission promulgated 3A1.4, which provides for increasing a felony offense by 12 levels or if the offense was intended to promote a “federal crime of terrorism.” \(^ \text{166} \) To determine what constitutes a “federal crime of terrorism”, for the purpose of applying the terrorism enhancement, courts must look to the statutory definition in 2332b (g) which defines the term as an offense “calculated to influence or affect the conduct of a government by intimidation or coercion or to retaliate against government conduct”, and (B) is a violation of one of a list of 39 other criminal statutes. \(^ \text{167} \)

In *U.S. v. Thurston* the court held that the plain and unambiguous language of the enhancement does not require conviction of an offense defined as a “federal crime of terrorism.” \(^ \text{168} \) Rather, in order to apply the terrorism enhancement, the court must find that the offense of conviction involved, or was intended to promote, an enumerated offense intended to influence, affect or retaliate against government conduct. \(^ \text{169} \) Establishing the element “crime of terrorism” is therefore not required in order to apply the terrorism enhancement. In particular, the prosecution is not required to establish evidence that the perpetrators committed the predicate offenses with intent to influence or affect the conduct of a government by intimidation or coercion or to retaliate against government conduct. Instead,

\(^{162}\) 18 Pa. Const. Stat. § 2701  
\(^{163}\) 18 Pa. Const. Stat. § 2702  
\(^{164}\) 18 Pa. Const. Stat. § 2709  
\(^{165}\) Pub. L. 103-322 section 120004 (Congress passed the Violent Crime Control and Law Enforcement Act of 1994. Under that Act, Congress directed the Sentencing Commission to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.  
\(^{166}\) USSG section 3A1.4, 18 U.S.C.A  
\(^{167}\) 18 U.S.C. § 2332 (b) (g) (5) (B)  
\(^{168}\) See, United States v. Thurston, 2007 WL 1500176 (D. Or. 2007)  
\(^{169}\) 2007 WL 1500176.
the *Thurston* court adopted an expansive interpretation under which in order to apply the penalty enhancement, the prosecution need only prove the defendant committed the underlying offense with intent to promote a federal crime of terrorism. 170

The overlap of federal and state criminal laws generally promotes sentencing disparities among defendants, as a wide spectrum of criminal conduct is now potentially subject to either federal or state prosecution.171 The choice between the two, however, can generate dramatically different sentencing results. Defendants often fare significantly worse under federal-law prosecution than state-law prosecution. The Bond case provides an example in which the federalization of a clearly local crime significantly increased the sentence, creating disparities between this defendant and others whose conduct inflicted similar harm. In Bond, the government requested a sentencing enhancement on the grounds that although Bond was a low-level technician, she had used “special skill” in selecting the chemicals used to carry out her crime.172 The District Court granted the government’s request and sentenced Bond to six years in prison. By comparison, had Bond been convicted under Pennsylvania state law for aggravated assault, she likely would have faced a prison term of up to 25 months.173

While the Bond case demonstrates crimes that would have been prosecuted under “ordinary” criminal provisions regardless of whether terrorism statutes were used, a more far-reaching implication concerns those cases in which “ordinary” criminal law is unable to reach. Unlimited prosecutorial discretion may implicate the authority not only to enhance the severity of the crime and penalty, but also to criminalize conduct, which could not have been criminalized without invoking terrorism statutes. More specifically, using the broad prohibition against providing material support may result in covering within the scope of criminal conduct various forms of legitimate activities that could not otherwise have been

170 Id.
171 *See*, Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, supra note 56, at 997-98 (arguing that increase in federal prosecutions overloads the federal courts system and inevitably results in unjustified sentencing disparities); *See, also*, Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643, 647–48, 668 (1997) (noting that: “disparities “are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions”).
172 *U.S. v. Bond* 581 F.3d 128. *See, also*, Eric Luna and Marianne Wade, Prosecutors as Judges, 67 Wash. & Lee L. Rev. 1413, at 1416 (2010) (discussing the Weldon Angelos case, in which instead of bringing state charges, the defendant was prosecuted under federal law, resulting in incredibly harsh sentence).
criminally regulated, such as the *Iqbal* and *Elahwal* prosecutions: while broadcasting a terrorist organization’s T.V. station was criminalized under the prohibition against providing material support, traditional First Amendment jurisprudence rejects any content-based limitations on speech related activities.\(^{174}\) Arguably, prosecution in this case would have been impossible without invoking the unique terrorism-related provision.\(^{175}\) The U.S. Supreme Court decision in *Holder v. Humanitarian Project* opens the door to future use of the prohibition against providing material support to criminalize conduct that could not have been criminalized otherwise.\(^{176}\)

2. **Shifting the Balance Between Localism and Federalism**

Terrorism prosecutions provide a poignant example of the complex relationship

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\(^{174}\) *See, generally*, Daphne Barak-Erez and David Scharia, *supra note* 94, at 14-15 (arguing that the Court’s construction of the prohibition on providing material support to terrorist organizations indirectly adopts a de facto criminal prohibition on incitement to terrorism, and that such prohibition stands in sharp contrast with traditional American freedom of speech jurisprudence which does not allow for content-based and viewpoint-based limitations on freedom of speech, as the law generally abstains from adopting a direct prohibition on incitement to violence), noting that American freedom of speech jurisprudence rejects any content-based prohibitions on freedom of speech).

\(^{175}\) *Id*, Barak-Erez and Scharia.

\(^{176}\) *Holder* 130 S. Ct. 2705 (After rejecting the plaintiffs’ vagueness argument, the Court further rejected their first amendment argument. Chief Justice Roberts offered four considerations to justify the conclusion that support for a terrorist organization’s legitimate activities carried a real risk of furthering terrorism. First, material support, particularly money, is fungible. Since terrorist organizations do not maintain organizational firewalls, funds raised for civil, nonviolent activities could be redirected to further terrorism, or at the very least “free up other resources within the organization that may be put to violent ends.” Second, material support for an organization’s legitimate activities, such as charitable and humanitarian activities, “helps lend legitimacy . . . that makes it easier for those groups to persist, to recruit members, and to raise funds--all of which facilitate more terrorist attacks.” Third, providing foreign terrorist groups with material support in any form could harm the United States’s relationships with key allies such as Turkey (in the case of the PKK) and undermine cooperative efforts between nations to prevent terrorist attacks. Finally, the executive branch--the branch both practically and institutionally most competent to make informed judgments about national security and foreign policy--had not only confirmed the seriousness of the three dangers above, but also had itself endorsed “Congress's finding that all contributions to foreign terrorist organizations further their terrorism.” Deference to the combined judgment of the political branches was especially appropriate in the terrorism context, in which “conclusions must often be based on informed judgment rather than concrete evidence.” The Court therefore upheld the constitutionality of the material support statute, concluding that the statute's broad means were “necessary” to prevent terrorism.)
between local and federal law enforcement. On the one hand, one of the defining characteristics of American criminal justice system is its localism. Scholars note that the American criminal justice system relies more on local than centralized decision-making in law enforcement, resulting in a dispersed and decentralized criminal court system. On the other hand, federal offenses cover a wide array of conduct that is already criminalized under state law. While federal law authorizes the prosecution of many forms of localized crime, federal prosecutors are able to handle only a small fraction of these cases, leaving the vast majority of criminal cases to local prosecutors.

Classifying crimes as “terrorism” alters this delicate balance in favor of more federal prosecutions of essentially localized crimes, which leads to a general trend in which Federal law, with its severe crimes and harsher penalties, increasingly dominates the enforcement of criminal law, a role traditionally reserved to the states, and particularly to local law enforcement.

The implications of favoring federal law enforcement over a localized criminal justice system are far-reaching: William Stuntz noted that local law enforcement is constrained by both budget and politics and is accountable for its prosecutorial policy in the eyes of the local community. Therefore, local prosecutors are bound to prosecute “bread and butter” crimes such as murder, robberies, rape, etc. In contrast, federal agencies, being less constrained, are not accountable to the public and therefore less attentive to its needs and concerns. Consequently, argued Stuntz, federal prosecutors are free to pursue different agendas, which are often related to their personal preferences, such as the advancement of their professional careers or their personal interest in enforcing particular type of crime. Scholars further note that the federal emphasis on terrorism prosecutions has increased the reliance on states’ investigative resources, both to coordinate with federal investigators in terrorism

177 See, William Stuntz, Terrorism, Federalism and Police Misconduct, Harvard J. of Law and Public Policy, at 1
178 See, generally, Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from The States, 109 Mich. L. Rev. 519, 522 (2011) (noting that states have the option of vesting authorities on either state attorneys or local district or county attorneys).
179 See, Beale, Many Faces, supra note 56 at 755, 768 (arguing that overfederalization tips the federal-state balance).
180 See, Stuntz, Pathological Politics, supra note 11, at 543-46.
181 Id, Stuntz.
182 Id, Stuntz.
183 Id, Stuntz.
investigations and to make up for the diversion of federal investigations from other kinds of cases.\textsuperscript{184} 

Rachel Barkow considers the question of when criminal enforcement responsibility should rest with local law enforcement and when it should reside with more centralized actors such as federal or state prosecutors.\textsuperscript{185} Barkow contends that the debate over the federalization of a crime boils down to a question of sentencing policy, namely, whether and when it is appropriate for the federal government to step into an area of traditional local authority over crime because of a differing view of sentencing policy.\textsuperscript{186} 

The federal prosecution of Bond sharpens tensions regarding the institutional allocation of prosecutions between local and federal law enforcement, demonstrating the vast prosecutorial power to classify not only which cases qualify as crimes of terrorism, but also whether they are prosecuted under state or federal law. While in some cases local law enforcement is legally unable to prosecute crimes because of deficiencies in state law, this was not the case in Bond: here, the facts of the case suggest that local law enforcement was simply uninterested in prosecuting Bond’s crimes. However, a more interesting question, is what aroused federal prosecutors’ interest in this minor case. One possible explanation may rest with the different penalties under state and federal law. In the Bond case, crimes that might have merited 25 months in prison under Pennsylvania law were severely punished with a 6-year prison term. The consequential nature of the choice between federal and state prosecution means that federal prosecutors have assumed enormous power to charge local offenses in vastly disparate ways, essentially shaping the criminal justice system’s sentencing policies.

\textsuperscript{184} See, Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Justice 377, at 407-416 (2006) (examining the federal, state and local relations in the law enforcement sphere, particularly after the 9/11 attacks, as a means of understanding present tensions and the demands that federal agencies place on local police, that are inconsistent with their crime fighting mission). 

\textsuperscript{185} See, Barkow, supra note 166, at 579 (discussing the policy choice between local and centralized law enforcement). 

\textsuperscript{186} Id, Barkow.
3. The Effect of Emotions on Juries’ and Judges’ Perceptions

Another implication of accurate classification concerns the role of strong emotions, public panic and societal hysteria in the context of terrorism prosecutions.187 Daniel Filler suggests that since the 9/11 attacks, fear and anxiety have dominated the public’s perception of actors who are labeled “terrorists,” and therefore using the “terrorism” rhetoric critically influences public perceptions of crime and punishment.188 Eric Luna addresses the role of the public’s emotions in the criminal justice system, suggesting that the history of society’s “moral panic” demonstrates the power of fear and hatred in social and political action.189 More specifically, Luna uses the example of America’s “war on terror” to demonstrate the way in which powerful emotions, particularly hatred and fear, often prevail over rational legal doctrines, resulting in significant deviations in criminal law and procedure.190

The terrorism classification, along with the “war on terrorism” rhetoric, may also affect juries’ and judicial perceptions regarding the adjudication of terrorism crimes. The public’s deep fear of “terrorists” plays a significant role in institutional actors’ perceptions of crime. Invoking the terrorism rubric, along with labeling the defendant a “terrorist,” may trigger emotional responses that affect jurors’ decisions regarding conviction and punishment. Prominent scholars have addressed the role of cultural cognition theory on jurors’ decision-making process.191 Under this theory, individuals tend to conform their perceptions of legally consequential facts to their defining group commitments.192 In the context of terrorism prosecutions, personal dispositions, biases and emotions may prove stronger than legal doctrines in making decisions about innocence and guilt; jurors might either identify themselves with the large group of Americans who fell prey to terrorism, or view themselves as potential targets of future terrorist attacks. Moreover, labeling defendants as “terrorists”

187 See, e.g. Demleitner, supra note 26 (suggesting that the increased application of the term “terrorism” may augment public insecurity and create unnecessary alarm over run-of-the-mill criminal activity).
188 See, generally, Daniel Filler, Terrorism, Panic and Pedophilia, 10 Va. J. of Social Policy & the Law 345, 367-69 (2003) (addressing the potential links between terrorism and pedophilia, a connection that stems from using the sexual predators rhetoric with respect to terrorists. Filler fears that social anxieties and moral panics may lead to application of anti-pedophilia policies to those that the public associates with terrorism).
189 See, Luna, Criminal Justice and the public Imagination, supra note 34 at 74
190 Id, Luna.
192 Id, Kahan, at 753-767
effectively increases the chances of conviction, because jurors are likely to grant deference to national security considerations and accept government policy judgments regarding what types of conduct constitute threats to national security, as well as to their own personal security.

D. Guilty Pleas and the Lack of Data on the Scope of Misclassification

The overwhelming majority of criminal cases in American criminal justice system are resolved in plea bargains. The U.S. Supreme Court in Padilla v. Kentucky squarely acknowledges this reality, with Justice Stevens noting that: “Pleas account for nearly 95% of all criminal convictions”. Two theories dominate scholarship regarding the plea bargaining process: The administrative theory argues that prosecutors have become so powerful that they force defendants to accept plea bargains in which they alone determine the appropriate punishment. In contrast, the shadow-of-a-trial theory suggests that both prosecutors and defendants participate in the plea bargaining process like a contractual negotiation.

While the fact that most criminal cases resolve in guilty pleas is hardly any news, it carries additional risks for the purposes of enforcing the criminal law against terrorism because of the unique role that prosecutors play in this area by classifying crimes as “terrorism” or “ordinary” crime. Most of the cases in which individuals are prosecuted under terrorism offenses typically resolve in plea bargains and therefore neither go to trial nor are being reviewed at the appellate level. Consequently, there is a very small body of criminal case law dealing with terrorism prosecutions. It is estimated that there have been several hundred convictions of terrorism crimes, mostly under the prohibition against providing material support, which over 80% resulted from a plea of guilty.

The potential dangers of limited case law on terrorism prosecutions are far-reaching: To begin with, the scope of prosecutorial misclassification of “ordinary” crimes as terrorism

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See, also, Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2465 (2004)
cannot be easily quantified due to a lack of empirical data and the absence of judicial decisions that interpret the substantive elements of terrorism statutes. But most importantly, in a criminal justice system dominated by plea bargains courts are deprived of the opportunity to exercise meaningful oversight on prosecutorial discretion regarding the use of terrorism statutes. In the majority of cases, the trial courts’ acceptance of plea bargains leaves prosecutorial power to misclassify crimes as terrorism beyond the scope of appellate court review. The only caveat is when defendants reserve their rights to appeal, such as in the Bond case. Consequently, neither legislatures nor the judiciary defines what conduct amounts to terrorism, leaving prosecutors to shape the substantive scope of the criminal law against terrorism.

E. The Perils of Misclassification of “Ordinary” Crime As Terrorism

Charging defendants with terrorism offenses in cases unrelated to terrorism and not different from “ordinary crime is an unwarranted, and often dangerous practice, which may result in some of the following risks and unintended consequences.

1. Lack of Consistency and Uniformity

The excessive discretion inherently built into the criminal justice system creates unwarranted disparity among similarly situated defendants. 198 Recall that one of the implications of distinguishing between terrorism and “ordinary” crime concerns sentencing disparities among similarly situated defendants. 199 But disparities also characterize prosecutorial charging decisions; indeed, one of the perils of prosecutorial misuse of terrorism offenses is that it dangerously compromises the criminal justice system’s uniformity and consistency regarding charging decisions in similar factual contexts. Furthermore, treating similarly situated defendants differently exacerbates arbitrariness and inequality in the criminal justice system.

Again, lack of uniformity in charging decisions is not unique to the terrorism context. Rather, it is common in other areas in the criminal justice system, which is generally

198 See, Sun Beale, Is Corporate Liability Unique, supra note 56, at 1510, and accompanying footnotes. 199 See, supra, Part III. C.
dispersed and decentralized, therefore resulting in inherent disparities in charging decisions. However, the problem is further exacerbated in terrorism cases due to the fact that the decision what conduct amounts to terrorism is not legislatively guided, but rather rests solely in the hands of prosecutors.

The lack of uniformity and consistency regarding charging decisions is particularly apparent in cases involving mass killings such as shooting sprees. Take, for instance, two cases involving sniper attacks on highways. Recall the Muhammad case discussed above: Muhammad was prosecuted under the Virginia terrorism statute, despite evidence suggesting that personal revenge and racial hatred motivated the shooting spree. In a similar attack a year later in Ohio, Charles McCoy shot randomly at motorists over a period of five months, killing one victim. McCoy was charged with aggravated murder, murder, felonious assault, vandalism and improper discharge of a firearm. However, he was not charged with terrorism offenses, even though a terrorism statute was in effect in Ohio at the time, and despite state prosecutors charging Biswanath Halder with a terrorism offense. This stark difference is surprising given the similarity of both crimes. However, while Muhammad, who was a Muslim, was prosecuted under the terrorism statute, McCoy was prosecuted under “ordinary” murder charges. Setting aside the fact that these prosecutions happened in different states, both Virginia and Ohio had state terrorism statutes in force at the time of the crimes. Might religious differences account for this differential treatment of similarly situated defendants?

2. Prosecutorial Bias and Prejudice

Many commentators have addressed the need for prosecutorial neutrality, including the notion that prosecutors should not be biased in their decision-making. Generally speaking, the requirement for neutrality means that prosecutors may not act out of racial or ethnic prejudice or against a particular religious group for reasons of its beliefs. As one scholar has put it: “Unreviewable and unchecked prosecutorial discretion invites improper considerations such as bias, prejudice or political considerations”. But the general

200 See, generally, Nathaniel Stewart, Ohio’s Statutory and Common Law History with Terrorism – A Study in Domestic Terrorism Law, 32 J. of Legislation 93 (2005)
201 See, Green, and Zacharias, supra note 137, at 860.
202 See, e.g. Sun Beale, Is Corporate Criminal Liability Unique? supra note 56 at 1510
requirement for prosecutorial neutrality does not provide a workable legal standard for how prosecutors should act, particularly in cases in which religion may be a relevant factor to the charges, such as in hate crimes.\footnote{See, Green, and Zacharias, supra note 137, at 860}

The 9/11 attacks and other crimes of terrorism where particular groups are significantly more represented, namely Muslims with Middle-Eastern connections, have brought the issue of racial profiling in terrorism prosecutions to the forefront of legal scholarship.\footnote{See, generally, Philip B. Heymann& Juliette N. Kayyem, Protecting Liberty in an Age of Terror (2005) 101-108; Samuel Gross & Debra Livingston, Racial Profiling Under Attack, 102 COLUM. L. REV. 1413 (2002); and R. Richard Banks, Racial Profiling and Antiterrorism Efforts, 89 CORNELL L. REV. 1201 (2003); Daphne Barak-Erez, Terrorism and Profiling: Shifting the Focus From Criteria to Effects 29 Cardozo L. Rev. 1 (2005)} Terrorism prosecutions provide a prominent example in which racial biases and nationality-based prejudices might infiltrate the prosecutorial decision-making process regarding the charges brought against a defendant whose conduct inflicted harm on a large number of victims. Given the lack of statutory guidance on what conduct amounts to terrorism, prosecutors are free to decide whether a crime qualifies as terrorism based on their own personal beliefs and inclinations. Therefore, one of the unintended consequences of unlimited prosecutorial discretion is that irrelevant factors such as the defendant’s religion or nationality may improperly taint the prosecutorial decision-making process.

\section*{3. Political Considerations}

Broad prosecutorial discretion in the context of terrorism prosecutions also implicates the heightened role of political considerations, demonstrating another aspect of the requirement of prosecutorial neutrality.\footnote{See, Green and Zacharias, supra note 137, at 869 (stating that one element of prosecutorial neutrality is nonpartisanship, and that the decision whether and when to bring charges in individual cases should be made regardless of partisan politics). See,also, ABA Comm. on Criminal Justice Standards, ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd ed. 1993) (stating that: “in making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or a desire to enhance his or her record of convictions).} In a series of landmark articles on the relationship between substantive criminal law and criminal procedure, the late William Stuntz argued that
state, federal and local politics regarding criminal justice policy are infamous for their highly reactive nature, demonstrating “the pathological politics of criminal law.” Stuntz argued that the combination of robust procedural protections and a political commitment to social regulation through crime control has led not only to pervasive exceptions to procedural safeguards but also to an excessive ratcheting-up of the harshness of substantive criminal law. The one-way-ratchet occurs because politicians typically perceive procedural protections as interfering with the effective regulation of crime, giving legislatures a strong political incentive to pass overbroad criminal statutes allowing law enforcement to exercise their authority in a wider range of situations.

Political considerations, however, play a prominent role not only in shaping legislatures’ criminal law policies, but also in affecting prosecutorial discretion regarding charging decisions, due to the unique political nature of prosecutors’ offices. An important feature that characterizes the American criminal justice system is prosecutors’ political accountability. The selection and retention of chief prosecutors is markedly political in nature. Both federal and state prosecutors are selected through partisan political processes: U.S. attorneys are political appointees who are subordinated to the Attorney General – a political appointee of the U.S. president. District attorneys and state attorneys are elected by their communities in a partisan ballot. Scholars note that the risk of political considerations influencing prosecutorial discretion is heightened in a system in which prosecutors are both politically ambitious and ideological. Furthermore, the nature of the American criminal justice system, where prosecutors’ electoral incentives are particularly notable, creates a problem of imbalances in incentives, because elected chief prosecutors often run on tough-on-

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206 See, Stuntz, Pathological Politics, supra note 11, at 547-57 (discussing legislatures’ incentives in expanding the scope of substantive criminal law).
207 See, Stuntz, Substance, Process and the Civil-Criminal Line, supra note 58 at 7-9
208 Id, Stuntz, Substance, process, at 7-15.
210 See, Michael A. Simons, Prosecutors as Punishment Theorists Seeking Sentencing Justice, 16 George Mason L. Rev. 303 (2009) (noting that federal prosecutors political accountability runs through the president, thus they are less directly accountable than their locally elected state counterparts).
211 See, Sun Beale, supra note 197, at 409-410 (discussing the appointment and removal of U.S. attorneys).
212 See, H.W. Perry, Jr., United States Attorneys- Whom Shall They Serve? 61 Law & Contemp. Prob., 129, at 144 (1998) (noting that a person who is seeking high profile cases and is particularly ideological might be more tempted to use the power of the office for partisan reasons).
crime platforms; thus, the pressures to ensure convictions outweigh the rewards for respecting defendants’ rights.213 This reality results in the political accountability of prosecutors, both at the local and state as well as at the federal level.

Prosecutors’ political considerations are not unique to terrorism prosecutions.214 However, political considerations play a premium role in terrorism prosecutions because of the high-profile nature of these cases and their inherently political nature. Arguably, the “war on terrorism” is heavily affected by politics dynamics, and classifying crimes as terrorism carries clear political implications. In addition, characterizing crimes as terrorism brings on extensive media coverage and public attention, which provides prosecutors with publicity and fame they would not have enjoyed had “ordinary” criminal charges been brought instead.215

4. Slippery Slope: Additional Applications of Terrorism Statutes

The combined effect of unlimited prosecutorial discretion and the broad language of terrorism offenses may lead to additional expansions of these prohibitions in factual contexts that are unrelated to terrorism. Moreover, since rhetoric plays a crucial role in the public’s understanding of crime, using the slogan “War on Terrorism” potentially opens the door for additional targets. This possibility raises significant concerns that terrorism statutes may be further misused in additional contexts, which exceed legislatures’ primary intent to combat politically motivated crimes.

a. Drug Trafficking

In the last decades, the criminal regulation of drug trafficking has become a major goal of the American criminal justice system.216 The phrase “War on Drugs” was coined to address law enforcement’s vigorous fight against drug use.217 Interestingly, the “War on

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214 See, generally, Sun Beale, Supra note 197, Rethinking the Identity, at 382-3 (discussing improper partisan political considerations that influenced prosecutorial discretion).
215 See, e.g. the extensive media coverage in the recent terrorism prosecution in State of New York v. Ahmad Farhani and Mohammad Mamdouh
217 Id, at 218
“drugs” has often been phrased in terms of a substantial risk to national security.\textsuperscript{218} The parallels between the “war on drugs” and the “war on terrorism” suggest that prosecutors may try to use terrorism offenses to prosecute drug traffickers by invoking the theory that drug trafficking is one form of international terrorism. Take, for instance, a hypothetical in which a drug trafficking organization escalates the measures it employs by using bombs for the purpose of trafficking drugs from one country to another.\textsuperscript{219} The broad wording of the prohibition against bombing of places of public use suggests that this conduct meets the elements of this offense.

A bill recently introduced to Congress further supports this theory; The bill proposes that six Mexican drug cartels be added to the list of foreign terrorist organizations.\textsuperscript{220} These drug cartels would be designated “terrorist organizations” as this term is understood in the Immigration and Nationality Act.\textsuperscript{221} The Bill is premised on the assumption that international drug trafficking constitutes a threat to the safety and security of the U.S. and its people, similar to other forms of terrorism. Adopting a bill that equates drug trafficking with terrorism carries far-reaching practical implications that exceed the scope of this Article.

\subsection*{b. Sex Trafficking}

In a provocative paper, Catharine MacKinnon compares the “war on terrorism” paradigm with violence against women.\textsuperscript{222} MacKinnon points out that in both cases, non-state actors commit violence against innocent civilian targets in acts that are premeditated and involve ideological and political, rather than criminal motives, as sexual violence is one practice of socially organized male power.\textsuperscript{223} MacKinnon further contends that both patterns of violence resemble dispersed armed conflict, but the world’s response to them has been

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\item \textsuperscript{218} \textit{See}, Gerald Ashdown, The Blueing of America: The Bridge Between The War On Drugs and the War on Terrorism, 67 U. Pitt. L. Rev. 753, 779 (2006)
\item \textsuperscript{219} \textit{See}, Abrams, \textit{supra note} 7 at 76.
\item \textsuperscript{220} \textit{See}, H.R. 1270—To direct the Secretary of State to Designate as foreign terrorist organizations certain Mexican drug cartels, introduced in House on March 30, 2011. Available at: \url{http://thomas.loc.gov/cgi-bin/query/z?c112:H1270:}
\item \textsuperscript{221} \textit{See}, section 212 (a) (3) (B) of the Immigration and Nationality Act (8 U.S.C. 1182 (a) (3) (B).
\item \textsuperscript{222} \textit{See}, Catharine A. MacKinnon, Women’s September 11th: Rethinking the International Law of Conflict, Harvard. Int’l L. J at (2006)
\item \textsuperscript{223} \textit{Id}, MacKinnon
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markedly different: while the post 9/11 paradigm shift permitted potent responses to massive non-state violence against civilians, international law fails to address violence against women as one form of terrorism or war crimes.\textsuperscript{224} MacKinnon further argues that just as acts of terrorism are crimes against humanity, so is much violence against women, making both internationally illegal, and justifying international response under the genocide legal category.\textsuperscript{225}

MacKinnon’s arguments are undoubtedly controversial, making it unlikely that the international community will declare “violence against women” as one form of international terrorism.” Arguably, MacKinnon’s account fails to address the substantive differences between terrorism and violence against women, particularly the fact that a major feature defining terrorism is the specific intent to coerce governments to change their policies and actions. This political motivation is clearly lacking in the context of violence against women.

However, despite the marked differences, international sex trafficking implicates other defining features that characterize terrorism, as McKinnon notes. Using a terrorism offense in a particular case does not require embracing the “violence against women as terrorism” paradigm as a whole. Instead, unlimited prosecutorial discretion provides prosecutors with a theory that may be invoked once a plausible case presents itself. Take, for instance, a hypothetical in which a sex trafficking organization escalates the measures it employs by using bombing for the purpose of trafficking prostitutes from Mexico to the U.S. Again, nothing in the broad statutory language prevents prosecutors from charging the defendants with bombing of places of public use by invoking the theory that using bombs for the purposes of trafficking prostitutes meets the elements of this offense.\textsuperscript{226} Using the broadly worded terrorism prohibitions to prosecute a specific international sex trafficking case is therefore not an implausible scenario.

\textsuperscript{224} \textit{Id.}, at 13-14 (noting that: “if women were seen to be a group, capable of destructing them, the term genocide would be apt”).  
\textsuperscript{225} \textit{Id.}  
\textsuperscript{226} 18 U.S.C §2332f
IV. NARROWING THE SCOPE OF TERRORISM OFFENSES

The risks of unconstrained prosecutorial discretion warrant the adoption of measures to curb prosecutorial authority and reduce the potential for misusing it. However, these risks generally remain beyond the scope of judicial scrutiny.227 Scholars have long proposed that courts exercise heightened judicial review of prosecutorial charging decisions, but these proposals have been rejected.228 Proposing judicial oversight of prosecutorial charging decisions in the area of terrorism prosecutions is an unrealistic solution because courts typically uphold the prosecutorial practice of unconstrained discretion in deciding whether to prosecute defendants, who to prosecute, and what offenses to charge with.229 Scholars have also suggested that internal prosecutorial guidelines provide a mechanism to cabin prosecutorial discretion.230 These types of proposals are also unlikely to constrain prosecutorial discretion in terrorism prosecutions, as they are merely internal guidelines, rather than law, and the scope of their adherence as well as the ability to enforce them remain unclear.231

Given the shortcomings of procedural measures to alleviate the concerns regarding misuse of terrorism offenses in contexts that are unrelated to terrorism, this part calls for a substantive solution. It suggests the adoption of a legislative reform of terrorism offenses that would not only limit the scope of these offenses solely to the context of terrorism, but would also distinguish between “ordinary crime” such as shooting sprees and terrorism. Arguably, a proposal for a legislative reform is a strong medicine to cure the problem of unconstrained prosecutorial discretion in the area of terrorism prosecutions. However, this proposal comes as a last resort, after acknowledging that alternative solutions have failed to cure the problems identified above.

231 See, Ellen S. Podgor, Pleading Blindly, 80 Mississippi L. J. 1633, 1636-38 (2011) (discussing the shortcomings of internal guidelines)
A. Specific Intent As Terrorism Offenses’ Mental State

This section of the Article advocates the adoption of a new element to narrow the scope of terrorism prohibitions by making a defining feature of terrorism a part of the mental state of terrorism offenses. More specifically, the proposal suggests that the defendant’s specific intent to coerce governments to change their actions and policies be made an element of terrorism offenses. To win a conviction, the prosecution would have to prove that the defendant engaged in violent acts that typically characterize terrorism with the intent to coerce governments to change their actions and policies.

1. The Relationship Between Intent and Motive

The proposal to make terrorism offenses specific intent crimes raises concerns about whether the substantive criminal law is equipped to consider political motivation in committing the crime of terrorism or intent to coerce governments to change their actions and policies. One might argue that the proposal conflates specific intent and motive and that the defendant’s motive to commit a crime should not affect his/her punishment. Should the defendant’s reasons for committing a crime matter for the purposes of imposing criminal liability, and if so, why?

Criminal law theorists continue to debate the role of motives in determining liability or grade of an offense.232 Scholars today question the famous statement that: "hardly any rule of penal law is more definitely settled than that motive is irrelevant."233 Traditional criminal law theory asserts that while specific intent in committing a crime is a legally permissible element, motives ought not be relevant to criminal liability or grading of an offense.234 The relationship between motive and intent has caused theorists considerable difficulty for years.

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233 See, Jerome Hall, General Principles of Criminal Law, at 153 (1947); see also Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law 37 (1993) (noting that: "It is as firmly established in legal doctrine as any rule can be that motive is irrelevant to responsibility....").
234 See, e.g., George Fletcher, Rethinking Criminal Law, 463 (1978)
and the distinction between a defendant’s allegedly irrelevant motive and his legally relevant intent is often ambiguous. Moreover, in contrast with the traditional view that motives are always irrelevant, scholars have argued that they are a relevant factor in many existing offenses. Prominent criminal law scholar Paul Robinson argues that motive ought to be, and commonly is, an element in determining liability or grade of offense. Robinson contends that every time an offense definition contains the phrase “with the purpose to,” the law takes into account, as an offense element, the defendant’s motive, the cause of his or her act.

Furthermore, despite the scholarly controversy regarding motive's role in criminal law, most scholars agree that as a practical matter, criminal law often does reflect a perpetrator's reasons for acting, noting the various ways that motives already influence the criminal law. Scholars further note that criminal law’s use of motive in defining offense liability often goes undisputed when other terms are used to obfuscate the role of motive. Specific intent crimes could also be recast as a crime defined by motive. Moreover, scholars include specific intent crimes as examples of when the criminal law treats motive as relevant. The proposal to narrow terrorism offenses by making the defendant’s specific intent an element of terrorism offenses is therefore neither inconsistent nor objectionable from the standpoint of current criminal law theory, and examining an array of specific intent statutes demonstrates the weakness of the “motive is always irrelevant” claim in determining criminal liability.

235 See, Wayne LaFave, Criminal Law, §3.6 (a) at 241-42 (3rd ed. 2000)
236 See, Joshua Dressler, Understanding Criminal Law, (3rd. ed. 2001)
237 See, Robinson, Hate Crimes, supra note 107 at 608 (noting that motive “should alter liability if, and only if it alters an actor’s blameworthiness for the prohibited act. Some motives alter our judgments of blameworthiness, others do not; distinguishing between the two is the challenge put to criminal code drafters.”)
238 Id, Robinson.
239 See, Dressler, supra note 224, at 121 (noting that: “A defendant’s motive is often relevant in criminal law).
241 Id, Burke.
2. The Parallels Between Hate Crimes and Terrorism

Hate crimes provide an illustrative analogy to terrorism offenses, supporting the rationales behind the proposal to make specific intent a part of the defendant’s mental state. To convict a defendant with a hate crime the prosecution must prove that the crime was motivated by an anti-group motive, and that the victim was selected by reason of his/her actual or perceived race, color, religion, national origin or sexual orientation. Admittedly, a main feature of hate crimes is the motive requirement. Moreover, hate laws are highly controversial precisely because of motive’s critical role in defining this crime: Several state courts have struck down these laws as unconstitutional, holding that criminal law could not punish motives.\(^{243}\) The Supreme Court however, reversed these decisions, holding that states could lawfully enhance punishment for conduct based on disfavored motive.\(^{244}\)

Some scholars suggest that hate crimes can be viewed as a close cousin to terrorism in that the target of an offense is selected on the basis of group identity, not individual behavior, and because the effect of both is to wreak terror on a greater number of people than those directly affected by the violence.\(^{245}\) A common argument to support both hate crimes and terrorism legislation is that these crimes merit enhanced punishment due to the greater harm they cause, and because both crimes are committed with an underlying intent to harm and influence others, beyond those specific victims who are directly affected.

Scholars have debated whether motive affects the scope of harm inflicted by the crime: Paul Robinson suggests that hate crimes ought to focus on the greater harm caused and intended by these crimes than would occur in an analogous offense without the hate motivation.\(^{246}\) A greater harm to a greater number of people, contends Robinson, is more likely to result when the conduct seeks to intimidate an identifiable group than in instances where the same conduct does not target a particular group.\(^{247}\) Other scholars argue that motive

\(^{243}\) State v. Mitchell, 485 N.W. 2d 807, 813 (Wis. 1992)
\(^{245}\) See, generally, Cynthia Lee in Hate Crimes and the War on Terror, in Hate Crimes: Perspectives and Approaches, Barbara Perry Ed. 2008 (addressing one aspect of the relationships between hate crimes and the war on terror).
\(^{246}\) See, Robinson, supra note 107 at
\(^{247}\) Id, Robinson
is irrelevant to criminal liability, because it does not generally affect the harm inflicted by the
criminal conduct.\textsuperscript{248} Wayne McCormack, for example, contends that motive ought not be an
element of terrorism offenses because it does not affect the extent of the harm intended and
inflicted, and it does not influence the understanding of the criminal activity.\textsuperscript{249} However,
Robinso\'s view that hate crimes increase the scope of the harm intended or inflicted stands
in sharp contrast with the view that motives do not affect the scope of the harm. Moreover,
hate crimes are justified precisely because they rest on the premise that a defendant\'s
discriminatory motive to commit the crime results in inflicting greater harm.

\textbf{B. The Proposal\'s Advantages}

The proposal to make specific intent the required mens rea for convicting a defendant
with terrorism offenses carries several important advantages. First, basing criminal liability
for terrorism crimes on the intent element aligns with criminal law theory\’s underlying
premise that greater harms justify imposing greater liability. The proposal advocated here
seeks to build on this premise, suggesting that crimes of terrorism ought to be defined by
focusing on the additional harms that acts of terrorism cause and intend to cause as a basis for
greater liability.\textsuperscript{250} Conduct intended to coerce governments to change their actions or
policies is inherently intended to cause greater harm on a greater number of victims. The
criminal law often makes the defendant\’s intent a relevant element in defining criminal
liability or grading an offense, where the defendant commits an underlying crime with a
purpose to commit an additional crime or additional harm in order to inflict greater harm on a
greater number of victims.\textsuperscript{251} Proposing to add the intent element to the definition of terrorism
offenses is consistent with this legislative strategy, because the defendant not only commits a
violent crime such as murder which is targeted against a specific victim, but also does it with
a broader intent to coerce governments, thus inflicting greater harm on the public at large.

Second, focusing on the intent to coerce governments as the focal point of the offense
of terrorism effectively limits the overbroad reach of terrorism offenses by making this

\begin{footnotesize}
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\item \textsuperscript{248} See, Fletcher, supra note 222, at 463
\item \textsuperscript{249} See, McCormack, supra note 31 at 19
\item \textsuperscript{250} See, Robinson, Hate Crimes, supra note 107, at
\item \textsuperscript{251} See, Dressler, supra note 224, at 121
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distinctive feature of terrorism an explicit element of the crime. In order to successfully limit
the reach of terrorism offenses, the defendant’s political intent to coerce governments ought
to be made elements of these offenses. However, while many scholars agree that terrorism is
a pattern of conduct motivated by political aspirations, that it is intended to coerce
governments to change their policies and actions, these features are not made elements of
terrorism offenses, resulting in a gap between the common understanding of terrorism and its
criminal prohibitions.\(^2\)\(^5\)\(^2\)\  Adopting a specific intent element would fill this gap by ensuring
that terrorism prohibitions are used only upon proving that the defendant engaged in violent
acts with the intent to coerce governments to change their actions and policies.

Moreover, the proposal’s focus on specific intent to coerce governments rather than
on a more generalized requirement such as intent to intimidate civilians further ensures that
terrorism offenses are not over-inclusive. Some federal definitions of terrorism define two
alternative types of intent: intent to intimidate civilians or intent to coerce governments.\(^2\)\(^5\)\(^3\)
However, making intent to intimidate civilians an element of terrorism fails to capture its
essence and ultimately results in an over-inclusive definition. What distinguishes terrorism
from other crime is its specific intent to coerce governments, while intimidating an
unidentifiable group of victims is merely the means to achieve this end. Making specific
intent an element of terrorism offenses, therefore, adds a critical feature that is unique to the
terrorism context.

Third, grounding terrorism statutes in the requirement of intent would provide a
necessary measure for accurately classifying crimes. Recall that under current law, the
distinction between “ordinary” crime and “terrorism” is often murky, with no clear legal
standard to distinguish between them.\(^2\)\(^5\)\(^4\) Making specific intent an element of terrorism
offenses ensures that terrorism offenses are used to prosecute only terrorism crimes and helps
facilitate prosecutorial decision in classifying what types of conduct fall under terrorism
prohibitions, thus curbing prosecutorial discretion in this area. Furthermore, adopting the
proposal would result in reducing the potential for misusing terrorism prohibitions in the
wrong cases, for the wrong reasons. The specific intent element would serve as a practical bar

\(^{2\) See, supra, Part I.\)
\(^{2\) See, supra, Part II.\)

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to legislatively prevent prosecutors from using terrorism offenses to prosecute cases that are unrelated to terrorism.

Fourth, the specific intent element is a feasible requirement. A potential objection to the proposal is that it would impose an unworkable burden on the prosecution and jeopardize government endeavors to combat terrorism. Therefore, one might argue that making specific intent an element of terrorism offenses is unwarranted. The proposal however, focuses on specific intent to commit violent crimes rather than on political motivation. While specific intent to coerce government actions or policies is inherently driven by political motivation, motive itself is not made an explicit element in defining the crime of terrorism. While proving motive is extremely challenging, as it involves the internal personal drive to commit a crime, intent implicates the more objective reason behind committing the act in the case of terrorism: the intention to influence and effect government actions and policies.\textsuperscript{255} While requiring the prosecution to prove an internal motive to act is an unworkable hurdle, proving the objective intention to bring about political change is a pragmatically feasible requirement.

Finally, adopting the proposal would not compromise the effective enforcement of criminal law: Crimes that do not meet the definition of the narrower terrorism offenses would not remain outside the scope of criminal regulation. Rather, when the defining features of terrorism are lacking, “ordinary” criminal law would come into play, enabling prosecution.

CONCLUSION

Politically motivated violent crimes that inflict (or are intended to inflict) substantial harm on a large number of people ought to be severely prosecuted and punished under specialized terrorism offenses. However, in order to successfully combat the real risks of terrorism, the criminal justice system ought to clearly distinguish between “ordinary” crime and terrorism by accurately classifying the type of conduct that meets the definition of terrorism.

This Article demonstrates the criminal justice system’s failure at this classification task due to two reasons: first, the defining features of terrorism are not made elements of

\textsuperscript{255} See, Robinson, Hate Crimes, \textit{supra note} 107, at 5 and accompanying footnotes.
terrorism offenses. Second, the authority to make the classification is placed solely in the hands of prosecutors who sometimes misuse terrorism statutes in cases that are unrelated to terrorism. The Article elaborates on the perils and unintended consequences of this practice, contending that its continuance carries critical implications for the enforcement of criminal law.

To offer a solution to this problem, the Article argues that the authority to classify which crimes amount to terrorism ought to be reserved to legislatures and advocates legislative reform to limit the scope of terrorism offenses by making specific intent to coerce governments to change their policies and actions an element of terrorism offenses. This legislative strategy would ensure not only that prosecutors are able to charge defendants with terrorism prohibitions only in terrorism-related cases, but would also prevent them from using such offenses in the wrong cases.