NOTE

THE ROOT OF ALL EVIL: EXPANDING CRIMINAL LIABILITY FOR PROVIDING MATERIAL SUPPORT TO TERROR

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Introduction

In the years since the United States announced the War on Terror, the federal government has attempted to curb international terrorist activities through a variety of means. In Afghanistan, the United States collaborated with a coalition of western and central Asian states to topple the Taliban regime through direct military action.[1] The war in Iraq has taken on its own impetus outside of any original justification, namely the eradication of al Qaeda in Iraq (AQI) and avoiding the establishment of a terrorist proxy state controlled by Iran.[2] In Europe, intelligence-sharing programs create a web of electronic and direct surveillance of suspected terrorists before they can implement their attack plans.[3] Even congressional counterterrorist plans have a

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1 *See, e.g.*, Eric Schmitt, *Many Eager to Help, but Few Are Chosen*, N.Y. Times, Nov. 30, 2001, at B3.

2 *See* Bruce Riedel, *Al Qaeda Strikes Back*, Foreign Aff., May/June 2007, at 24, 26–28.

3 *See* Press Release, U.S. Dep't of State, U.S., Europol Sign Supplemental Intelligence-Sharing Agreement (Dec. 23, 2002), *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2002&m=December&x=20021223151113jthomas@pd.state.gov0.1011011 (describing the intelligence sharing program between the United States and Europol, the EU criminal intelligence agency).

decidedly global scope, focusing on secure borders and effective early warning systems to keep terrorists out of the United States.[4]

While the broadsword of military action or the scalpel of covert intelligence each aims at excising the same danger, the banker's pen may be mightier. As one court noted, the instruments of terror do not exist by themselves, but rather because of the financial support provided to extremists.[5] To attack the financial roots of terror, Congress enacted prohibitions on "providing material support to terrorists."[6] Congress defines material support as knowingly conveying support, aid, or anything of value to a terrorist or terrorist organization.[7] The language of these provisions lends itself to prosecutorial discretion as to which groups to prosecute and what penalty to pursue.[8]

The government's record in securing convictions under these laws is inconsistent, at best. While "providing material support" was the lead charge in 162 federal prosecutions between 2001 and 2006, it was the lead count in convictions only eight times.[9] The acquittals are more troubling. For example, the government charged Muhammad Hamid Khalil Salah with channeling millions of dollars to Hamas, a Palestinian terrorist group.[10] Despite evidence that Salah once moved $985,000 in a single transaction,[11] the government accepted his plea of guilty to simple fraud. U.S. Attorney Patrick J. Fitzgerald declared

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4 *See infra* Part III.A.

5 *See* Humanitarian Law Project v. Reno (*Humanitarian Law Project II*), 205 F.3d 1130, 1135 (9th Cir. 2000) (explaining the connection between funding and acts of terrorism).

6 18 U.S.C. §§ 2339A–2339C (2006).

7 *See id.* § 2339A(b)(1) ("[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials . . . .").

8 For example, the prescribed maximum term of imprisonment for providing material support is fifteen years, but "if the death of any person results," the penalty is increased to life. *Id.* § 2339A(a); *see also id.* § 2339B(a)(1) (providing the same penalties).

9 Transactional Records Access Clearinghouse, Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11/01 Attacks (2006), http://trac.syr.edu/tracreports/terrorism/169 [hereinafter TRAC Report].

10 *See* Second Superseding Indictment at 3–4, United States v. Marzook, 462 F. Supp. 2d 915 (N.D. Ill. 2006) (No. 03 CR978), 2003 WL 25714791.

11 *Id.* at 22–23.

the plea as a victory against fraud, but skirted questions of terrorism.[12] In another case from the Northern District of Illinois, *United States v. Arnaout*,[13] the government accepted a guilty plea to a single count of racketeering from a man initially charged with laundering money and goods to Chechnyan and Bosnian terrorists.[14] In this case, Fitzgerald stated that the presiding judge felt that the government "failed to connect the dots"—undoubtedly shorthand for failure to establish the links between Arnaout and terror.[15]

The problem extends beyond trials in Chicago. Indeed, a jury imposed civil damages of $52 million on Salah based on his connections to Hamas in the same court where the government could not secure a criminal conviction.[16] Despite this finding of liability, a jury in Houston found the government's case against the organization that acted as the conduit for some of Salah's transactions too weak to sustain a conviction.[17] In the Middle District of Florida, a judge determined that "providing material support" requires a specific purpose to further the ends of terrorism, despite the clear language of the material support statutes and the purpose of Congress.[18]

A potential explanation for these failures is that the statutes are insufficiently clear, and insufficiently broad. Sections 2339A–C of Title 18 have a confusing and counterproductive mens rea requirement[19] that can be clarified and widened to capture more donative activity. Rather than forcing prosecutors to prove that a defendant

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12 *See* Press Release, U.S. Dep't of Justice, Benevolence Director Pleads Guilty to Racketeering and Conspiracy and Agrees to Cooperate with the Government (Feb. 10, 2002), *available at* http://www.usdoj.gov/usao/iln/pr/chicago/2003/pr021003_01.pdf.

13 282 F. Supp. 2d 838 (N.D. Ill. 2003).

14 *See* Plea Agreement at 2–4, United States v. Arnaout, 282 F. Supp. 2d 838 (N.D. Ill. 2003) (No. 02 CR 892), 2003 WL 25582843; *see also* Second Superseding Indictment at 8–18, United States v. Arnaout, 282 F. Supp. 2d 838 (N.D. Ill. 2003) (No. 02 CR 892), 2003 WL 25584155 (explaining the original charges against Arnaout).

15 *See* Peter Slevin, *The Prosecutor Never Rests*, WASH. POST, Feb. 2, 2005, at C1.

16 *See* Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 931 (N.D. Ill. 2004) (granting the Boim family partial summary judgment and ordering the case to proceed to the civil liability phase), *vacated sub nom.* Boim v. Holy Land Found. for Relief and Dev., 511 F.3d 707, 710 (7th Cir. 2007). The Seventh Circuit opinion was subsequently vacated after a rehearing en banc. *See* 511 F.3d at 710.

17 *See infra* notes 75–101 and accompanying text.

18 United States v. al-Arian, 329 F. Supp. 2d 1294, 1299–1303 (M.D. Fla. 2004).

19 *See* 18 U.S.C. § 2339A (2006) (criminalizing provision of material support to any person with knowledge that the person is preparing to engage in certain enumerated federal crimes); *id.* § 2339B (criminalizing the provision of material support to designated Foreign Terrorist Organizations, or groups that in engage in terror, knowing that they are so designated or that they so behave); *id.* § 2339C (criminalizing

had actual knowledge that a recipient of aid was a terrorist group, the statutes should promote responsible giving by forbidding reckless donations. The material support provisions also target Foreign Terrorist Organizations (FTOs),[20] groups outside the United States,[21] or individuals who seek to commit specified acts of terrorism.[22] Inexplicably, the statutes make no mention of funding to terrorists without any international connections. This "it can't happen here" mentality towards domestic terrorism reflects the frightening concept that we have not learned the lessons of Pearl Harbor, the Oklahoma City bombing, or September 11, namely that the oceans do not insulate us, and that it indeed can "happen here"—and it has.[23]

Rather than continuing to play the passive waiting game, Congress should move first. The means are available to address the problem. Initially, the present mens rea requirement for crimes in § 2339 requires prosecutors to prove that the defendant knowingly provided material support to a terrorist or terror group.[24] Precisely what constitutes culpability under the statutes has generated some judicial disagreement[25] and ample scholarly discussion.[26] Congress can speak

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provision or collection of funds with knowledge that they will be used to commit terrorist acts).

20 *See id.* § 2339B(a).

21 *See id.* § 2339B(b); *see also id.* § 2339C(d)(1) (providing extraterritorial jurisdiction only in cases where the recipient of funds was either a U.S. citizen who committed a terrorist act abroad or a foreigner who committed a terrorist act in the United States). There is no § 2339C liability for providing funds to an American terror group that commits terrorism in the United States.

22 *See id.* § 2339A(a) (listing predicate offenses).

23 The danger lies also in the mischaracterization of terrorism as coming from foreigners (as in September 11) and antigovernment or radical environmentalists at home. This view ignores the threat of homegrown Islamic extremism. *See, e.g.*, Larry Copeland, *Domestic Terrorism: New Trouble at Home*, USA TODAY, Nov. 15, 2004, at A1 (quoting U.S. Marshals Chief Inspector Geoff Shank that counterterrorism experts are "concerned about the guy in a turban. But there are still plenty of *angry, Midwestern white guys* out there" (emphasis added)); *see also infra* Part III.

24 *See* 18 U.S.C. § 2339A(a); *id.* § 2339B(b).

25 Most courts contend that there is no "purpose to further the terrorist act" requirement under the statutes. Nevertheless, the Middle District of Florida disagreed in 2004, and imposed a knowledge mens rea requirement. *Compare* United States v. al-Arian, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004) (requiring purpose to further terrorism in order to sustain a material support conviction), *with Humanitarian Law Project II*, 205 F.3d 1130, 1133–36 (9th Cir. 2000) (imposing liability for any contribution regardless of purpose).

26 *See generally* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 11–18 (2005); Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861 (2004); David Henrik Pendle, Comment, *Charity of the*

clearly and with finality by establishing reckless knowledge—without any purpose to aid terrorism—as the state of mind requirement for foreign contributions.[27] While there are due process and expressive association issues raised by such a change, proper statutory drafting and incorporation of current case law alleviates those concerns.[28]

In addition, Congress should create a new species of material support crimes for domestic terrorism. By widening the scope of § 2339B to include "homegrown" terror groups, legislators will equip U.S. Attorneys with the tools to target terror cells with no discernible connection to international terrorism. Further, including fundraising groups and "clearinghouses" that amass funds under the guise of legitimate activity provides the means to separate protected speech and illegal support for terror. Like its foreign counterpart, a domestic material support statute survives constitutional scrutiny, as it imposes liability for conduct, not speech, or "mere association."[29] Because there is no constitutional infirmity in either the foreign or the domestic context, this proposed statute requires that the defendant recklessly contribute to a person or group that committed, planned, conspired, or attempted to commit terrorist activities in the United States.

Part I of this Note examines the origin of the material support statutes and their current interpretation in the leading series of cases addressing them, before examining some of their weaknesses. Part II advances the recklessness mens rea for material support crimes and addresses constitutional considerations. Part III explores the nascent homegrown terrorism movement in the United States, and how the current statutes fail to provide sufficient criminal liability in the domestic context. Finally, Part IV outlines a domestic material support statute for the United States.

Heart and Sword: The Material Support Offense and Personal Guilt, 30 SEATTLE U. L. REV. 777 (2007).

27 This Note uses the word "purpose" to describe a defendant's aim, rather than the vague "intent."

28 The constitutional elements of these statutes are addressed *infra* Part II.B. For a good example of the mischief caused by imprecision in criminal statutes, see *Liparota v. United States*, 471 U.S. 419, 424–30 (1985), where congressional intent and language permitted two radically different interpretations of a crime relating improper possession of food stamps.

29 *See Humanitarian Law Project II*, 205 F.3d at 1133–36.

I. CRIMINAL LIABILITY UNDER THE CURRENT CODE[30]

Provision of support to terrorists has long been a crime under U.S. law, but often within the framework of trade with the enemy during wartime.[31] By the late twentieth century, geopolitical changes prompted the federal government to address terrorism as a distinct activity.[32] Congress enacted the modern antiterrorist statutes in 1986,[33] initially as a measure to improve security at American diplomatic missions abroad.[34] House Speaker Thomas P. "Tip" O'Neill remarked in a letter to the Chairman of the House Foreign Relations Committee that "[l]egislation addressing the problem of terrorism is a top priority this year," and that Congress should create an omnibus committee.[35] With the end of the Cold War, the general terrorism provisions[36] underwent repeated amendment, usually to increase penalties.[37]

The Violent Crime Control and Law Enforcement Act of 1994[38] was Congress's first major step towards creating liability for support,

30 As with all criminal statutes, these statutes incorporate the notion that criminal liability is normally based upon the concurrence of two factors, "an evil-meaning mind . . . [and] an evil-doing hand." Morissette v. United States, 342 U.S. 246, 251 (1952).

31 Chesney, *supra* note 26, at 4 (noting that this practice has roots in "the earliest days of the republic").

32 *See id.* at 4–18 (describing the development of antiterror laws and the role of material support provisions).

33 *See* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1202(a), 100 Stat. 853, 896 (codified as amended at 18 U.S.C. §§ 2331–2332 (2006)). Congress enacted this new law in the shadow of the attack on Marine Barracks Lebanon that year and the siege of the American Embassy in Tehran that ended just five years earlier.

34 *See id.* § 102(b)(1)–(5), 100 Stat. 853, 855 (codified at 22 U.S.C. § 4801 (2006)) (setting out the purposes of the bill as primarily aimed at improving security at United States diplomatic posts abroad).

35 H.R. REP. NO. 99-494, pt. 2, at 1872 (1986).

36 The terrorism provisions of the United States Code are set out in Chapter 113B, or 18 U.S.C. §§ 2331–2339D (2006).

37 *E.g.*, Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 18 U.S.C.) (increasing penalties for most terrorist offenses from five years' imprisonment to ten or fifteen years' imprisonment). This trend has not subsided, as several Chapter 113B provisions have pending amendments raising the penalty from fifteen years to forty. *See, e.g.*, H.R. 3156, 110th Cong. § 614 (2007); Terrorism Prevention and Deterrence Act of 2007, S. 1320, 110th Cong (2007).

38 Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 16, 18, 28, 42 U.S.C.).

rather than commission, of a terrorist act.[39] Just two years later, and in the shadow of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).[40] Finally, the Suppression of the Financing of Terrorism Convention Implementation Act of 2002 widened the scope of antifinancing crimes to include those who "provide[] or collect[] funds" for terrorism.[41] These three statutes, codified in Title 18 of the U.S. Code at §§ 2339A–2339C, respectively, constitute the American effort at curbing material support for terror.[42]

Each of the material support crimes targets different behavior. Section 2339A punishes anyone who "provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out" specified federal offenses.[43] This section aims at the perpetrators of terrorist offenses and those who directly support them. It also reflects the earlier focus of antiterrorism efforts on large-scale attacks, like train-wrecking or presidential assassinations.[44]

Sections 2339B and 2339C embody a different approach to antiterrorism: attacking the financial roots of terror. Section 2339B prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization."[45] This seemingly straightforward statute has faced a great deal of scrutiny and various revisions in recent years.[46] The generally accepted interpretation of the statute is that any person who contributes to a foreign terror group—whether the

39 *See id.* § 120005, 108 Stat. 1796, 2022–23 (codified as amended at 18 U.S.C. § 2339A (2006)) (establishing penalties for providing material support to terror).

40 Pub. L. No. 104-132, § 303(a), 110 Stat. 1214, 1250 (codified as amended at 18 U.S.C. § 2339B (2006)).

41 Pub. L. No. 107-197, § 202(a), 116 Stat. 721, 724 (codified as amended at 18 U.S.C. § 2339C (2006)).

42 For convenience, I will refer to all three collectively as the "material support statutes."

43 18 U.S.C. § 2339A(a). Predicate acts under § 2339A(a) include destruction of an aircraft or airport facilities (*id.* § 32), hostage-taking (*id.* § 1203), conspiracies to injure, maim or kill persons abroad (*id.* § 956), and wrecking trains (*id.* § 1992). *Id.* § 2339A(a).

44 This focus is not without basis in experience. Al Qaeda's modus operandi gravitates toward the dramatic (the simultaneous attacks on September 11, the coordinated African Embassy bombings in 1996, the Khobar Towers attack). *See* LAWRENCE WRIGHT, THE LOOMING TOWER 307 (2007) (noting that highly visible, large-scale attacks would become a hallmark of al Qaeda operations).

45 18 U.S.C. § 2339B(a)(1).

46 *See infra* notes 51–74 and accompanying text.

group is so designated by the United States government or, when not designated, if it engages in terrorism—commits an offense under § 2339B. "Material support" means funds, equipment, materiel, information, expertise, or any item or good that would aid the terror group's enterprise, except for religious or medical items.[47]

Congress enacted § 2339C in compliance with the International Convention for the Suppression of the Financing of Terrorism.[48] The statutory language tracks the Convention's provision that forbids any person from, "by any means, directly or indirectly, unlawfully and willfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" terrorist acts.[49]

After the September 11 attacks, prosecutorial use of the material support statutes increased exponentially.[50] This surge in indictments forced the latent issue of what Congress meant by "knowingly provides material support or resources to a foreign terrorist organization."[51] The *Humanitarian Law Project* cases in the Ninth Circuit provided answers to this question in the most widely accepted interpretation of the statutes. In one of the cases in the series, *Humanitarian Law Project v. United States Department of Justice* (*Humanitarian Law Project III*),[52] the Ninth Circuit noted that there were three potential interpretations of the statute's language. The government's preferred interpretation promoted a strict liability reading of § 2339B, limiting the knowledge requirement to the act of donation.[53] A literal construction of the statute could hold that the statute required both knowledge of the donation and knowledge that the donee was a designated FTO. Opt-

47 18 U.S.C. § 2339B(g)(4) (employing the definition of material support found at *id.* § 2339A(b)(1)–(b)(3)).

48 Pub. L. No. 107-197, 116 Stat 721, 721 (codified at 18 U.S.C. § 2339C note); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 [hereinafter International Convention].

49 International Convention, *supra* note 48.

50 TRAC Report, *supra* note 9.

51 18 U.S.C. § 2339B(a). Additionally, the designation process whereby a group is declared an FTO came under scrutiny in *People's Mojahedin Organization of Iran v. United States Department of State*, 182 F.3d 17, 23–25 (D.C. Cir. 1999) and *National Council of Resistance of Iran v. United States Department of State*, 251 F.3d 192, 203–09 (D.C. Cir. 2001). Each of these cases upheld the designation process as a valid exercise of executive authority, and precluded any due process claims on that basis. *See People's Mojahedin Org. of Iran*, 182 F.3d at 22–25 (refusing to provide judicial review of the designation process); *Nat'l Council of Resistance of Iran*, 251 F.3d at 205–09 (finding no due process violation in the designation process).

52 352 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).

53 *See id.* at 400.

ing for neither view, the court interpreted § 2339B to require knowledge that a donation was made, and knowledge that the donee was *either* a designated FTO or a group that engaged in terrorism.[54]

Humanitarian Law Project III's predecessor case, *Humanitarian Law Project v. Reno* (*Humanitarian Law Project II*),[55] addressed the lurking First Amendment issue surrounding expressive association. The defendants contended that AEDPA impermissibly precluded them from supporting an organization or engaging in advocacy.[56] They claimed that they were entitled to promote the positions of the Humanitarian Law Project.[57] Circuit Judge Alex Kozinski dispensed with their argument, noting that "advocacy is far different from making donations of material support."[58] Thus, while an individual may support the politics and methods of an international terrorist group, they may not provide the group with "the weapons and explosives with which to carry out their grisly missions."[59]

A. Problems Under the Current Scheme

Most courts have followed the *Humanitarian Law Project III* standard and found liability where an individual contributor knew that the donee was either a designated FTO or that it engaged in terrorist activities.[60] Other jurisdictions have been similarly receptive to the *Humanitarian Law Project II* pronouncements on nonprotected donations and use of intermediate constitutional scrutiny.[61]

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54 *See id.* at 402–03.

55 205 F.3d 1130 (9th Cir. 2000).

56 *See id.* at 1133.

57 *See id.*

58 *Id.* at 1134.

59 *Id.* at 1133. The interaction between material support and expressive association is discussed further *infra* Part II.

60 *See, e.g.*, United States v. Abdi, 498 F. Supp. 2d 1048, 1060–61 (S.D. Ohio 2007); United States v. Marzook, 383 F. Supp. 2d 1056, 1069 (N.D. Ill. 2005); United States v. Paracha, No. 03 CR. 1197(SHS), 2006 WL 12768, at *23–26 (S.D.N.Y. Jan. 3, 2006), *aff'd*, No. 06-3599-Cr., 2008 WL 2477392 (2d Cir. June 19, 2008). Indeed, all but the "aberrant" *United States v. al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004), apply the *Humanitarian Law Project II* and *III* standards for mens rea. While most commentators and courts suggest that congressional action and the *Humanitarian Law Project* cases mooted *al-Arian*, it remains good law in the Middle District of Florida. *See* Humanitarian Law Project v. Gonzales (*Humanitarian Law Project V*), 380 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005) (reading congressional action subsequent to the decision *al-Arian* as rendering that case moot).

61 *See, e.g.*, *Abdi*, 498 F. Supp. 2d at 1059–64 (citing with approval *Humanitarian Law Project II* on matters of constitutional sufficiency and statutory interpretation).

This approbation ignores very real problems in the Ninth Circuit's statutory interpretation.[62] As one commenter recently noted, the Court "fashioned a mental element that cannot be derived from the statute's language."[63] *Humanitarian Law Project II* purports to apply Congress' intent by splitting the difference between the contentions of the defendants and the government. Nevertheless, the *Humanitarian Law Project II* decision created a definition of "knowledge" distinct from either of the plain readings of the text. Up to that point, neither the language of the statute nor the legislative history pointed to the interpretation employed by the court.[64] Despite a lengthy analysis of Supreme Court precedent on statutory interpretation,[65] the Ninth Circuit followed its own course and engaged in some Solomonic difference splitting.

The *Humanitarian Law Project III* court ignored the canon of interpretation that "ambiguity concerning the ambit of criminal statutes . . . [should] be resolved in favor of lenity."[66] Had the court applied lenity—and proper grammar—the appropriate reading would have been that "knowingly" was an adjunct, and thus modified the entire sentence as written, or at least those parts of the statute affecting potentially innocent conduct.[67] Under that view, "knowingly providing material support" means that the defendant would have needed knowledge of the contribution and knowledge that the group was a designated FTO. Instead, the court permitted conviction if the defendant knew of the designation or "of the organization's unlawful activities that caused it to be so designated."[68]

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62 First and Fifth Amendment issues raised by the material support statutes are addressed *infra* Part II, where I discuss the constitutional sufficiency of my proposals.

63 Jonakait, *supra* note 26, at 878.

64 *See id.* at 879–81.

65 *See Humanitarian Law Project III*, 352 F.3d 382, 397–402 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004) (citing United States v. X–Citement Video, 513 U.S. 64, 69 (1994); Liparota v. United States, 471 U.S. 419, 426 (1985); Morissette v. United States, 342 U.S. 246, 251 (1952), *vacated*, 393 F.3d 902 (9th Cir. 2004).

66 United States v. Yermian, 468 U.S. 63, 77 (1984) (Rehnquist, J., dissenting) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

67 *See id.*

68 *Humanitarian Law Project III*, 352 F.3d at 403. Professor Jonakait compellingly outlines the flaws in this judicial interpretation of the statute. For example, "[t]aken on its face [the decision] requires knowledge that could never be proved" because knowledge of the reasons for designation are entirely at the discretion of the Secretary of State, unknown to anyone outside "the inner counsels of the State Department." Jonakait, *supra* note 26, at 879–83.

Before the entire Circuit could review this position en banc,[69] Congress performed a legislative *deus ex machina*. Passage of the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004[70]—which adopted the language of *Humanitarian Law Project III*—legitimated convictions where the defendant knew of terrorist activities, but not of an FTO designation.[71] The en banc panel took its cue from Congress and declined to hear oral arguments on the mens rea portion of the prior decisions.[72]

Relying on the *Humanitarian Law Project* series of cases, most courts have avoided serious constitutional quandaries in material support prosecution.[73] The *Humanitarian Law Project* saga, then, is worthy of attention if for no other reason than that it highlights the relative dearth of juridical analysis on the material support statutes, which are among the most common lead charges in terrorism indictments since September 11.[74] It is time for closer scrutiny of—with an eye towards improving—the criminal code.

II. Changes to the Material Support Statutes

The material support statutes, while potentially useful tools, need improvement. The knowledge prong alone provides an excellent starting point for the changes to be made to §§ 2339A–C. The knowledge prongs of each section substantively state and prohibit the same thing: any contribution to a person or group that the defendant knows is a terrorist organization or commits terrorist acts. If Congress changed the requisite mens rea from knowledge—a mens rea that is confusing, but agreed upon—to recklessness, it would significantly increase the odds of securing convictions. As it stands, several scenarios exist that illustrate the deficiencies in the current standard.

A prime example of the flaw in requiring actual knowledge that a donee organization actually engages in terrorism is the government's case against the Holy Land Foundation for Relief and Development

69 *See* Humanitarian Law Project v. U.S. Dep't of State (*Humanitarian Law Project IV*), 382 F.3d 1154, 1555 (9th Cir. 2004) (granting rehearing en banc).

70 Intelligence Reform and Terrorism Prevention Act, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 3, 5, 6, 8, 12, 18, 22, 28, 31, 42, 46, 49, 50 U.S.C.).

71 *Id.* § 6603(c)(2), 18 U.S.C. 2332b (2006).

72 *See Humanitarian Law Project V*, 380 F. Supp. 2d 1134, 1138 (C.D. Cal. 2005).

73 *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 328 n.3 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005).

74 TRAC Report, *supra* note 9.

(HLF).[75] The HLF, founded in 1989, was the nation's (self-proclaimed) largest Muslim charitable foundation in 2001.[76] In December of that year, President Bush froze all HLF assets, declaring the organization a Specially Designated Terrorist (SDT) and a Specially Designated Global Terrorist (SDGT).[77] These "designations were based on information supporting the proposition that HLF was closely linked to Hamas."[78] HLF appealed the SDT/SDGT designations to the U.S. District Court for the District of Columbia.[79] The District Court conducted a "detailed review of the administrative record and reiterated the evidence on which the Treasury Department relied [in designating the] HLF as an SDGT."[80] The court concluded that there was

> ample evidence that (1) HLF has had financial connections to Hamas since its creation in 1989; (2) HLF leaders have been actively involved in various meetings with Hamas leaders; (3) HLF funds Hamas-controlled charitable organizations; (4) HLF provides financial support to the orphans and families of Hamas martyrs and prisoners; (5) HLF's Jerusalem office acted on behalf of Hamas; and (6) FBI informants reliably reported that HLF funds Hamas.[81]

Thus, the Treasury Department discerned ties between HLF and Hamas as early as 2001, a determination upheld by a district court and affirmed by the court of appeals.

After *Holy Land*, the estate of David Boim—an American killed by a Hamas bombing in Israel in 1996—sued the Foundation.[82] HLF, now a codefendant in the wrongful death suit, tried to relitigate the SDT/SDGT designation and the underlying evidentiary basis for it.[83] The U.S. District Court for the Northern District of Illinois examined

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75 *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).

76 *See id.* at 160.

77 *See id.* The President has authority to impound funds pursuant to his national security authority as well as the International Emergency Economic Powers Act (IEEPA), 50 U.S.C.A. §§ 1701–1707 (West 2003 & Supp. 2008). Additionally, just 12 days after September 11, President Bush issued an executive order that permitted him to freeze assets of those with ties to terrorists. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

78 *Holy Land*, 333 F.3d at 160.

79 *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

80 *Holy Land*, 333 F.3d at 161.

81 219 F. Supp. 2d at 69.

82 *See* Boim v. Quranic Literacy Inst., 340 F. Supp. 2d 885, 888–91 (N.D. Ill. 2004) (providing the procedural history of the case).

83 *See id.* at 902.

Holy Land, and determined that the issue "was not only actually litigated in the *Ashcroft* case, but it was necessary to the D.C. Circuit's decision to affirm the district court's dismissal of the bulk of HLF's complaint."[84] In short, the D.C. Circuit's ruling in *Holy Land* relied on "[t]he ample record evidence (particularly taking into account the classified information presented to the court *in camera*) establishing HLF's role in the funding of Hamas and its terrorist activities is *incontrovertible*."[85] Consequently, the court found that issue preclusion ought to apply.[86] The court also noted that FBI investigations showed HLF to be "the primary [domestic] fund-raising entity for HAMAS and that a significant portion of the funds raised by the [HLF] are clearly being used by the HAMAS organization."[87] This funding to Hamas provided the lynchpin in the wrongful death suit summary judgment, and the court—trebling the damages awarded by the jury—ordered HLF to pay $156 million to the Boim family.[88]

These successes against HLF notwithstanding, the knowledge loophole of §§ 2339B–C threatens future successful prosecutions. The government's largest material support case suffered a major setback in October, 2007, when the prosecution ended in mistrial.[89] *United States v. Holy Land Foundation* centered on the individual liability of HLF leaders, including Mufid Abdulqader and Shukri Abu Baker.[90] The government provided evidence of the group's ties to Hamas, including a conversation between the defendants and other Hamas sympathizers in Philadelphia in 1993.[91] While discussing their intent to derail the Israeli-Palestinian peace process at the meeting, defendant Baker declared "that the United States should be used as a

84 *Id.* at 903.

85 *Id.* (quoting *Holy Land*, 333 F.3d 156, 165–66 (D.C. Cir. 2003)) (emphasis added).

86 *See id.* at 166.

87 *Id.* at 893. The case remains in flux—while a panel of the Seventh Circuit vacated the District Court judgment, *see* Boim v. Holy Land Found. for Relief and Dev., 511 F.3d 707 (7th Cir. 2007), that decision was itself vacated by an en banc ruling June, 2008, *see id.*

88 *See* Rudolph Bush, *Hamas-Case Trial told of '96 Killing*, CHI. TRIB., Dec. 8, 2006, § 2, at 3.

89 *See* Adam Liptak & Leslie Eaton, *Financing Mistrial Adds to U.S. Missteps in Terror Prosecutions*, N.Y. TIMES, Oct. 24, 2007, at A16.

90 *See* Superseding Indictment at 7–12, United States v. Holy Land Found. for Relief & Dev., 445 F.3d 771 (5th Cir. 2006) (No. 3:04-CR-00240), 2005 WL 4902463.

91 *See id.* at 10–11. The FBI recorded the meeting under a Foreign Intelligence Surveillance Act (FISA) warrant. *See* Defendant's Reply Brief at 1, United States v. Holy Land Found., 445 F.3d 771 (5th Cir. 2006) (No. 3:04-CR-00240), 2006 WL 4679092 (describing evidence obtained under a FISA warrant).

fundraising platform to further [Hamas'] goals. The attendees acknowledged the need to avoid scrutiny by law enforcement officials in the United States by masquerading their operations under the cloak of charitable exercise."[92] After Hamas' designation as an FTO in 1996, the HLF changed tactics to promote their goals by encouraging members to use inflammatory language that would generate funds without directly mentioning the organization or terrorism.[93]

Despite this evidence, a jury first acquitted the defendants, and then three jurors recanted, resulting in a mistrial.[94] One juror remarked that the government's proffered connection between HLF and Hamas was too attenuated—a sure byproduct of the knowledge requirement.[95] Although the government will retry the case, the mistrial in the largest § 2339 case in history is a "'stunning setback for the government.'"[96]

How is such a turn of events possible? HLF's ties to Hamas came from a "massive administrative record"[97]—that included FBI tapes of HLF leaders *specifically pledging* support to Hamas.[98] That record, created by the Treasury Department, was reviewed by a federal district court judge and a panel of appellate judges. It was afforded full preclusive effect by another federal judge in a civil trial that produced a multimillion dollar damages award. Yet nine jurors in Texas thought the government's case was "'strung together with macaroni noodles.'"[99] Jurors are now "'demanding strict proof,'" a standard made difficult to fulfill by the statute's unnecessarily complex knowledge requirement.[100] In other words *United States v. Holy Land Foundation for Relief & Development* is precisely the kind of absurd result that

92 Superseding Indictment, *supra* note 90, at 9.

93 *See id.* at 14.

94 Liptak & Eaton, *supra* note 89.

95 *See id.* A juror noted that the prosecution "'danced around the wire transfers by showing us videos of little kids in bomb belts and people singing about Hamas, things that didn't directly relate to the case.'" *Id.* (quoting juror William Neal).

96 Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 23, 2007, at A1 (quoting Matthew D. Orwig, a former U.S. Attorney). Indeed, former Undersecretary of the Treasury Jimmy Gurulé, who authorized Holy Land Foundation's original SDT/SDGT designation in 2001, stated that the verdict represented "'the continuation of what I now see as a trend of disappointing legal defeats.'" *Id.*

97 Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003).

98 *See* Superseding Indictment, *supra* note 90, at 9.

99 Peter Whoriskey, *Mistrial Declared in Islamic Charity Case*, WASH. POST, Oct. 22, 2007, at A3 (quoting juror William Neal).

100 *See* Liptak & Eaton, *supra* note 89 (quoting former federal prosecutor Thomas M. Melsheimer).

the knowledge prong of the material support statutes permit, and why the material support law must be changed.[101]

A. Why Recklessness

Of the four general mental states required in criminality, recklessness has the widest applicability. The American Law Institute, in drafting the Model Penal Code (MPC), established recklessness as the presumed mens rea for all crimes unless otherwise stated.[102] In the MPC, a person who behaves recklessly "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that . . . [given the circumstances,] its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe . . . ."[103]

The precision of Section 2.02 guards against an interpretation of recklessness drawn from the estuaries of legal and nonlegal language.[104] The "reckless" behavior of everyday parlance cannot serve as a basis for a conviction. Instead, criminal recklessness requires that a defendant disregard a risk that no reasonable person would have ignored.[105] Use of recklessness as a mens rea also serves to prevent the "criminaliz[ation of] otherwise innocent conduct."[106] Further, it places potential donors on guard and protects against the law's effect being "frustrated by knowing winks and nods."[107]

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101 This conclusion rests on the belief that Congress has conclusively spoken on the matter, and cases like *Humanitarian Law Project I* through *V* have exhaustively established knowledge of the donee's status as an FTO or of their terrorist activities as the mens rea. There is no purpose requirement, a fact borne out by case law and the explicit text of the statutes. *See supra* Part I.

102 MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985).

103 *Id.* § 2.02(2)(c).

104 While examination of both the legal definition and the vernacular use of a word provides context in most situations, in this instance it would confuse matters where the two usages significantly depart from one another.

105 The MPC descriptions of both recklessness and negligence use the "reasonable person" standard. The important distinction between the two is that the reckless actor disregards a risk no reasonable person would have disregarded, while a negligent actor is simply unaware of a risk that a reasonable person would have foreseen. *See generally id.* §§ 2.01–2.04 (describing the distinction between the various mentes reae).

106 United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).

107 Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) (explaining how overly strict statutes and constructions permit clever defendants to evade prosecution).

The Model Penal Code comments develop the knowledge-recklessness distinction. In circumstances involving knowledge of a material fact or circumstance, it is impossible to determine precisely what a defendant knew and when he knew it. Instead, the distinction between "knowing" acts and "reckless" acts comes in gradations of cognizance.[108] "Knowledge" usually requires "proof of notice of high probability,"[109] which is by no means certitude. Recklessness, on the other hand, "involves conscious risk creation . . . . [A] state of awareness is involved, but the awareness is of risk, that is of a probability less than substantial certainty."[110] The "contingency" element reduces the degree of awareness needed to commit the underlying offense.

At first glance, knowledge as mens rea has normative arguments in its favor. As a higher mens rea requirement, knowledge of terrorist acts guards against prosecution of the low-hanging fruit—those who recklessly donate. It also secures convictions against those who understand whom and what their money goes to support. Nevertheless, the fear of improper prosecutions is simply unsubstantiated by the data. Most of the material support cases end in pleas to other charges or acquittal, indicating that the current statutes are far from a liability trap used by United States Attorneys.[111] Moreover, the "low-hanging fruit" defendants are precisely those who should be prosecuted, because their contributions fund suicide bombings just as surely as those who knowingly contribute. An argument about convicting the guilty certainly has merit, but that would not change under a recklessness standard.

The strongest arguments for the recklessness standard are pragmatic ones. Initially, terrorists and their networks rely heavily on support from abroad to finance their operations.[112] The United States must take the necessary steps to forestall terrorist financing, notably by targeting the supply side—donors. Further, the potential for avoiding liability is substantial under the current scheme of knowledge. By eliminating the defense of innocence through ignorance, prosecutors would be free to secure convictions of those who hide behind the increasingly layered and diffuse terror-funding networks. As a result,

108 *See* MODEL PENAL CODE § 2.02 cmt. 9, at 248 (Official Draft and Revised Comments 1985).

109 *Id.*; *see also id.* n.42 (explaining that the first draft of the Model Penal Code based knowledge on "substantial probability," but that the drafters changed the wording to "high" probability to avoid too low of a threshold for guilt).

110 *Id.* § 2.02 cmt. 3, at 236.

111 *See* TRAC Report, *supra* note 9.

112 In the late 1990s, for example, Osama bin Laden poured out millions of his money just to start the fledgling al Qaeda network. WRIGHT, *supra* note 44, at 222–29.

changing the statutes to require reckless knowledge eliminates the problems of acquittals in cases like *Holy Land Foundation for Relief & Development*, where the "Philadelphia Meeting" would have been sufficient to sustain a conviction. Additionally, by expanding terror-support liability, prosecutors gain a valuable asset in plea bargains negotiated with middlemen and American representatives of terrorists.[113]

Changing the mens rea requirement has an important channeling function as well. Aside from the prophylactic effect of broader liability—that would forestall some donors who hoped to donate in willful blindness—a changed mental state element would encourage due diligence and careful investigation by donors. There are thousands of deserving—and legitimate—humanitarian organizations in the United States and abroad with ties to the Middle East and the developing world. These organizations would not suffer under a new regulation, nor would their supporters. Indeed, by forestalling innocent contributions to terror-controlled front organizations, the legitimate groups would receive more funds.

With these benefits in mind, Congress should change the current statutes to reflect the needs and the reality of the present situation. With the appropriate mens rea and other changes, the new statutes would read:

> 18 U.S.C. § 2339A (Proposed) (Originally § 2339A–B)
>
> (a) PROHIBITED ACTIVITIES.—
>
> (1) UNLAWFUL CONDUCT.— Whoever knowingly provides material support or resources to a foreign terrorist organization, a person who plans to commit or has committed terrorism, or any person(s) or group(s) under the direction or control of a foreign terror organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 25 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must
>
> (i) disregard a serious or known risk that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989), or

113 As RICO predicate offenses, the material support statutes also convey significant liability on enterprises and corporations. *See* 18 U.S.C. § 1961 (2006) (listing the material support provisions as RICO predicate acts).

(ii) know that the organization or person receiving material support engages in or has engaged in activities that violate § 2339B of this title.

(2) PURPOSE UNNECESSARY.—To violate this paragraph, a person need not purposely promote or further the illicit, illegal, or unlawful ends of a terrorist organization.

18 U.S.C. § 2339B (Proposed) (Originally § 2339C)

(a) OFFENSES.—

(1) IN GENERAL.—Whoever, in a circumstance described in subsection (b), by any means, directly or indirectly, recklessly provides or collects funds with the purpose that such funds be used, in full or in part, by a person or persons who engage in, have engaged in, or have purpose to carry out any of the following—[Remainder of the original § 2339C remains].

The alterations merge the current §§ 2339A and 2339B.[114] Section 2339B liability now depends on whether the defendant disregarded a serious risk that the donee was an FTO or that it engaged in terrorism, regardless of the defendant's purpose for how the support would be used. The proposed Section 2339A(a)(1)(ii) closes a loophole where contributors provide support to a third party clearinghouse, and not directly to terrorists. Proposed Section 2339B would remove any purpose requirement for defendants who provide or collect funds,[115] and incorporates a broader category of proscribed target acts.[116] Moreover, because it preserves the provisions of the International Convention for the Suppressing of the Financing of Terrorism, the United States would remain in compliance with the treaty.[117] Indeed, the proposed changes reflect the notion that the Convention

114 Because the proposed statutes merge all terror activities and groups into one category, the list of terrorist activities in the original § 2339A becomes redundant. As such, it is preserved implicitly in the proposed change. Section 2339A(1)(a) also captures the so-called "Lone Wolf" terrorist—the person who acts without any ties to terror networks—by criminalizing support to any person who plans to commit or has committed acts of terrorism.

115 This position is consistent with Congress' view on the danger of providing any funds to a terrorist group, regardless of how the money is used. Because funds are fungible, money spent on legal purposes still frees up other assets to be used on illicit purposes, and thus still benefits terrorism. *See Humanitarian Law Project II*, 205 F.3d 1130, 1132–36 (9th Cir. 2000) (explaining that purpose is irrelevant in a material support prosecution, because all contributions to terrorists support the "grisly" aims of terrorism and noting Congress' specific finding that no donation to a terror group is ever innocent of the resulting violence).

116 The domestic ramifications of these changes are addressed *infra* Part IV.

117 *See supra* note 48 and accompanying text.

represents a floor, and not a ceiling, of liability for terrorism prevention.

To clarify how the revised statutes would be an improvement, one need look only to the *United States v. Holy Land Foundation for Relief & Development* case.[118] The material support statutes, as amended, could have altered the outcome of that trial. For example, rather than proving that Abdulqader knew that Hamas was a terrorist organization (or that it was a designated FTO), the U.S. Attorney would only have needed to prove that the defendants disregarded a substantial risk of those connections. Thus, the "Philadelphia Meeting"[119] was likely evidence of a substantial risk that donations to the HLF would go to terrorists, and no reasonable person would disregard such a risk.

Detractors of more rigid anticontribution rules raise a panoply of objections to increasing liability. As the court in *Afshari v. United States*[120] noted, "one man's terrorist is another man's freedom fighter," or so the argument goes.[121] Clausewitz's axiom that war is the extension of politics by "other means" tends to legitimate the winners in combat, rather than the virtuous.[122] Though indulging in historical counterfactuals is an entertaining exercise—and a useful one for defense attorneys—it does little to provide an understanding of how to eradicate funding networks for terrorists. Along those lines, debating the philosophical underpinnings of recklessness may serve its purpose as a determinant of what level of liability Congress should impose for certain behavior. Yet discussion must eventually give way to action.

Moreover, this Note does not advocate a liability trap for the unwary.[123] The justification for recklessness is not to catch the unwitting contributor to an organization that hides its acts of terror. For example, assume that *A* contributes to *B*, a group that solicits funds for victims of violence in Belfast. *A* does not know that *B* is a front for *C*, a radical terrorist organization committed to a violent resolution of the Troubles in Northern Ireland. *A* would be guilty of no crime

118 *See supra* notes 89–101 and accompanying text.

119 Superseding Indictment, *supra* note 90, at 10–11.

120 426 F.3d 1150 (9th Cir. 2005).

121 *Id.* at 1155.

122 Indeed, *Irgun*—the radical Zionist insurrection led by Menachem Begin—engaged in activities that were terroristic. *See* JOSEPH HELLER, THE BIRTH OF ISRAEL, 1945–1949, at 270–72 (2003) (describing the bombing of the King David Hotel in Jerusalem and the *Irgun* bombing campaign in 1946–48).

123 On the contrary, avoiding conviction of the innocent should be a top priority for both scholars and prosecutors. Instead, this Note attempts to curb exploitation of loopholes by defendants who are smart enough to say that they "just didn't know."

under the proposed changes to § 2339B, provided *A* did not disregard a risk no reasonable person would have ignored. Thus, if *B* mentioned ties to *C*, or espoused the violent ideology of *C*, a reasonable person would have—at least—investigated that potential relationship.

Again, mere negligence in these circumstances will not suffice. Even if a reasonable person *should* have known that there were ties to a terrorist group, this would be insufficient to secure a conviction.[124] For example, assume *A* is an unwitting contributor to a group like Hamas.[125] *B*, a fundraiser for Hamas, tells *A* the name of the organization and that any funds would go towards building a hospital.[126] While many people have heard of Hamas and know of its campaign of suicide bombings in Israel, *A*'s ignorance is not ipso facto criminal recklessness. Instead, the government would need to prove that *A* was aware of a substantial risk that Hamas engaged in terror, and still contributed.

These proposed changes would have little cognizable effect on innocent contributors. Defendants have a built-in defense that they were simply unaware of the risks associated with their behavior. Again—and in spite of the recurrence of the "reasonable person" language—criminal negligence would be insufficient to convict under the new regime. It is the act of *disregarding* a substantial risk that creates criminal liability under the proposed statutes, not awareness of the existence of the risk.

The result of these changes is that guilty contributors cannot hide behind a difficult mens rea requirement to escape liability, but innocent contributors still avoid conviction. Indeed, the statute as amended gives improved effect to Congress' original aim—the elimination of sources of funding for terror.

B. The Due Process Critique

A potential criticism of the proposed material support statute focuses on potential due process considerations.[127] Some commentators suggest that the current statutes violate the standards for personal

124 *See* MODEL PENAL CODE § 2.02 (Official Draft and Revised Comments 1985) (explaining the difference between negligence and recklessness).

125 For further examination of Hamas and its history, see MATTHEW LEVITT, HAMAS (2006).

126 Hamas, in fact, does build hospitals and provide social services. *See id.* at 3–6.

127 *See Humanitarian Law Project III*, 352 F.3d 382, 397 (9th Cir. 2003), *vacated*, *Humanitarian Law Project IV*, 393 F.3d 902 (9th Cir. 2004) (noting that § 2339B implicates due process concerns).

guilt set forth in *Scales v. United States*.[128] The argument proposes that by criminalizing provision of material support without a guilty purpose, §§ 2339A–C violations are, in the Court's words in *Scales*, "an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions."[129] For example, one commentator posits that the statutes would be unconstitutional without establishing that the "relationship between . . . [the proscribed conduct and international terrorism] is sufficiently substantial to justify imposing liability without requiring culpability."[130] The argument against these apparent flaws would apply a fortiori to the statutes as amended, given that the changes would likely increase the conviction rate.

From the outset, this critique ignores a key facet of the *Humanitarian Law Project* decisions and §§ 2339A–C. There *is* a culpability requirement—namely, contributing to a group that the donor knows is an FTO or that it engages in terror.[131] In *Humanitarian Law Project III*, the Ninth Circuit states that "*Scales* established the test, stated above, to determine whether holding a person culpable for his or her *relationship* to an organization is consonant with due process; *Scales* analyzed the *relationship* between a person's '*status or conduct*' with an organization . . . ."[132] As the Supreme Court itself said in *Scales*, its decision "prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, *unaccompanied by any significant action* in its support or any commitment to undertake such action."[133] The material support statutes are predicated on the act of donation, not mere agreement or membership without adherence to the unlawful objective.[134] Changing the required mens rea to recklessness has no effect on the actus reus: donation.

To quell those concerns further, the explicitly stated mens rea requirement satisfies *Scales* as well. Defendants' due process rights are "duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent."[135] Because the proposed

128 367 U.S. 203, 225–27 (1961). For an explanation of the due process critique, see Jonakait, *supra* note 26, at 884–902.

129 *Scales*, 367 U.S. at 227.

130 Pendle, *supra* note 26, at 798.

131 *Humanitarian Law Project III*, 352 F.3d at 396–97 (noting that what the statute criminalizes is providing "'material support' to a designated organization that engages in both humanitarian and unlawful activities").

132 *Id.* at 395.

133 *Scales*, 367 U.S. at 228 (emphasis added).

134 *See, e.g.*, *Humanitarian Law Project III*, 352 F.3d at 395–97 (explaining the relevance of conduct in a *Scales* analysis).

135 *See Scales*, 367 U.S. at 228.

Sections 2339A–C each prescribe a recklessness requirement, they avoid the associational strict liability that *Scales* prohibits.[136] The "guilty knowledge" mentioned in *Scales* should be read as a requiring a mens rea in general, and not one in particular, especially when viewed in the context of the case. The Court went to great lengths to determine whether the Smith Act,[137] which prompted *Scales v. United States*,[138] prohibited membership in the Communist Party as a matter of strict liability or because of guilty participation in illicit activities.[139] It concluded that some degree of mens rea was necessary to sustain a conviction, and relied on the state of mind Congress explicitly chose in the statute—knowledge.[140] There is no reason to believe that the Court would not have similarly upheld the Smith Act if it had based liability on reckless behavior.[141]

C. The Expressive Association Critique

The proposed statutes also potentially implicate rights of expressive association. The right to associate with a group "overlap[s] and blend[s]"[142] with the freedom of speech guaranteed by the First Amendment.[143] Association is a "fundamental element of personal liberty,"[144] and the right to associate extends to unpopular positions and groups.[145] Adherents to extreme ideologies fall within the ambit of the First Amendment, including those who support the ends of ter-

136 *See id.* at 226–28; *see also Humanitarian Law Project III* at 405–08 (Rawlinson, J., dissenting) (distinguishing between active material support to terror groups and mere association or theoretical support).

137 18 U.S.C. § 2385 (2006).

138 *Scales*, 367 U.S. at 205.

139 *See id.* at 207–19.

140 *Id.* at 224–28.

141 One commentator has suggested that the statutes be revised to include a reckless purpose element as a curative measure to the potential due process infirmity of § 2339B. *See generally* Pendle, *supra* note 26. Because those due process concerns are unfounded, any change to the purpose element would only serve to make prosecutions *more* difficult. In other words, moving from no purpose requirement (the present standard) to reckless purpose (the proposed change) does not rectify any constitutional infirmity, it does not resolve the *Holy Land Foundation for Relief & Development* conundrum evinced above, and it unnecessarily increases the burden of proof for the government.

142 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (expounding on the ties between association and free speech).

143 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

144 Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

145 *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (noting that expressive association is "'especially important in preserving political and cultural

rorism.[146] Association may also include monetary support for an individual or group—that also receives First Amendment protection.[147] In the political advocacy context, the Supreme Court stated that "[m]aking a contribution, like joining a political party, serves to affiliate a party with a candidate."[148] Some scholars posit that "contributing resources to any organization is an act of affiliation with that group, implicating the right of association."[149]

United States v. O'Brien[150] provides the framework for differentiating between permissible and criminal forms of speech. *O'Brien* addressed the symbolic speech of burning a draft registration certificate in violation of a federal statute.[151] The Court rejected O'Brien's demand for a sweepingly broad concept of protected speech.[152] Instead, it adopted a four-part test to determine the constitutionality of a statute—a test now referred to as the "intermediate scrutiny" standard.[153] Chief Justice Warren set out the test as follows:

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diversity and in shielding dissident expression from suppression by the majority'" (quoting *Roberts*, 468 U.S. at 622)).

146 The importance of the means-ends distinction will become apparent upon examination of the relevant material support case law. For an explanation of the distinction between "mere association" and material support, see *Humanitarian Law Project II*, 205 F.3d 1130, 1133 (9th Cir. 2000), *aff'd in part, vacated in part sub nom.* Humanitarian Law Project v. U.S. Dep't of Justice (*Humanitarian Law Project IV*), 393 F.3d 902 (9th Cir. 2004), *aff'd sub nom.* Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007) (explaining that one may be a member of a designated terrorist group without violating the material support statutes).

147 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (holding that donations to political groups constitute expression).

148 *Id.* at 22.

149 *See* Jonakait, *supra* note 26, at 888; *see also* ROBERT D. PUTNAM, BOWLING ALONE 338 (2000) (cited in Jonakait, *supra* note 26, at 885 n.77).

150 391 U.S. 367 (1968) (upholding a conviction of a Vietnam war protester who destroyed his draft card on the grounds that his actions were not protected speech).

151 *See id.* at 369–70. O'Brien, a war protester, was charged under the Universal Military Training and Service Act, 50 U.S.C. app. § 462(b) (1964), which sanctioned anyone "'who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any [draft registration] certificate.'" *O'Brien*, 391 U.S. at 370.

152 *See O'Brien*, 391 U.S. at 369–70. As the Court put it:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.

Id. at 376.

153 *Id.* at 377. While the *O'Brien* formula was not the first iteration of intermediate scrutiny, it has become a juridical standard.

> [G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[154]

The Ninth Circuit performed this *O'Brien* analysis in *Humanitarian Law Project II*.[155] Judge Kozinski began by pointing out that "expressive *conduct* receives significantly less protection than pure speech."[156] The key question in *Humanitarian Law Project II* was whether AEDPA was narrowly tailored enough to pass constitutional muster.[157] Because the issue was one of both foreign affairs and national security, the court afforded Congress "wide latitude in selecting the means to bring about" its policy preferences.[158]

In light of that deference, Congress' findings on the nature of support to terrorism are crucial to future applications of the *O'Brien* analysis to the revised statutes.[159] Monies sent to terrorists—for any purpose—may be used for illicit ends. For example, while donors may wish to support the hospital-building efforts of Hamas, the money they provide "frees up resources that can be used for terrorist acts."[160] Congress recognized this fungibility problem in its findings before passing AEDPA, noting, "'foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that [terrorist] conduct.'"[161] Given both the national security implications of material support to terrorists and the current statutes' favorable judicial history, there is no reason to believe that the revised statutes would not survive intermediate scrutiny. By ensuring criminal punishment only for those

154 *Id.*

155 *See Humanitarian Law Project II*, 205 F.3d 1130, 1135 (9th Cir. 2000).

156 *Id.* at 1134–35; *see also* Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." (citing *O'Brien*, 391 U.S. at 376–77)).

157 *Humanitarian Law Project II*, 205 F.3d at 1136. The Court quickly dispensed with the other three elements of the *O'Brien* analysis, summarizing the issue in just one paragraph. *Id.* at 1135.

158 *Id.* at 1136.

159 *See id.*

160 *Id.*

161 *Id.* (quoting Pub. L. No. 104-132, § 3031(a)(7), 110 Stat. 1214, 1247 (codified as amended at 18 U.S.C. § 2339B (2006))). Indeed, armed with these determinations, the Ninth Circuit upheld Congress' regulation of contributions in the Act. *See id.*

who engage in criminally reckless behavior, the new statutes avoid a direct—and impermissible—restriction on expression.[162]

III. The Domestic Terror Crisis

The third portion of this Note will focus on revising the material support statutes to reflect the changing nature of terrorism.[163] The proposed changes to the material support statutes rectify the gap in current law that permits terrorists from the United States to escape liability.

The words "September 11" have become a political mantra in the United States, spoken early and often in electoral cycles to warn alternately of the dangers of terrorism or chastise those who failed to foresee those dangers. A more appropriate treatment of that date is recognition of its paradigmatic significance in the American understanding of terrorism. In the aftermath of those attacks, the federal government clamored to erect a workable antiterror framework.[164] The majority of this reaction addressed the problem of "keeping the terrorists out," something we failed to do before September 11. Among the hijackers, the Saudi Arabians, for example, had little difficulty gaining entry to the United States.[165]

Because the hijackers were all foreigners, the idea that all terrorists must also come from outside the United States seeped into the American consciousness. The amorphous and international al Qaeda bore principal or direct responsibility for most of the preceding terror

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162 This analysis covers the potential claim of "political speech." While nearly any act can have some communicative or political overtones, this cannot justify funding terror. Put another way, while John Wilkes Booth's assassination of President Lincoln was obviously political, Dr. Samuel Mudd could not disclaim liability for helping the assassin on the basis of expressing his approval for the Confederacy.

163 The following Part addresses issues of Islamic extremism and uses Arabic terms frequently throughout. For purposes of clarity, when referring to the particular strain of fundamentalist Islam to which most terror groups ascribe, I use the term "Salafism" rather than the more popular "Wahhabbism." Further, when the term "jihad" is used, it refers to the Salafist notion of holy war against the West, secularism, and other Muslims (a notion known as *qital*), as opposed to the more orthodox view of an internal struggle for self-perfection among individual Muslims. For an excellent summary of Salafism, its roots, and its interaction with mainstream Islam, see Wright, *supra* note 44, at 72–73.

164 *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 15, 18, 22, 28, 31, 42, 49, 50 U.S.C.) (instituting major reforms of American national security policy and law enforcement).

165 Wright, *supra* note 44, at 349.

attacks on American interests abroad.[166] Consequently, Congress framed the antiterror issue in terms of global security and legislated accordingly.[167] This preoccupation seemed justified given the contemporary state of American terrorism law. Senator Jon Kyl noted at the time that "[i]t will probably surprise the Members of [the Senate] a great deal to know that, under current law, a terrorist alien is not considered either inadmissible to, or deportable from, the United States."[168] Passage of the USA PATRIOT Act, changes in immigration law, and the material support statutes reflected Congress' commitment to fighting "global" terror.

Absent from this policy overhaul was any serious discussion of domestic terror.[169] To understand the phenomenon of the dearth of legislative or executive attention to homegrown terror, I offer a survey of current United States policy.

A. The Government's Myopia on Domestic Terror

Ignoring purely domestic terror begins at the top. The National Security Strategy (NSS) of the United States "explains the strategic underpinning of [the President's] foreign policy."[170] More than this, the NSS reflects the attitude of the administration towards all matters affecting the security of American persons and interests.[171] The NSS approach to global security and terrorism is decidedly ideological, explaining the rise of domestic terror as follows:

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166 *See generally id.*

167 *See* 147 CONG. REC. 20,732 (2001) (statement of Sen. Kyl) ("[T]he U.S. government will need additional tools to keep terrorists out of the country and, once they are in the country, find them and remove them. That means, among other things, eliminating the ability of terrorists to present altered international documents, and improving the dissemination of information about suspected terrorists to all appropriate agencies.").

168 *Id.*

169 In the seven years since September 11, the concept of American domestic terrorism has received only the barest of attention, in the form of the Violent Radicalization and Homegrown Terrorism Prevention Act of 2007. H.R. 1955, 110th Cong. (2007). The Act does not purport to tackle the emergence of homegrown terror, but rather to fund academic research on the topic. *See id.*; *see also infra* note 210 (describing features of the legislation). This unenacted bill represents the sole legislative effort of the federal government in combating homegrown terrorism.

170 Stephen Hadley, Nat'l Sec. Advisor, Remarks on the President's National Security Strategy (Mar. 16, 2006), *available at* http://www.state.gov/r/pa/ei/wh/63257.htm (last visited Nov. 11, 2008).

171 *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2006), http://www.whitehouse.gov/nsc/ns/2006/nss2006.pdf [hereinafter NSS]. The present strategy conveys policy positions on immigration, commerce, terrorism, and the domestic security apparatus, among others.

> Democracies are not immune to terrorism. In some democracies, some ethnic or religious groups are unable or unwilling to grasp the benefits of freedom otherwise available in the society. Such groups can evidence the same alienation and despair that the transnational terrorists exploit in undemocratic states. This accounts for the emergence in democratic societies of homegrown terrorists such as were responsible for the bombings in London in July 2005 and for the violence in some other nations.[172]

The proffered solution is "[t]he advance of freedom and human dignity through democracy."[173] No pragmatic solution is presented.

This ideological—as opposed to legislative or prosecutorial—approach to terrorism carries over to the National Strategy for Homeland Security (NSHS), the domestic counterpart to the NSS.[174] The NSHS characterizes domestic terrorism as a phenomenon driven by radicalization.[175] While this correctly grasps the roots of domestic terror, it provides no working framework for how to address the problem, only offering to continue "efforts to defeat this threat by working with Muslim American communities that stand at the forefront of this fight."[176]

Domestic security agencies fare little better under any scrutiny. The FBI, for example, is the vanguard agency for counterterrorism.[177] Director Robert Mueller testified before Congress in September 2007 that the Bureau considered "homegrown terrorists or extremists, acting in concert with other like-minded individuals, or as lone wolves,

172 *Id.* at 11.

173 *Id.*

174 *See* HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY (2007), http://www.whitehouse/gov/infocus/homeland/nshs/NSHS.pdf [hereinafter NSHS].

175 *See id.* at 9–10 ("The United States also is not immune to the emergence of homegrown radicalization and violent Islamic extremism within its borders. The arrest and prosecution inside the United States of a small number of violent Islamic extremists points to the possibility that others in the Homeland may become sufficiently radicalized to view the use of violence within the United States as legitimate. While our constitutional protection of freedom of religion, history of welcoming and assimilating new immigrants, strong economic opportunities, and equal-opportunity protections may help to mitigate the threat, drivers of radicalization still exist.").

176 *Id.* at 10.

177 The FBI National Security Branch describes its mission as "lead[ing] and coordinat[ing] intelligence efforts that drive actions to protect the United States." *See* Fed. Bureau of Investigation, Nat'l Sec. Branch, Mission Statement, http://www.fbi.gov/hq/nsb/nsb_mission.htm.

[to be] one of the gravest domestic threats we face."[178] One year earlier, Deputy Director John Pistole pointed out that the majority of the terrorism cases in the United States involved material support, a position borne out by empirical research.[179] Nevertheless, Director Mueller notes that many of the cases under review "may have ties overseas."[180] Similarly, the National Security Branch (NSB) of the FBI focuses its counterterrorism efforts on international terrorism entering the United States, though it does address the burgeoning domestic terrorist threat.[181] The Department of Homeland Security, on the

178 *Terrorist Threat Six Years After 9/11 Before the S. Comm. on Homeland Security & Governmental Affairs*, 110th Cong. 2 (2007) [hereinafter Homeland Security Comm. Testimony] (testimony of Robert S. Mueller, Director, Fed. Bureau of Investigation).

179 *See* TRAC Report, *supra* note 9.

180 *See* Homeland Security Comm. Testimony, *supra* note 178, at 2 (testimony of Robert S. Mueller, Director, Fed. Bureau of Investigation).

181 *Current and Projected National Security Threats Before the S. Select Comm. on Intelligence*, 110th Cong. 18 (2007) (testimony of Robert S. Mueller, Director, Fed. Bureau of Investigation). Nevertheless, aside from a brief recitation of the dangers of radicalization, the NSB describes homegrown terror as follows:

> While much of the national attention is focused on the substantial threat posed by international terrorists, we must also contend with an ongoing threat posed by domestic terrorists based and operating strictly within the United States. Domestic terrorists, motivated by a number of political or social issues, continue to use violence and criminal activity to further their agendas.
>
> Despite the fragmentation of white supremacist groups resulting from the deaths or the arrests of prominent leaders, violence from this element remains an ongoing threat to government targets, Jewish individuals and establishments, and non-white ethnic groups.
>
> The militia/sovereign citizen movement similarly continues to present a threat to law enforcement and members of the judiciary. Members of these groups will continue to intimidate and sometimes threaten judges, prosecutors, and other officers of the court.
>
> . . . .
>
> Animal rights extremism and eco-terrorism continue to pose a threat. Extremists within these movements generally operate in small, autonomous cells and employ strict operational security tactics making detection and infiltration difficult. These extremists utilize a variety of tactics, including arson, vandalism, animal theft, and the use of explosive devices.

Id.

Despite this admission, the majority of the Bureau's resources are devoted to avoiding international terrorism from coming to the United States. For example, since 2002, the FBI has staged four major terror-attack simulations involving all levels of local, state, and federal officials known as TOPOFF (for "Top Officials") 1 through 4. *See id.* Every one has focused solely on international terrorists coming into the United States. *See* Dep't of Homeland Sec., TOPOFF: Exercising National Prepared-

other hand, offers no statement on domestic terror groups, adopting the "keep them out" strategy.[182]

Even those who recognize the danger of homegrown terror offer no solutions to the problem. John Scott Redd, the director of the National Counterterrorism Center (NCTC), explained in the summer of 2007 that the "terrorist threat the United States faces includes both al-Qaeda-directed plotting as well as al-Qaeda-inspired, 'homegrown' terrorists."[183] Despite this admission, Redd goes on to say that there is "no magic organizational bullet" to solving the problems of domestic terror.[184] Director Mueller's testimony to Congress is similarly bereft of suggestions on how to tackle domestic terror. Instead, his remarks reflect the FBI's institutional preoccupation with terrorism as a foreign-born problem.[185]

There seems to be no shortage of words about the homegrown terror problem. Conservatives, progressives, technocrats, and bureaucrats all acknowledge the existence of a looming threat. Few, however, have proffered a potential answer, and those few do not include members of Congress or the administration.[186] To be fair, assigning blame is simple and crafting solutions is not. Nonetheless, the current government posture both ossifies the belief that terrorists come from abroad and offers no policies or statutory revisions to combat homegrown terrorism. Indeed, the only pending revisions to the material

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ness (Apr. 21, 2008), http://www.dhs.gov/xprepresp/training/gc_1179350946764.shtm.

182 *See* Homeland Security Comm. Testimony, *supra* note 178, at 2 (testimony of Michael Chertoff, Secretary, U.S. Dep't of Homeland Sec.) ("A key priority for our Department remains keeping dangerous people from entering the United States to engage in criminal activity or to carry out terrorist attacks. If we can prevent dangerous people from infiltrating our borders then we have successfully dismantled a large part of the threat.").

183 John Scott Redd, Editorial, *Yes, We Do Have a Clue*, WASH. POST, July 13, 2007, at A12.

184 *Id.*

185 *See supra* notes 178–81 and accompanying text. This is not to suggest that the FBI should direct its attention away from international terrorists like al Qaeda and their affiliates. Rather, this Note advocates providing the FBI, the Department of Homeland Security, and the Department of Justice the tools to tackle homegrown terrorism without needing to prove a potentially nonexistent foreign connection under the (very useful) material support statutes.

186 *See, e.g.*, Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007) (exploring conspiracy law as a tool to combat terror). Professor Chesney's article does not provide a solution to the structural flaws present in the material support statutes, however.

support statutes are sentencing increases.[187] These laws, though a potent tool for prosecutors, suffer the same myopic infirmity as the government's general approach to terror—namely, they require an international element.[188]

The principal danger with this international focus is that it has not adapted to the changing shape of either foreign or domestic terrorism. A widely acclaimed survey of domestic extremism published by the New York Police Department (NYPD Report) directly addresses the issue and explores the growing problem of fundamentalism and radicalization in the United States.[189]

The NYPD Report traces the trajectory of radicalization, from "pre-radicalization" through "jihadization" and attack.[190] Moreover, it provides in-depth analysis of five terror attacks in Europe since September 11 as well as three foiled attacks in the United States during the same period.[191] As a general rule, the report finds that there is no talismanic formula for determining who will follow the trajectory to a grisly end and who is merely testing the ideological waters. Its general portrait, though, is a "[m]ale Muslim . . . [u]nder the age of 35," from the middle class, educated, and easily categorized as "[u]nremark-

187 *See, e.g.*, H.R. 3156, 110th Cong. § 614(a) (2007); S. 1320, 110th Cong. (2007) (increasing penalties for material support from fifteen to forty years).

188 *See* 18 U.S.C. § 2339B(a)(1) (2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization . . . ."); *id.* § 2339C(b) (establishing jurisdiction over terrorists acts committed in the United States by foreign persons and over acts committed outside the United States by U.S. nationals or "habitual residen[ts]" of the United States); *id.* § 2339D(a) (forbidding any person from obtaining "military-type training from or on behalf of any organization designated . . . as a foreign terrorist organization").

189 MITCHELL D. SILBER & ARVIN BHATT, N.Y. POLICE DEP'T INTELLIGENCE DIV., RADICALIZATION IN THE WEST (2007), http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf. The report focuses on Islamic fundamentalism at the expense of other forms of domestic extremism, like the Aryan Nation or some animal rights groups. Nevertheless, those groups follow patterns of behavior known and documented by the government, while the threat of the homegrown jihadi is a new phenomenon in the United States.

190 *Id.* at 19. The four stages proffered by the NYPD begin with "pre-radicalization," an analysis of the environment in which potential extremists live. *Id.* at 22. Next comes "self-identification," which "marks the point where the individual begins to explore [fundamentalist] Islam." *Id.* at 30. The following step is "indoctrination," where the individual "progressively intensifies his beliefs, wholly adopts jihadi-Salafi ideology and concludes, without question, that the conditions and circumstances exist where action is required to support and further the Salafist cause." *Id.* at 36. Finally, the radicalization consummates in "jihadization," where individuals "accept their individual duty to participate in jihad and self-designate themselves as holy warriors or mujahedeen." *Id.* at 43.

191 *See generally id.*

able."[192] If this taxonomy seems imprecise, it is because it seems to describe the majority of Muslim men in America—a point that critics of the report would not be hesitant to raise.

Despite some imprecision, the report as a totality is a useful resource for chronicling the transition from "unremarkable" citizen to jihadi. For example, each of the five European case studies paints a similar picture of this process.[193] Most of the attackers came from middle- to upper-middle class families and nearly all were citizens or second-generation immigrants in their respective countries.[194] With the exception of the Hofstad Group, the attackers normally had no criminal records and in some cases were noted for their talents in the workplace and their amicability.[195] Many did not appear to have assimilation problems, like Jamal Zougam—one of the Madrid bombers—who "was described as handsome, likable and one of the more popular youths among the Moroccan community living in Madrid . . . . [He] seemed to be perfectly integrated into Spanish society."[196] Most striking of all, perhaps, is the apparent lack of religiosity among the plotters until shortly prior to the attacks.[197] These men uniformly paint a picture of swift change from docile to deadly.

The important query is whether this process occurs in the United States as well. The report acknowledges the comparative lack of "rich details" in the American cases but nevertheless finds a similar pattern of radicalization among U.S. citizens.[198] The homegrown terrorists studied by the NYPD were mostly middle class and well educated.[199]

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192 *Id.* at 23.

193 The attacks and plots chronicled are the Madrid commuter train bombings of March, 2004, the Hofstad terror cell in the Netherlands that beheaded Theo van Gogh, the July 7th (7/7) London Tube bombings, a 2005 Australian terror plot against critical infrastructure and government posts, and the so-called "Toronto 18," a group of Canadians who plotted to attack infrastructure and to behead Canadian Prime Minister Stephen Harper. *See id.* at 21–53.

194 *See id.* at 23–28.

195 *See id.* at 24–27.

196 *Id.* at 24.

197 Most of the 7/7 bombers attended secular British schools and were not overtly religious at all. *Id.* at 26. Nearly half of the Australians were not practicing Muslims until eighteen months before the planned attacks, similar to the majority of the Toronto 18, who were either not "particularly pious" or "had not practiced Islam until they started the radicalization process." *Id.* at 28 (citing *Anti-Terror Sweep: The Accused*, NAT'L POST (Ontario), June 5, 2006, at A6).

198 *See id.* at 56. The three case studies are of the "Lackawana Six" from upstate New York, the "Portland Seven" from Oregon, and several plotters from Northern Virginia. All were arrested before they were able to progress significantly beyond the planning stages for their attacks. *Id.* at 54–64.

199 *See id.* at 57–60.

Among them were Mary Kay salesmen, Intel programmers, popular high school students, and former soldiers and Marines, including a decorated veteran of the Gulf War.[200] Like their European counterparts, they had no reputation for overt regliosity.[201] The time span of their radicalization was similarly brief, but the American defendants were less uniform in their commitment to waging violent jihad.[202]

How did these seemingly "normal" Americans espouse such a virulent and violent anti-American ideology? These haunting transformations underscore the challenge legislators, law enforcement, and prosecutors face—confronting an enemy that transmogrifies disaffected youths into terrorists.[203] Part of the change occurs via the insidious influence of jihadi literature and media.[204] Steven Emerson notes that Salafist "guest lecturers" have come to conferences in the United States for decades, and their rhetoric is in keeping with the anti-Americanism of most Islamist theology.[205]

The universal consensus, though, is that the Internet is a primary font of extremist proselytizing, whether on websites, chat rooms, or message boards.[206] The FBI describes the forging of domestic jihadi cells as the "BOG" syndrome, for "Bunch of Guys."[207] It appears that potential jihadis do not follow the route used by the Aryan Nation for committing terror, namely the "Lone Wolf" approach, where connection to other members is curtailed to limit potential conspiracy liabil-

200 *Id.*

201 *Id.* One deceptive element of Salafism is its emphasis on dissimulation: it encourages its adherents to lie about their beliefs in order to remain concealed and thereby be more adept at waging jihad. While this is a possible explanation for the general lack of lifelong religious fervor among some terrorists, most of the plotters in the NYPD Report's case studies did not have significant exposure to Salafist Islam early enough for this theory to bear much scrutiny. *See id.* at 56–64 (chronicling lives of the plotters); *see also* WRIGHT, *supra* note 44, at 132 (explaining the dissimulating nature of Salafism).

202 *See* SILBER & BHATT, *supra* note 189, at 56–64.

203 That enemy being extremist ideology, not just the people it warps. While this may seem like ontological hair-splitting, it should underscore our conceptualization of the "War on Terror" as a struggle against both the individuals who create terror and the extremism that creates terrorists.

204 *See* SILBER & BHATT, *supra* note 189, at 68.

205 STEVEN EMERSON, AMERICAN JIHAD 203–37 (2002) (detailing the lectures and comments of various extremist speakers who espouse the "culture of *qital*"—combat-driven jihad).

206 *See, e.g.*, SILBER & BHATT, *supra* note 189, at 68.

207 Josh Meyer, *Small Groups Now a Large Threat in U.S.*, L.A. TIMES, Aug. 16, 2007, at A1.

ity.[208] Indeed, the NYPD believes a key facet of homegrown terrorism is the "'echo chamber'" effect, where individuals propel and encourage one another to radicalize and commit to jihad.[209]

While the process of radicalization is important to understand—and potentially forestall[210]—it is the NYPD Report's ultimate conclusion that jihadis search one another out that bears most on potential legislative reform.[211] Though it is incorrect to say that al Qaeda is popular among Muslims the United States,[212] it would be error to say that the Salafist extremism does not have at least a potential foothold.[213] And while the formation of small cells of radicalized men

208 In no way does this mean that the proposed statutes should not (or do not) address Lone Wolf terrorism. *See supra* note 114 and accompanying text.

209 Meyer, *supra* note 207 (quoting Samuel J. Rascoff of the NYPD). The Internet element of homegrown terrorism poses a dual threat to law enforcement. First, using the Internet is a singular activity, even when it connects groups of people. In other words, while I may be speaking to dozens or even hundreds of other people at once in a chat room, I am also alone in my room. The surveillance and early-detection difficulties this poses are obvious. Second, it is foolish to discount the difference between entering text and speaking words aloud. By eliminating the human interaction at the early stages of radicalization, potential terrorists do not have the chance to hear themselves speak their beliefs until they have progressed much further down the trajectory of radicalization. This unexplored sociological aspect of the echo chamber effect adds to the dangers already enumerated by the FBI.

210 The study of homegrown terror will, perhaps, improve with the creation of the Center of Excellence for the Study of Violent Radicalization and Homegrown Terrorism in the United States. *See* Violent Radicalization and Homegrown Terrorism Prevention Act of 2007, H.R. 1955, 110th Cong. § 2 (2007) (proposing creation of the Center). Though Orwellian in name, the Center will study the growth, development, and nature of domestic radicalization. *See id.*

211 The NYPD Report emphasizes that an essential element of the radicalization trajectory is that individuals "sought, found and bonded with other like-minded individuals. This loosely-knit but cohesive group of people forms a cluster—an alliance based on social, psychological, ideological and ethnic commonalities." SILBER & BHATT, *supra* note 189, at 37. The relationship need not be in person, however. As one conspirator stated, "I was able to meet them on the internet. We spoke numerous times over the phone and there was also a lot of literature available on the internet I was able to see." *Id.* at 70 (quoting Mohammed Junaid Babar).

212 *See* PEW RESEARCH CTR., MUSLIM AMERICANS 6 (2007) http://pewresearch.org/assets/pdf/muslim-americans.pdf. Sixty-seven percent of American Muslims aged thirty and older have a negative view of the organization. *Id.*

213 *See id.* Seven percent of Muslims ages eighteen to twenty-nine—a demographic that comprises the majority of the NYPD radicalization profile—have a favorable opinion of al Qaeda and fifteen percent believe that suicide bombings are justified. *Id.* These findings track the "Pew Global Attitude Project's findings among Muslims in Great Britain, France, Germany and Spain. In contrast, surveys among Muslims in the Middle East and elsewhere in the world do not show greater tolerance of suicide bombing among young people." *Id.*

may seem far removed from the creation of a domestic terror network, it in fact follows the paradigm of many terror groups around the world.[214]

Three crucial lessons must be gleaned from the foregoing. First, homegrown terrorism revolves around collective activity, normally in groups of young men connected through a particular venue that serves as an incubator for extremism.[215] Second, the nascent jihadi is supported and drawn further along the trajectory of radicalization by groups that reinforce *qital* through Salafist propaganda and personal instruction.[216] Finally, these terrorists do not always go abroad, nor do they always have connections to international terrorism.[217]

IV. MATERIAL SUPPORT TO DOMESTIC TERROR

Armed with this knowledge, the deficiencies of current antiterrorism laws become clearer. Though direct support to anyone—whether an alien or a United States person—who prepares or commits specified terrorist acts is illegal,[218] there is no domestic material support statute.[219] Yet curbing material support to domestic terrorism is a key factor in stymieing homegrown jihadis from "carry[ing] out their grisly missions."[220] Although the fact that these "individuals are not on the law enforcement radar" complicates the matter, it should not preempt swift legislative action.[221]

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214 *See* WRIGHT, *supra* note 44, at 50, 57 (describing the formation of al-Jihad, one of al Qaeda's precursor organizations led by Ayman al-Zawahiri, al Qaeda second-in-command); *see also id.* at 114–56 (outlining a similar formation of al Qaeda as a conglomerate of groups brought to Afghanistan during the war against the Soviets).

215 SILBER & BHATT, *supra* note 189, at 68. These incubators include nongovernmental organizations (NGOs) like the Holy Land Foundation, bookstores or cafes, Muslim Student Associations, and, of course, Internet chat rooms. *Id.*

216 *See id.* at 72.

217 Most of the "Lackawanna Six" did not intend to go abroad. *Id.* at 62. Similarly, foiled attempts to bomb the JFK terminal and Herald Square in New York did not involve homegrown terrorists trained abroad, but rather young Americans radicalized entirely within this country. *Id.* at 67–71. There is also a statutory difference between getting literature or ideological guidance from an international source and proving a sufficient legal connection to sustain a conviction under the relevant statutes.

218 18 U.S.C. § 2339A (2006).

219 See *supra* note 188 and accompanying text (pointing out the international element in current material support law).

220 *Humanitarian Law Project II*, 205 F.3d 1130, 1135 (9th Cir. 2000).

221 SILBER & BHATT, *supra* note 189, at 85. The report notes that radicalized persons "[i]n the early stages . . . are not participating in any kind of militant activity, yet they are slowly building the mindset, intention and commitment to conduct jihad." *Id.*

The current material support statutes are the obvious candidate for reform. Congress repeatedly indicated its desire to see support for terrorism eradicated in its prior amendments, some enacted as recently as 2004.[222] Despite the prevalence of §§ 2339B–C near the top of federal terrorism indictments, there have been remarkably few convictions since 2001.[223] Of the 108 material support prosecutions brought to trial by U.S. Attorneys in the six years following September 11, just nine resulted in a conviction.[224] A partial explanation for this surprising gap is the mutating and increasingly sophisticated terror organizations the United States faces.

To demonstrate the potential gaps in the present laws, observe the legal outcome in the following hypotheticals. Presume that a group of seven men, aged eighteen to thirty, form a group called *al Gharib* ("the Strangers").[225] Its members are all American citizens, second-generation immigrants, have never been outside the country, and have followed the NYPD "trajectory of radicalization" outlined above. They individually purchase enough fertilizer to create several small, but potent, pipe bombs and detonate them in the food courts of several malls in Cleveland, Ohio.

Any person who knowingly provided aid to the group after this attack would be guilty as an accessory after the fact, under the appropriate circumstances,[226] but would have no liability for supporting terrorism under § 2339B, because *al Gharib* is not a foreign terrorist organization.[227] Moreover, there is no liability for aiding and abetting

222 Indeed, Congress drafted IRTPA as a specific response to the Ninth Circuit's *Humanitarian Law Project III* ruling, which would have made convictions more difficult.

223 *See supra* notes 9–18 and accompanying text. The trend toward diminishing material support prosecutions has not changed—between May 2007 and May 2008, there were twenty percent fewer terrorism prosecutions initiated for the same period the year before. Transactional Records Access Clearinghouse, Terrorism-Related Financing Prosecutions for May 2008 (2008), http://trac.syr.edu/tracreports/bulletins/finterror/monthlymay08/fil/.

224 Liptak & Eaton, *supra* note 89.

225 At the point of formation, the members are only an "overt act" away from federal conspiracy liability. *See* 18 U.S.C. § 371 (2006). The difficulty in this situation is not whether a conspiracy exists, but the lack of proof available to sustain a conviction. For more on the limitations on the efficacy of conspiracy law as a tool to combat terrorism, see generally Chesney, *supra* note 186 (exploring conspiracy law as a tool to combat terrorism).

226 Provided that they had a purpose to support or assist the underlying offense. *See* 18 U.S.C. § 2 (2006) (outlining aiding and abetting liability).

227 Consequently—and because the statute only applies to "financial institutions"—those who provide *al-Gharib* with support would not be subject to double damage civil liability, either. *See id.* § 2339B(b) (2006). The supporter would *not* be

unless the government can show specific purpose to further the terrorist acts.[228] Consequently, while the foreign material support provisions have no purpose requirement, aiding and abetting liability hinges on the government proving the most stringent purpose requirement in the law.[229] Federal conspiracy liability is similarly unhelpful, because it requires proof of agreement among two or more persons as well as an overt act in support of the conspiracy.[230] Thus, in our example, if one person provides support, or if he agrees with no other person to provide support, there is no conspiracy.

Taking a step back, what becomes of those persons who provide housing and money to *al Gharib* without knowing that the funds would be used to commit a terrorist act, but with knowledge that the group intended to commit such acts? Section 2339A prescribes a penalty only for those who know that their support will be used for carrying out certain acts,[231] while § 2339B has the foreign group element.[232] These are the same problems Congress addressed in the foreign context, and on which the Ninth Circuit ruled definitively in *Humanitarian Law Project II*—namely, that any support to terrorism frees up resources that could be used elsewhere. This truth does not become inapplicable simply because the underlying actors are American.

Presume that *al Gharib* is preparing another attack. Recognizing the risk of soliciting direct contributions but in desperate need of resources, they turn to a charitable organization (Community Center), where they met some months earlier. This organization openly supports *al Gharib* and frequently acts as its mouthpiece in the press. The Community Center solicits money as well as PVC pipe and fertilizer from the community—the same type used in the Cleveland bombings. Donors to the Center face no § 2339A or § 2339B liability, because they are a step of recursion away from *al Gharib*, and again, the statutes do not cover simple attacks like pipe bombs. Similarly, they face no § 2339C liability, because they are not the clearinghouse

guilty of "harboring a terrorist" under § 2339 because detonating a pipe bomb is not one of the enumerated offenses in that statute. *See id.* § 2339A(a).

228 Criminal liability attaches to any person who aids and abets a criminal act. *Id.* § 2. Nevertheless, aiding and abetting, as understood in the Code, requires specific purpose to further the underlying criminal activity. *See* Nye & Nissen Corp. v. United States, 336 U.S. 613, 620 (1949) (noting that aiding and abetting requires that the defendant "consciously share[] in any criminal act").

229 This result is absurd in light of Congress' elimination of a purpose requirement in the IRTPA.

230 *See* 18 U.S.C. § 371 (imposing liability on conspirators only after agreement and an act in furtherance of the conspiracy).

231 *Id.* § 2339A.

232 *Id.* § 2339B.

for "funds," or because they provided physical goods. Assuming that the Community Center did not provide funds, it escapes § 2339C liability for the same reason.

Changing the material support statutes would eliminate these impermissible gaps in the law. While no statutory regime is perfect, Congress has the opportunity to amend one with significant loopholes—loopholes that defeat the purposes of legislation like AEDPA and IRTPA.

A. Lessons Learned Abroad

Amending material support laws to punish recklessness and to include domestic terrorism is not without precedent. American allies in the War on Terror have enacted legislation permitting them to regulate reckless contributions to, and support for, terrorists. Contextualizing the proposed changes reveals that they are not outside the mainstream of international responses to terror—if anything, they would be more restrictive for prosecutions and law enforcement than most antiterror regimes.[233]

The United Kingdom arguably has the most experience in antiterrorism among Western states. From the mid-nineteenth century, the British faced the escalating terrorism of the Fenian Brotherhood and its successors, the Irish Republican Army (IRA).[234] The British addressed the struggle with Irish nationalists as an insurrection until the late twentieth century, well after the formation of the Republic of Ireland as an independent entity.[235] As a result, even in 1999, most antiterror laws in the United Kingdom focused on limiting support for the IRA.[236]

Since 2000, the British have drastically revised their counterterrorism laws. The Terrorism Act 2000 created a material support

233 Obviously, other nations are not bound by constitutional provisions like the Bill of Rights. The comparison between American and international antiterror laws should be understood as an comparative exercise, not an argument for the more strident laws found abroad.

234 For an intriguing overview of the Irish independence movement and the "Troubles" in Northern Ireland, as well as British responses, see generally TIM PAT COOGAN, THE TROUBLES (2002).

235 *Id.* at 134 (noting that the British approach to the IRA was literally a declared war and that captured members "were more likely to face a rope than a cell").

236 Indeed, to this day, any group in the Republic of Ireland that contains the name "Irish Republican Army" is an ipso facto terrorist organization—a holdover from the British dominion in Ireland. Offences Against the State Act, 1939 (Act No. 13/1939) (Ir.) *available at* www.irishstatutebook.ie/ZZA13Y1939.html (last visited October 10, 2008).

scheme that forbade any person who "invites . . . [provides] . . . [or] receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism."[237] The language of "reasonable cause to suspect" tracks the concept of negligence—a state of mind requirement more easily satisfied than recklessness. Just two months after September 11, Parliament passed the Anti-terrorism, Crime and Security Act 2001,[238] which broadened police powers and lengthened detention periods for potential terrorists, but left the material support provisions untouched.[239] After the London bombings on July 7, 2005, the Parliament acted again, passing the Terrorism Act 2006 and, again, the negligence provision remained.[240] Despite widespread changes to the general tenor of the counterterrorism laws, there was apparently no need to revise the negligence standard.[241]

Other common law nations have grappled with material support liability as well. Australia has adopted the British standard, implementing a sliding scale of material support liability.[242] Under Australian law, any person who "intentionally provides to an organisation support or resources" and knows that the organization engages in terrorism is subject to twenty-five years in prison,[243] while the penalty for a reckless contribution made to a terror group is fifteen years.[244] Canada, on the other hand, employs a statute similar to the present American one, criminalizing support only when given with knowledge of terrorist activities.[245]

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237 Terrorism Act, 2000, c. 11, § 15–15(3)(b).

238 Anti-Terrorism, Crime, and Security Act, 2001, c. 24.

239 *Id.* §§ 89–101.

240 *See* Terrorism Act, 2006, c. 11 (leaving the negligent liability provisions unchanged).

241 Parliament has refused to implement other counterterrorism policies because of perceived impact on civil liberties or improper mens rea elements. Indeed, it refused to enact the Council of Europe Convention on the Prevention of Terrorism (CECPT), which mandated the creation of a new crime of "public provocation to commit a terrorist offence." JOINT COMM. ON HUMAN RIGHTS, THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM 9–17 (2006–7), http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/26.pdf. While other provisions of the statute impermissibly limited civil liberties and created a "chilling effect," the Joint Committee on Human Rights determined that "subjective recklessness" was not problematic. *Id.*

242 *See* Criminal Code Act, 1995, c. 5, § 102.7.

243 *Id.* § 102.7(1).

244 *Id.* § 102.7(2).

245 *See* Criminal Code of Canada, R.S.C., ch. C-41, § 83.02 (2001) ("Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used [for terror-

Though Canada—among other states—requires knowledge of terrorist activities, it is among the vast majority of Western states that do not differentiate between domestic and international terrorism.[246] Much like the Terrorism Acts 2000 and 2006, the criminal codes of France, Germany, and other European Union member states categorize a terrorist simply as a person who uses fear "designed to influence the government or to intimidate the public or a section of the public . . . [where] the use or threat [of action] is made for the purpose of advancing a political, religious or ideological cause."[247] By not differentiating between domestic and foreign terrorism, these states appropriately view terrorism as a transnational phenomenon, one that can arise from within a state's own borders.[248]

Conclusion

Attacking terrorism at its financial roots must continue to be a priority of the United States' counterterrorism regime. The material support statutes offer prosecutors a potent tool in this effort, but their potential remains unnecessarily circumscribed by their limited scope. Requiring proof of knowledge hampers effective action against defendants who hide behind claims of ignorance. A reckless mens rea requirement for material support promotes care in contributions and eliminates the shibboleth defense of lack of knowledge.

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ism] . . . is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.").

246 *See id.* § 83.01 (establishing uniform treatment for terrorism committed by both Canadians and aliens).

247 Terrorism Act, 2000, c. 11, § 1(1)(b)–(c) (Eng.). "Purpose" when used in this context refers to the actual commission of a terrorist act, not material support. As such, it is substantively similar to the American definition of terrorism as "violent acts or acts dangerous to human life that . . . 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." 18 U.S.C. § 2331 (2006).

248 Notably, the United States does not distinguish between foreign and domestic terrorism in its intelligence gathering. *See* 50 U.S.C. § 401a (2000 & Supp. V 2005) (defining "national intelligence" as referring "to all intelligence, regardless of the source from which derived and including information gathered within or outside the United States" which poses a threat to the country). Moreover, elements of Chapter 113B of Title 18 of the U.S. Code ("Terrorism") make recklessness the mens rea for offenses. *See, e.g.*, 18 U.S.C. § 2332d (2006) (prescribing penalties for anyone who engages in financial transactions with a state that the accused "know[s] *or* [*has*] *reasonable cause to know*" is designated as a supporter of terrorism (emphasis added)). It makes little sense for our intelligence-gathering and financial offense laws to be indiscriminate but prosecutions for material support to be so limited.

In addition, the statutes should reflect the understanding of extremism as a phenomenon that may develop in the United States. At present, there is no material support liability for those who would underwrite homegrown terror. If the last seven years of counterterrorism work has proven anything, it is the adaptability and resilience of terrorists. As our legislative responses to terror financing grew more sophisticated, so did these money networks. Now, rather than making direct contributions to Hamas or their proxies, terror groups funnel their support through convoluted channels that insulate donors from criminal liability. There is no reason to believe that the organizational aspect of terror would be any less adaptable. Without ready resort to criminal prosecution, the United States would have far less leverage against domestic donors and fellow-travelers. By amending the material support laws to include domestic terrorism—and bringing them in line with international practice—our antiterrorism efforts can be of greater effect and use against an emerging threat.