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

When Carol Anne Bond discovered that her husband had impregnated her best friend Myrlinda Haynes, she sought revenge.¹ Bond, a trained microbiologist employed by a chemical manufacturer, stole a supply of toxic chemicals from her employer and purchased more over the Internet. Over several months, Bond attempted to harm Haynes by spreading these chemicals in her house, on her car door handles, and in her mailbox.² Haynes complained to local law enforcement, but they did not further pursue her complaint. After the matter was referred to the U.S. Postal Inspection Service, and following a federal investigation, federal prosecutors charged Bond with possessing and using a chemical weapon, in violation of 18 U.S.C. § 229.³ Bond pleaded guilty to the charges and was sentenced to six years in prison.

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

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

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² Bond, 581 F.3d 128, 132
³ 18 U.S.C. §§229(a); 229F(1); (7); (8) (West, 2011)
she was charged with was beyond Congress’s constitutional authority to enact.\(^4\) The Court expressed no view on the merits of Bond’s challenge to the statute’s validity, which are to be considered by the Court of Appeals on remand.

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

The Bond case highlights some critical, yet unresolved, questions concerning the definition and classification of terrorism for the purposes of enforcing the criminal law against terrorism. In Bond, prosecutors misused a prohibition enacted by Congress to meet American obligations under an international treaty to charge a defendant with crimes not markedly different in nature, effect and defining characteristics from other types of “ordinary” crime normally dealt with by the criminal justice system.\(^5\)

Federal and state legislation does not contain explicit “terrorism” offenses per se.\(^6\) Instead, various criminal provisions prohibit a wide array of specified crimes that are commonly perceived as terrorism-related offenses. These broadly worded offenses cover numerous crimes that typically – though not necessarily – characterize terrorist acts. Terrorism-related offenses may be divided into several categories: one legislative technique involves focusing on the technical measures used to carry out the attack, such as bombs or weapons of mass destruction. Another technique involves specifying an array of predicate offenses which constitute terrorism only if the prosecution establishes evidence that they were committed with intent to intimidate or coerce a civilian

\(^4\) Bond v. U.S. 131 S. Ct. 2355, at 2366-67, No. 09-1227 (holding that where a litigant is party to a justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of the government).


\(^6\) See, Norman Abrams, Anti-Terrorism and Criminal Enforcement, at 93-96 (2nd ed. 2008) (hereinafter: Anti-Terrorism) (noting that neither the word terrorism nor any of its variants appears in the definition of 18 U.S.C section 2332)
population. This legislative approach creates ambiguity with regard to whether these offenses are limited to the terrorism context, or cover additional crimes, which share similar features with terrorism. This crucial question, however, remains mostly unresolved under current law.

The decision to charge Bond with a terrorism-related offense stems from a combination of two features that characterize the criminal law against terrorism: the first is a doctrinal problem of definition: the definition of terrorism, or its distinct features, is not made an element of terrorism offenses. The second is an institutional problem of classification: in the absence of legislative guidelines, enormous prosecutorial discretion provides prosecutors with the authority to misclassify “ordinary” crimes as terrorism.

This Article is not about the prosecution of actual crimes of terrorism. Instead, its focal point is the prosecutorial misclassification of terrorism offenses in cases involving “ordinary” crimes, unrelated to terrorism. The article argues that decisions to bring charges against defendants under terrorism-related prohibitions do not necessarily require the conduct in question to involve terrorist acts as the term “terrorism” is commonly understood.

The article’s key thesis is two-pronged: It suggests that empirically, the criminal justice system has failed to accurately distinguish between “terrorism” and “ordinary” crime, and that normatively, drawing clear legal boundaries between prosecution of terrorists and prosecution of defendants who employ methods capable of inflicting massive harm is a warranted and prudent enforcement policy. It further contends that it is important to define what is not terrorism just as it is important to define what precisely terrorism is. Furthermore, accurately defining terrorism, as this article sets out to do, and making its distinct features an element of terrorism-related offenses, is critical for distinguishing between terrorism and “ordinary” crime, due to the risks and unintended consequences of prosecutorial misclassification of “ordinary” crimes as “terrorism”.

Despite the seeming breadth of the law’s response to terrorism following the 9/11

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7 In this Article I use the term “terrorism offenses” to discuss terrorism-related prohibitions. While these offenses do not use the term terrorism itself, they are commonly understood to proscribe conduct that typically characterizes terrorism.
terrorist attacks, legal reforms within the criminal justice system have been concerned primarily with process, such as the presidential authority to detain individuals without trial.\(^8\) Rather than define the substantive elements of the criminal prohibitions, the statutory definitions of terrorism impact mainly procedural, investigation authorization or punishment enhancement. The majority of terrorism-related federal offenses remained intact since the comprehensive legislative amendments of 1986 and 1996, and the legislative amendments that followed 9/11 made almost no changes in substantive federal criminal law.\(^9\) Most scholarship on the criminal law against terrorism thus focuses on criticizing the investigatory and procedural aspects of prosecuting terrorism.\(^10\)

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

The institutional problem of classification is equally critical in the area of terrorism offenses: Since the distinction between terrorism and “ordinary” crime is not legislatively

\(^8\) See, Erwin Chemerinsky, Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement, 51 UCLA L. Rev. 1619, at 1623, 1627 (2004) (noting that the PATRIOT ACT gives the government powers that traditionally have only been used in foreign countries or for foreign intelligence gathering in the U.S).

\(^9\) The Omnibus Diplomatic Security and Antiterrorism Act (ODSAA) (1986), The Antiterrorism and Effective Death Penalty Act (AEDPA) (1996). The picture is different, however, at the state level, as many state legislatures passed terrorism-related prohibitions following 9/11: see infra.

\(^10\) See, e.g., Robert Chesney and Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 Stan. L. Rev. 1079, 1108 (2008) (discussing two competing models for detention: the military detention and the civilian criminal trial model, noting that the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has established capacity of convicting terrorists based on criteria that come close to associational status).
guided, the authority to make these classifications remains solely in the hands of the criminal justice system’s main institutional actors: prosecutors. A main feature of the American criminal justice system is the enormous discretion wielded by prosecutors.\footnote{See, generally, William Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 506 (2001) (hereinafter: Pathological Politics) (noting that the role that the definition of crimes and defenses play is to empower prosecutors, who are the criminal justice system’s real lawmakers).} The failure to make terrorism an element of the crime provides prosecutors with broad authority to classify what crimes ought to be prosecuted as terrorism. This practice results in law enforcement shaping the contours of substantive criminal law and taking over the role of legislatures.

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

This Article proceeds as follows: Part I traces the source of prosecutorial misuse of terrorism statutes by pointing out the anomaly that characterizes the criminal law against terrorism: While federal and state law adopts various prohibitions that are perceived to be “terrorism-related”, these prohibitions do not make terrorism--or its distinct features such as the defendant’s political motivation--an element of the crime. Instead, the terrorist nature of the crimes is merely implied or inferred from their features such as the technical means used to carry out the attacks or the scope of the harm inflicted.

Part II examines the practical implications of applying terrorism-related offenses in various contexts by considering court decisions in which the prosecution relied on a different feature that typically characterizes terrorist acts to invoke the terrorism theory. The cases demonstrate that charging the defendants in such instances with terrorism-related offenses is both unwarranted and a misuse of prosecutorial authority, because these offenses could have been prosecuted under general criminal laws.

Part III describes the risks and unintended consequences of prosecutorial misuse of antiterrorism provisions in light of the defining features that characterize the American criminal justice system, including unconstrained prosecutorial discretion, the rule of plea
bargains, the local and decentralized nature of the criminal law enforcement and the political dimension of the legal system. These perils include granting prosecutors the power to enhance the severity of the crime and the penalty of “ordinary” crimes, which results in sentencing disparities among similarly situated defendants and the infiltration of bias against defendants labeled as “terrorists”, interfering with the balance between federal and local law enforcement, and opening a door to expanding the reach of terrorism offenses to additional contexts such as drug trafficking and gang crime.

Part IV proposes legislative reform designed to constrain prosecutorial discretion by clarifying that the defendant’s political motivation should be the distinct feature that separates terrorism from “ordinary crime”. The proposal aims to limit the use of terrorism-related offenses only to actual crimes of terrorism by making specific intent to coerce governments to change their policies or actions a necessary element of terrorism crimes.

I. THE DEFINITIONAL PROBLEM

The first part of this Article traces the source of the problem of legal ambiguity concerning what type of conduct constitutes terrorism by laying out the theoretical foundation that frames the subsequent discussion. The point of departure for evaluating whether terrorism-related offenses are used only in actual terrorism cases begins with the scholarly debate concerning the definition of terrorism.

A. The Conceptual Framework: Defining Terrorism

The definition of terrorism is controversial and contentious: Voluminous scholarship addresses the term from multidisciplinary aspects including political theory, foreign relationships, philosophy and international law. To date, there exists no consensus on the definition of terrorism, and this term is used in different ways in various contexts.

13 See, Bruce Ackerman, BEFORE THE NEXT ATTACK: Preserving Civil Liberties in an Age of Terrorism, at 13 Yale University Press (2006) (noting that: “Terrorism is simply the name of a technique: intentional attacks on innocent civilians”), See, also, Abrams, supra note 6, at 62-75 (noting that there is no unanimous definition of terrorism and the definitions of terrorism differ in what they include), M. Cherif Bassiouni, International Terrorism; Multilateral Conventions (1937-2001) 14, n.48 (Transnational Publishers, Inc. 2001). See, also Kevin J. Greene, Terrorism as Impermissible Political Violence: An
Moreover, some scholars even suggest that it is a political phenomenon, rather than a legal term, and thus cannot be operationalized through precise legal provisions.\footnote{14}

Scholars, both legal and non-legal, have long debated the question of what constitutes terrorism.\footnote{15} Leading terrorism scholar Martha Crenshaw argues that terrorism is: “a method or system used by a revolutionary organization for specific political purposes. Therefore, neither one isolated act nor a series of random acts is terrorism.”\footnote{16} Other scholars also agree that political motivation is an essential factor in defining terrorism, distinguishing it from “ordinary” crime, typically motivated by greed, anger, and desire for domination.\footnote{17}

After attempting to differentiate terrorists from other criminals, Bruce Hoffman defines terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in pursuit of political change.”\footnote{18} Leading legal scholar Philip Heymann describes terrorism as: “violence conducted as a political strategy by a substantial group or secret agents of a foreign state.”\footnote{19} Heymann further notes that: “terrorism falls into the category of violent ways of pursuing political ends, a category that includes war between states, civil war, guerilla warfare and coup d’état.”\footnote{20}

Another feature of terrorism is a terrorist’s organizational affiliation. This feature distinguishes terrorist acts committed on behalf of a group from those of a lone perpetrator who engages in a massive shooting spree.\footnote{21} However, scholars have also noted the increasing role of unaffiliated terrorists,\footnote{22} who may not directly be affiliated with a group but still associate themselves with extremist movements.\footnote{23}

\footnote{15} See, Wayne McCormack, Understanding the Law of Terrorism 8-9 (2007) (discussing different scholarly views on what conduct counts as terrorism)
\footnote{16} See, Crenshaw, supra note 12, at 22.
\footnote{17} See, e.g., Christopher Harmon, Terrorism Today, at 31-33 (2000) (defining terrorism as: “the deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends”.)
\footnote{18} See, Bruce Hoffman, Inside Terrorism at 40 (2006)
\footnote{19} See, Philip Heymann, TERRORISM AND AMERICA (1998), at 3-9 (discussing different features of terrorism).
\footnote{20} Id, Heymann.
\footnote{21} Id
\footnote{22} See, Robert M. Chesney, Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism, 80 S. Cal. L. Rev. 425, 425-436.
Scholars continue to disagree about whether the definition of terrorism should focus on the perpetrators’ wrongdoing or on the target of terrorism, namely, the civilian population. Anne-Marie Slaughter and William Burke-White, contending that the focus should shift to the types of targets attacked, suggest that the principle of civilian inviolability offers a better definitional approach.

Indeed, one of the most critical features distinguishing terrorism from “ordinary” crime is the targeting of civilians on the basis of their group identity, rather than individual behavior or personal characteristics. This feature distinguishes acts of terrorism from “ordinary” crime in which the targets are individuals rather than members of a nation. Criminal law, however, has historically focused on defining perpetrators’ wrongdoing. Focusing on the targets of terrorist attacks is therefore incompatible with the criminal law’s paradigmatic role of condemning perpetrators’ criminal acts. Moreover, the indirect and more critical targets of terrorism are governments, whose citizens are attacked as a pretext for demanding political change.

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

Since 9/11, the American criminal justice system has rested on the premise that terrorism is the most significant national security threat. A Department of Justice document, “Goals and Objectives: for Fiscal Years 2007 – 2012,” states as one of its objectives: “to prosecute those who have committed or intend to commit terrorist acts in the U.S.” Implied in this statement is a preliminary premise that the phrase “terrorist acts” operates by a single definition that applies to all terrorism offenses. Considering the wide array of terrorism-
related prohibitions, however, casts doubts on the accuracy of this premise. Moreover, the above scholarly understanding concerning terrorism is not reflected in the criminal justice system, creating a gap between the (mainly non-legal) scholarship on terrorism and the language of terrorism-related offenses.

Federal and state antiterrorism legislation adopts many different definitions of terrorism, each focusing on different features of this term. These definitions, however, do not play a significant role in the criminal justice system, because the actual use of the term “terrorism” in the criminal prohibitions themselves is very limited. Federal and state law adopts broad prohibitions aimed at fighting terrorism without requiring the prosecution to bring evidence to establish the terrorism connection beyond a reasonable doubt. The majority of terrorism prohibitions do not make terrorism an element of the crime. Acknowledging that the concept is too contested, legislatures avoid making terrorism itself an element of the crime while having a political incentive to expand the scope of the crime by allowing for the prohibitions to cover broader factual contexts.

Instead of making terrorism’s distinct features an element of terrorism-related offenses, various provisions criminalize a wide variety of crimes that typically characterize terrorism. The terrorism classification is not legislatively guided, but implicit, as it may be inferred from these features. Eric Luna notes the ambiguity of terrorism offenses by asking: “What makes an individual a terrorist: Is it the severity of his acts such as the infliction of

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29 See, e.g., 18 U.S.C. § 2332 stipulates that “domestic terrorism” must: “(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any other state… (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.” The U.S. Department of State designates a “foreign terrorist organization” based on three criteria: that it is a foreign organization, that it engages in “terrorist activity”, and that its terrorist activity threatens the safety of U.S. nationals or the national security of the U.S. The term “terrorist activity” is defined in 22 U.S.C. § 2656 (f) as: “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” This definition makes political motivation an inherent part of terrorist activity, which most legal provisions do not address and requires an organizational affiliation, a feature typically lacking from other statutory definitions. See, also, Nicholas J. Perry, The Numerous Federal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. Legis. 249, 256-261 (discussing various criminal codes definitions of terrorism).


31 See, Norman Abrams and Sara Sun Beale, Federal Criminal Law and its Enforcement, Supplement (2004) at 89 (noting that: “Despite the fact that a number of different definitions of terrorism or a terrorism purpose can be found in the federal criminal laws, it is difficult to find a federal criminal statute that makes terrorism or a terrorism purpose an element of a federal crime.”)

32 See, Eric Luna, Criminal Justice and the Public Imagination, 7 Ohio State Journal of Criminal Law 71, 110 (2009)
massive indiscriminate harm or is it targeting innocent civilians?” While neither federal nor state criminal law contains explicit “terrorism” offenses per se, various statutes use different legislative techniques to criminalize terrorism-related crimes. In each of the following federal terrorism prohibitions, a different feature that typically characterizes terrorist acts serves to classify the offense as a crime of terrorism.

1. **The Nature of the Technical Measures and the Scope of the Harm**

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

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33 See, McCormack, supra note 15, at 58.
34 18 U.S.C. (West 2011)
35 18 U.S.C §229 (West, 2011)
36 18 U.S.C. § 229 states in relevant part that: ...(b), it shall be unlawful for any person knowingly- (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).
37 18 U.S.C § 229F(1)(A) (West, 2011)
38 18 U.S.C § 229F(8)(A) (West, 2011)
39 18 U.S.C §2332f (West, 2011) (proscribes the following: “Whoever unlawfully delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility (A) with the intent to cause
These criminal provisions neither make terrorism an element of the offense nor state that these offenses constitute terrorism. Rather, the scope of the harm intended, along with the nature of the technical measures used to carry out the attacks--typically weapons that cause massive harm--determine the common classification of the offense as “terrorism.” These provisions therefore sharpen a key question: Do these offenses necessarily and under all circumstances proscribe terrorist crimes, or do they also cover additional crimes that inflict massive harm on victims?

At first glance, the plain text suggests that these offenses may also be used to prosecute other types of crimes unrelated to terrorism. Indeed, they seem broader in scope than the terrorism context. While terrorists typically use these technical measures, it is not always the case, as the statutory language does not require the terrorism connection. If neither the prohibitions themselves nor the headers limit the use of the offenses to the terrorism context, then terrorism is not a necessary requirement for using these prohibitions. Under this theory, any conduct involving the use of technical measures that inflict substantial harm falls under the prohibition, irrespective of the perpetrator’s motive, intent or affiliation with a terrorist organization. For example, this theory would enable using the “bombing of public places” prohibition to prosecute a case in which explosives are used as part of a drug-trafficking operation. \(^{40}\) This statutory construction enables the prosecution to invoke expansive and creative theories regarding what types of conduct qualify as “terrorist acts”.

The counterargument, however, is that despite the lack of explicit statutory language, requiring the terrorism connection, these prohibitions do, in fact, constitute terrorism offenses. One possible theory is that launching weapons of mass destruction should always be considered either an act of terrorism or an act of war. Therefore, classifying certain crimes as terrorism may be logically inferred from the technical measures used to carry out the attack. Moreover, the nature of the harm that flows from these activities -- massive injuries, to a large number of victims – further supports the assertion that these are terrorism crimes. Furthermore, the legislative intent and the amendments’ historical context, along with the location of the prohibitions – being part of the chapter entitled “terrorism”, and subsequent to

\(^{40}\) See, Abrams, supra note 6 at 76 (discussing several applications of terrorism definitions to demonstrate the ambiguities concerning what conduct qualifies as terrorism).
the terrorism definitions in §2331 -- demonstrate that these prohibitions were enacted to combat terrorism, and therefore ought to cover only crimes of terrorism.\footnote{Id., Abrams, at 8-21 (describing the legislative history leading to the amendment of terrorism offenses).}

2. \textbf{Intent to Coerce Governments or Intimidate Civilian Population}

Another common legislative technique to criminalize terrorism-related conduct involves specifying a wide array of predicate offenses and requiring that they be committed either with intent to intimidate civilian population, or alternatively, with intent to coerce governments. Following 9/11 many state legislatures adopted terrorism-related statutes based on this model. For example, the New York Legislature passed the Anti–Terrorism Act of 2001, which included article 490 of the Penal Law, entitled “Terrorism,” defining various terrorism-related offenses. It provides that a person in guilty of a crime of terrorism when he or she commits a specified offense “with intent to intimidate or coerce a civilian population”.\footnote{Penal Law section 490.25 (1) provides, in pertinent part, that a person is guilty of a “crime of terrorism” when he or she commits a “specified offense” as defined in penal law section 490.05 (3) (a) (including any violent felony offense as defined in penal law section 70.02 or conspiracy to commit such an offense) “with intent to intimidate or coerce a civilian population.” A person found guilty of a specified offense as a crime of terrorism is subject to substantial enhancement of the penalty, as provided in Penal Law section 490.25 (2).}

Several scholars have lodged criticism against the criminal prohibitions on terrorism, noting their overbroad nature and unlimited scope.\footnote{See, e.g., Chemerinsky, supra note 8 at 1623-4} Erwin Chemerinsky criticizes the broad scope of the definition of terrorism, focusing on the element of “intent to intimidate civilians or coerce governments”. Chemerinsky contends that: “This is an incredibly broad definition… Many lawful protests might be seen as trying to coerce or intimidate government or civilian population. If they are large enough, they might even be seen as dangerous to human lives. An antiwar protest rally where windows are intentionally broken in a federal building could be prosecuted as terrorist activity. Most crimes, from assault to robbery to rape to kidnapping to extortion, are intended to coerce”.\footnote{See, e.g., Chemerinsky, supra note 8 at 1623-4 (suggesting that the broad definitions of terrorism are able to cover a variety of factual contexts unrelated to terrorism).} Chemerinsky further critiques the broad
powers granted to the government under the PATRIOT ACT, which are not limited to what common understanding would define as terrorism.\textsuperscript{45} Moreover, Chemerinsky notes that the experience with other broad statutes, such as the federal Racketeer Influenced and Corrupt Organization Act law is that they often are used in contexts far beyond what their drafters intended. Similarly, argues Chemerinsky, the government uses the PATRIOT ACT’s provisions in cases that have nothing to do with terrorism under its commonly accepted meaning.\textsuperscript{46}

Nora Demleitner also critiques the broad definition of terrorism offenses, suggesting that: “some charged under anti-terrorism statutes do not appear to fit the picture of these terrorists. She argues that: “The confusing array of definitions of "terrorism" have led to disagreement over what is categorized and prosecuted as a terrorist event, and why. Federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorist cases.”\textsuperscript{47} Demleitner further notes that: “the hallmark of a terrorism offense is that it is politically motivated. However, precise definitions confusingly vary even within federal law.”\textsuperscript{48}

The common thread that characterizes all terrorism-related offenses is their overbroad nature. The broadly worded prohibitions are vague and enormous in scope, covering a wide array of crimes varying in severity and in their relation to terrorism.\textsuperscript{49} For example, the open-ended phrase “intent to intimidate or coerce” offers a broad criminal prohibition, which allows for a wide variety of activities to fall within its scope. It is therefore not clear what prosecutors must show to demonstrate that the defendant intended to “intimidate or coerce a civilian population.” The term “civilian population” remains undefined and as scholars note,

\textsuperscript{45} See, Chemerinsky, supra note 8, at, 1623-4 (suggesting that the broad definitions of terrorism are able to cover a variety of factual contexts unrelated to terrorism).
\textsuperscript{46} Id, Chemerinsky.
\textsuperscript{47} See, Nora Demleitner, How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions, 16 FED. SENT. REP 38 (2003)
\textsuperscript{48} Id, (noting that some charged under anti-terrorism statutes do not appear to fit the picture of terrorists, and that federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorist cases. Demleitner further suggests that one explanation for the need for increased terrorism prosecution might be for individual U.S. Attorneys' Offices to appear “tough on terrorism”, which presumably leads to commendations and rewards. Another explanation might lie in the Congressional budget process which holds potential financial rewards for a Department of Justice focused on terrorism cases, which have after all turned into a national frenzy).
\textsuperscript{49} See, Chemerinsky, supra note 8 at 1623-27 (noting the breadth of terrorism offenses and their ability to cover a wide variety of situations).
certain criminal activity by its very nature has the effect of “intimidating” significant parts of the population. Moreover, many “ordinary” defendants also intend their coercive acts to influence not only their immediate victims, but others in the surrounding area. Under existing expansive prohibitions these defendants might also meet the statutory definition of a “terrorist,” affording prosecutors wide latitude in bringing “terrorism” charges against defendants whose crimes have harmed a large number of victims.

The above statutory language provides two separate paths to establishing a terrorism conviction: the prosecution may either bring evidence that the defendant intended to intimidate or coerce a civilian population, or instead prove that the defendant intended to coerce governments. Making these alternative, rather than cumulative, elements results in an expansive prohibition that enables the prosecution to invoke the terrorism theory in a variety of contexts unrelated to actual acts of terrorism. Had the offense required establishing both elements concurrently, this would have resulted in a much-narrower construction of terrorism-related offenses.

Scholarly critique of overbroad criminal prohibitions goes above and beyond the particular context of terrorism. Rather, the expansive nature of terrorism-related prohibitions is merely an example of larger problems in other areas of the criminal justice system, particularly the federal system. Many scholars have long criticized the overbroad nature of federal criminal prohibitions. In a series of papers, Sara Sun Beale elaborately addresses the over-breadth of federal criminal prohibitions, noting that too many federal offenses cover too much conduct and many individual offenses are overbroad and badly drafted. Beale further notes that the number of federal crimes has increased tremendously in recent years, with federal offenses covering a wide array of conduct already criminalized under state law. In a

51 See, e.g., Peter Low, Federal Criminal Law, FEDERAL CRIMINAL LAW, second ed. at 5-7 (2004) (discussing the overlap of federal and state criminal laws).
53 See, Beale, The Many Faces of Over-Criminalization, supra note 52 at 754 (noting that as a result of recent legislation, the bulk of federal criminal provisions now deals with conduct also subject to the states’ general police powers).
series of influential Articles, the late criminal law scholar William Stuntz argued that the constitutionalization of criminal procedure created a strong political incentive for legislatures to broaden the substantive criminal law to escape the stringent requirements of criminal procedure.\textsuperscript{54} Broader criminal codes, argued Stuntz, allow police and prosecutors to enjoy the benefits of criminal law enforcement techniques in a wider range of situations.\textsuperscript{55}

Terrorism-related prohibitions, however, offer a context in which the familiar problem of the enormous scope of criminal prohibitions is further exacerbated. This problem becomes especially critical because terrorism’s distinct features are not made an element of terrorism-related offenses. To secure a terrorism conviction, the prosecution is not required to establish the nexus between the crimes committed by the defendant and his/her political motivation or his/her intent to affect government policies. The lack of legislative constraint limiting the application of these offenses only to actual acts of terrorism enables a variety of crimes to be covered by these overbroad provisions. These theoretical concerns regarding the expansive scope of terrorism-related offenses have materialized in practice, as the following case law demonstrates.

\section*{II. THE CASE LAW: TERRORISM CHARGES IN VARIOUS CONTEXTS}

The broad language of terrorism-related prohibitions raises significant concerns that they may be used to prosecute various crimes that are unrelated in any meaningful way to actual crimes of terrorism. The following part examines the body of criminal case law that was prosecuted under terrorism prohibitions, by considering whether they were properly classified as crimes of terrorism.

\subsection*{A. The Technical Measures}

Should the measures used to carry out a violent attack determine the nature of the


\textsuperscript{55} See, Stuntz, Pathological Politics, supra note 11 at 509 (noting that as criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors).
crime as terrorism, given the easy accessibility of weapons associated with warfare or terrorism? While the use of weapons of mass destruction, including chemical weapons, typically characterizes terrorism, this is not always the case, as these technical measures are sometimes used in other contexts.

1. U.S. v. Bond

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

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

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

56 See, Abrams, supra note 6 at 95-6 (discussing the prohibition against weapons of mass destruction, raising doubts whether this prohibition is a terrorism offense in all of the possible factual contexts in which the described offense might be committed. In other words: should the use of a weapon of mass destruction always be deemed to amount to a crime of terrorism?)

During oral arguments in the U.S. Supreme Court, Justice Alito offered a hypothetical illustrating the scope of antiterrorism legislation and its potential applications in cases unrelated to terrorism. Justice Alito noted that given the breadth of the chemical weapons statute, under a plausible reading of the offense, if the defendant decided to retaliate against her friend by pouring a bottle of vinegar in her goldfish bowl, that conduct would be a violation of this statute, potentially punishable by life imprisonment, as vinegar causes toxic harm to animals and is capable of killing them.\(^{58}\) While this hypothetical may sound absurd, it demonstrates that the overbroad wording of the federal prohibition on the use of chemical weapons enables prosecutors to charge defendants in contexts unrelated to crimes of terrorism, such as the *Bond* case. Moreover, the factual background in this case suggests that federal law enforcement prosecuted this case simply because local law enforcement seemed uninterested in pursuing it, and the federal prohibition against the use of chemical weapons presented no legal obstacle in choosing this option.\(^{59}\) The use of chemical weapons here thus served as a pretext for federal prosecutors to exercise their authority and take over the state’s traditional role in enforcing criminal law through local law enforcement.

2. U.S. v. Ghane

The federal prosecution of Hessan Ghane demonstrates another example in which the severe federal prohibition against possessing and using chemical weapons was wrongly applied.\(^{60}\) Ghane, a naturalized U.S. citizen of Iranian descent, was admitted to an emergency room after contacting a suicide hotline.\(^{61}\) Ghane told the physician he had cyanide in his apartment which he had acquired during his work as a chemist. When asked if he would turn in the cyanide he refused, stating that he “might want to use it later.” In a psychiatric evaluation, Ghane expressed anger toward government officials and told the psychiatrist: “You know I have access to chemicals.”\(^{62}\) The hospital notified the police, who conducted a

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\(^{59}\) *Bond v. U.S.* 131 S. Ct. 2355, at 2360 (noting that before she started using the chemicals, Bond also engaged in harassing conduct of Hanes and for that she charged and convicted under state law with minor offenses).


search of Ghane’s apartment and found a bottle with white powder that contained seventy-five percent pure potassium cyanide.

Ghane was prosecuted for possession of chemical weapons, in violation of 18 U.S.C section 229 (a) (1) and 229A (a) (1). At trial, Ghane testified that he never intended to use the cyanide to harm anyone, asserting that he suffered from severe depression and kept the cyanide in case he ever decided to commit suicide. After the court held that the defendant was competent to stand trial, the jury convicted him with criminal possession of potassium cyanide. The court rejected the claims that section 229 of the U.S. Code was unconstitutionally vague and overbroad and that the jury instructions were erroneous because they enabled conviction even if the defendant intended to use the cyanide for a peaceful purpose, but the conviction was upheld.\textsuperscript{63}

The prosecution’s theory that Ghane’s conduct met the definition of the terrorism-related offense relied heavily on Ghane’s expression of anger toward unnamed government officials and on his statement that he might use the chemicals in his possession. It should be noted that section 229 prohibits both the possession as well as use of chemical weapons and that Ghane was charged under the former element. Moreover, while the unlawful conduct under section 229 also includes threatening to use chemical weapons, Ghane’s statement fell short of an actual threat to use the chemicals, since he did not specify any type of action that he might take against any particular individual.

In contrast with the \textit{Bond} case, in which the defendant used chemicals with the intent to harm his victim, Ghane’s intention was to harm only himself. Moreover, in contrast with the \textit{Bond} case in which the defendant’s acts amounted to “ordinary” crimes, invoking the terrorism theory in this case criminalized conduct that is not a crime under “ordinary” criminal law.

\textsuperscript{63} U.S. v. Ghane, 2011 WL 529645 at 7
B. The Scope of the Harm Intended or Inflicted

Criminal law theory rests on the assumption that the scope of the harm inflicted or intended by a defendant ought to determine his or her criminal liability.64 Under this theory, greater harm justifies placing greater criminal liability on the defendant.65 Applying this rationale in the terrorism context suggests that the defendant’s intent to inflict massive harm on a large and random group of people justifies imposing greater criminal liability by charging him with the more severe terrorism-related offenses, rather than with “ordinary” crimes.

The above assertion raises the question of whether the scope of the harm intended or inflicted always determines the classification of a crime as terrorism. If so, where should the legal boundary be drawn between crimes of mass killings, such as shooting sprees in public places, and terrorist crimes? The prevailing paradigm is that serial killers are not usually considered terrorists.66 However, this paradigm has been challenged in the following cases, after the prosecution argued that indiscriminate shooting rampages amounted to acts of terrorism.

In addition, those cases in which massive harm on a large group of people was inflicted or intended also raise the question of the proper legal construction of the phrase “intent to intimidate civilian population”. Recall that terrorism involves not only the infliction of harm on random targets, but also the intent to intimidate the public at large.67 Recall also that many prohibitions criminalize, as one form of terrorism offenses, a wide array of conducts which are committed with “intent to intimidate civilian population”.68 The precise reading of this open-ended phrase, however, remains unclear, as the following cases demonstrate.

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64 See, Paul Robinson, Hate Crimes: Crimes of Motive, Character or Group Terror, in 4 Annual Survey of American Law, 605, at 608 (1992/1993) (hereinafter: Hate Crimes) (contending that the scope of the harm intended or inflicted ought to determine the criminal liability or the grading of an offense).
65 Id., Robinson.
66 See, McCormack, supra note 15, at 8, and accompanying note 11 (noting that serial killers are not usually considered terrorists, however this paradigm was challenged in the prosecution of Muhammad).
67 See, supra, Part I. A. 1.
68 See, supra, Part I. B. 2
1. U.S. v. Muhammad

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

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

According to Malvo’s testimony, he was 15 years old when he first met Muhammad, and began living with him and studying the teachings of the Nation of Islam. Malvo testified that Muhammad often spoke about race and socioeconomic disparities, telling him that: "the white man is the devil." Muhammad trained Malvo in shooting high powered rifles, marksmanship and sniper tactics. When Muhammad learned that his wife and children were living in Maryland, he told Malvo that they were going to Washington, D.C. "to terrorize

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69 John Lee Malvo and John Allen Muhammad 934 A. 2d 1059 at 1065, 177 Md. App. 188.
70 Va. Code. Ann §18.2-18 (defining a terrorism crime as: “an act of violence … committed with the intent to: (i) intimidate the civilian population at large or ii) influence the conduct or activity of the government of the U.S”) The Muhammad case is markedly different from most terrorism prosecutions: while terrorism cases are typically handled by federal prosecutors who charge defendants with federal terrorism offenses, Muhammad was prosecuted under Virginia state terrorism statute.
71 934 A. 2d 1059, at 1078 (noting that the only inconsistency in Malvo's statements concerns the detail of whether he or Muhammad had been the actual triggerman on various occasions).
72 Muhammad’s attorneys argued for dismissal of the terrorism charge on the ground that all potential jurors were alleged victims of the crime. The prosecution countered with an agreement to a change of venue outside the area of killings.
73 See, McCormack supra note 15, at 19 (suggesting that the Muhammad prosecution exemplifies the potential for definition confusion).
74 934 A. 2d 1059 at 1077
these people." Muhammad asserted that, notwithstanding a court order awarding custody to the wife, "no white man in a black world is going to tell him when and where and why he cannot see his children." Malvo described how they first conducted a surveillance of the home of Muhammad's wife and children and later traveled to Montgomery County, Maryland, which Muhammad chose as "the perfect area to terrorize" because "it was lower to upper middle class, well-off, mostly whites." The two scouted out spots for the shootings, measuring distances and looking for populated areas without surveillance cameras and hiding places where shots could be fired without witnesses. Malvo then proceeded to testify about each of the six murders that he and Muhammad committed in Montgomery County.\textsuperscript{75}

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

Interestingly, at Muhammad's trial the prosecution suggested that personal revenge motivated the shooting rampage, arguing that it was part of a plot to kill Muhammad’s ex-wife and regain custody of his children.\textsuperscript{76} However, this theory was rejected by the judge, who ruled that there was insufficient evidence to support this argument. Defense attorneys for both sides also raised this argument but the court rejected them.\textsuperscript{77}

Most importantly, nothing in Malvo’s testimony supports the prosecution’s theory that the killing rampage was in fact an act of terrorism. While Malvo’s testimony revealed that Muhammad was heavily influenced by Islam, there was no proof that Muhammad was

\textsuperscript{75} 934 A. 2d 1059 (Muhammad’s and Malvo’s murder spree expanded to several jurisdictions, other than Montgomery county. However, the epicenter of the killings occurred in Montgomery county. The defendants also murdered 4 other victims in Virginia, Alabama and Washington DC, for which they were also convicted. See, Muhammad v. Commonwealth, 619 S.E. 2d 16 (VA, 2005).
\textsuperscript{76} 619 S.E. 2d 16, at 36-37 (VA, 2005)
\textsuperscript{77} 619 S.E. 2d, at 38
affiliated with a terrorist organization or intended to coerce the government to change its actions or policies.

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

2. State v. Halder

Shooting rampages at schools offer another example in which prosecutors attempt to invoke the terrorism theory. However, in the case against Biswanath Halder, the state of Ohio’s reliance on the terrorism classification proved unsuccessful after the court rejected the prosecution’s theory.78 The case involved a shooting rampage at Case Western Reserve University on May 9, 2003. A video surveillance camera recorded Halder, a 62-year-old former student, carrying a Tech 9 semi-automatic machine style handgun and a Berretta nine-millimeter handgun into the University building. The video showed Halder shooting and killing the first person he encountered, then firing indiscriminately at the occupants and police, wounding two victims. Before surrendering to the police, Halder held 100 hostages for eight hours.

A Grand Jury handed down a 338-count indictment against Halder, including, three counts of aggravated murder with firearms, felony murder, mass murder, and terrorism.79 After the State presented its evidence, and before jury deliberations, the trial court dismissed the terrorism charge, holding that “the attack against a small, random group of people in the business school building did not constitute a terrorist attack as defined by Ohio law.”80 The

79 See, Halder indictment, id, (The grand jury also indicted Halder on thirty-five counts of attempted murder with three and five year firearm specifications, and fourteen counts of aggravated burglary with firearm specifications. Prior to the commencement of trial, the trial court dismissed 136 counts of the indictment, leaving intact a 202-count indictment). 80 See, Associated Press. Thomas J. Sheeran, Available on: http://www.accessmylibrary.com/coms2/summary_0286-12053336_ITM
jury subsequently found Halder guilty of several crimes including capital murder, aggravated murder, aggravated burglary, and kidnapping.

Ohio law defines terrorism as committing crimes with “a purpose to intimidate or coerce a civilian population.” The Halder prosecution thus attempted to invoke the terrorism theory by arguing that Halder’s shooting rampage was intended to intimidate or coerce a large group of people. Considering the evidence presented in Halder’s trial, however, characterizing the case as “terrorism” is erroneous: Halder was convinced that a University computer lab supervisor with whom he did not get along had hacked into his computer and deleted thousands of his work files. After the suit he filed against the employee was thrown out of court, Halder sought revenge by going on a shooting spree. Despite his diagnosed mental disorders and delusional beliefs, Halder was found competent to stand trial.

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

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


The Morales case demonstrates a prosecutorial attempt to use, for the first time, New

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81 See, OHIO REV. CODE ANN. § 2909.21 (LexisNexis 2011), see, also, Ohio Revised Code, Ann §2909.24, (LexisNexis 2011). (Ohio’s law defines terrorism as follows: (A) “Act of terrorism” means an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense if committed in this state or constitutes an offense in any jurisdiction within or outside the territorial jurisdiction of the United States containing all of the essential elements of a specified offense, and that is intended to do one or more of the following: (1) Intimidate or coerce a civilian population; (2) Influence the policy of any government by intimidation or coercion; (3) Affect the conduct of any government by the act that constitutes the offense. Having defined an “act of terrorism,” the Ohio Code criminalizes “terrorism,” stating: “no person shall commit a specified offense with purpose to do any of the following: (1) intimidate or coerce a civilian population; (2) influence the policy of any government by the specified offense; (3) affect the conduct of any government by the specified offense.)
York state’s antiterrorism law to prosecute a gang member who killed an innocent bystander in a gun battle over dominance in Mexican-American neighborhood in the Bronx.  

On August 18, 2002, a fight among members of rival gangs broke out following a party. In the course of the fighting, shots were fired, resulting in the death of a 10–year–old girl and the paralysis of a young man. Defendant Edgar Morales, a member of a gang of Mexican–American young adults and teenagers known as the St. James Boys (SJB), was ultimately charged with having committed these shootings.

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

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

The significance of the Morales decision lies in thwarting the prosecutorial attempt to expand the scope of antiterrorism law to cover “ordinary” street crime. Unlike the majority of

82 People v. Morales 86 A.D. 3d 147, 924 N.Y S 2d 62, N.Y. A.D 1 Dep. 2011
83 Morales, 86 A.D. 3d 145, at 155
84 Morales, at 155
criminal cases, which resolve in plea bargains, the *Morales* case was resolved in a jury trial, and ultimately in a reversal by the Court of Appeals. The result might have been different had Morales accepted a plea bargain and waived his right to an appellate court review. Upholding Morales’ conviction would have resulted in a significant expansion of antiterrorism law to include “ordinary” crimes unrelated to terrorism, in particular those committed by large scale organized criminal groups.

On appeal, the *Morales* Court adopted a narrow construction of the open-ended element “intimidate or coerce a civilian population,” a phrase which hypothetically could apply to any form of criminal activity. First, the Court points out that to constitute a crime of terrorism, the “civilian population” targeted by the actor must be a group of people other than the direct victims of the crime.\(^85\) The court further notes that: “If the term “with intent to intimidate or coerce a civilian population” included the intent to intimidate or coerce the direct victims of a particular crime, any specified offense involving intimidation or coercion of a group of people (such as a bank robbery) would constitute a crime of terrorism.”\(^86\)

Second, the Court held that the context of the antiterrorism statute weighs against stretching the meaning of the language to cover a narrowly defined subcategory of individuals. The court cites the legislative history of the statute to support this construction, noting that the legislature intended to address extraordinary criminal acts perpetrated for the purpose of intimidating a broad range of people, not a narrowly defined group of particular individuals whom the criminal actor happens to regard as adversaries.\(^87\) The court stressed that: “the term “to intimidate or coerce a civilian population,” in the context of the aforementioned legislative findings, implies an intention to create a pervasively terrorizing effect on people living in a given area, directed either to all residents of the area or to all residents of the area who are members of some broadly defined class, such as a gender, race, nationality, ethnicity, or religion. The intention by a gang member to intimidate members of rival gangs, when not accompanied by an intention to send an intimidating or coercive message to the broader community, does not, in our view, meet the statutory standard.”\(^88\)

This decision, however, does not fully clarify the ambiguity concerning the legal

\(^{85}\) *Morales*, at 155  
\(^{86}\) *Morales*, at 155 ,FN 8  
\(^{87}\) *Morales*, at 156.  
\(^{88}\) *Morales*, at 157
construction of the overbroad element: “intent to intimidate civilian population”. Moreover, the Court does not read a political motivation requirement into the terrorism-related offense, leaving the door open to additional prosecutorial attempts to invoke the terrorism theory in cases where the defendant’s political motivation and actual terrorist acts are missing. It thus remains to be seen whether other courts would adopt a more expansive reading of the terrorism-related offense or opt for a restrictive construction, limiting the application of the statute only to the terrorism context.


On May 11, 2011 NYPD arrested Ahmed Farhani and Mohamad Mamdouh for conspiring to attack a Manhattan synagogue and for buying gun, ammunition and an inert grenade to carry out the attack. The arrest stemmed from a sting operation, after an undercover detective secretly recorded both suspects ranting about their hatred of Jews and discussing a synagogue attack. According to the court complaint, Farhani suggested disguising himself as an observant Jew so he could infiltrate a synagogue and leave a bomb inside.

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

This case brings to the forefront not only the issue of classification of crimes into terrorism and “ordinary” crimes but also the proper allocation of authority between local and federal law enforcement. While terrorism cases are typically pursued by federal law enforcement, this case was handled by local law enforcement. In New York the FBI-led Joint Terrorism Task Force has been a central player in terror cases following 9/11, and the U.S.

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90 Id.
91 Id.
Attorney's office is well-known for its successful prosecution of several high-profile terrorism cases. While Federal law enforcement was made aware of this investigation, they declined to pursue the case, and the Manhattan district attorney's office brought charges, invoking New York’s state terrorism law for the first time.93

The institutional allocation of authority between federal and local law enforcement in this case calls into question the New York Prosecutors’ classification of it as terrorism. Not only did the investigation fail to establish a connection between the defendants and a specified terrorist organization, but the plot remained in its early stages, without crossing the line between preliminary planning and a criminal conspiracy.94

The common thread characterizing the prosecution’s theory in the above cases is its focus on the scope of the harm intended or inflicted or on the defendant’s specific intent to intimidate civilian population to classify the crimes as terrorism. This harm includes both injuries to the direct targets of the attacks as well as intimidating the public at large.95 The prosecutorial choice to focus on this feature, however, ignores the absence of other features that typically characterize terrorism, mainly the political motivation and specific intent to coerce governments. These examples demonstrate that neither intent to intimidate civilians nor inflicting harm on a large number of victims is a sufficient element to distinguish terrorism from “ordinary” crime. In addition, prosecutorial attempts to invoke the terrorism theory conflate the narrow category of crimes of terrorism with the much broader category of acts of terrorizing. Terrorizing victims, however, is an inherent feature in most crimes, rather than a unique feature of crimes of terrorism. Conflating the two thus leads to unwarranted expansion of terrorism offenses to cover additional contexts beyond the legislative intent.

III. PROSECUTORIAL DISCRETION: IMPLICATIONS OF MISCLASSIFICATION

The following section explores the institutional aspect of misclassifying “ordinary” crime as terrorism: overbroad, unchecked and essentially unlimited prosecutorial discretion.

93 See, e.g. New York Penal Law section 490.25 (criminalizing acts of terrorism. Following 9/11 many states, N.Y among them, adopted legislation that is modeled after federal terrorism crimes.)
95 See, supra, Part I.
In the area of the criminal law against terrorism prosecutorial discretion goes too far, enabling prosecutors to misuse terrorism offenses by charging defendants with these offenses in a wide variety of contexts that are unrelated to terrorism, as this term is commonly understood. The following discussion focuses on the practical implications of accurate classification of terrorism offenses and the perils of prosecutorial misuse of these prohibitions.

A. Unconstrained Prosecutorial Discretion in Charging Decisions in General

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

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

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96 See, e.g., Gerald E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, at 2123-4 (1998) (discussing the common critique of American criminal justice system that the prosecutor is the controlling figure in the typical criminal case).
97 See, Wayne R. LaFave, Jerold H. Israel, Nancy J. King, CRIMINAL PROCEDURE, Fourth Edition, at 683. See, also, Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L. J 1420, 1422-3 (discussing the range of prosecutorial discretion not to prosecute and the authority to prosecute). See, also, Josh Bowers, Legal Guilt, Normative Innocence and the equitable decision not to prosecute, 110 Columbia L. Rev. 1655.
98 Wayte v. U.S. 470, U.S. 598, 608 (1985) (holding that absent an impermissible standard such as race or religion, prosecutors have discretion to decide who will be charged with a crime). See, also, U.S. v. Armstrong, 517 U.S. 546 (1996) (holding that a defendant is not entitled to a discovery claim for a selective prosecution argument).
99 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2719, 2731 (2010) (holding that the plaintiff’s vagueness claim lacks merit, and that the prohibition against providing material support does not violate the first amendment).
discretionary decision that violates equal protection, such as a charging decision that used impermissible criteria such as race or religion.\textsuperscript{100} Terrorism prosecutions, however, typically do not reach that level.\textsuperscript{101}

The main issue, therefore, is not whether these prosecutorial decisions are lawless or unconstitutional, but whether they are wise, prudent and warranted.\textsuperscript{102} Under current law, misusing the overbroad prosecutorial discretion typically falls short of actual prosecutorial misconduct. However, from a normative perspective, it is an unwarranted prosecutorial practice with dangerous practical implications, and thus should be better structured and legislatively constrained.

Scholars have long critiqued the risks of overbroad prosecutorial discretion: Sara Sun Beale, for example, addresses the effects of over-breadth federal criminal offenses, noting that such legislation gives federal prosecutors too much unchecked, unreviewable and virtually unlimited discretion to select the few cases that will be prosecuted and which offenses to charge.\textsuperscript{103}

In a landmark Article, the late prominent criminal law scholar William Stuntz argues that the power to define criminal law is in the hands of prosecutors, not legislatures.\textsuperscript{104} Stuntz challenges the prevailing assumption that substantive criminal law, as amended by legislatures, defines in advance the conduct punished by the state by arguing that the role played by the definition of crimes and defenses in the allocation of criminal penalties is smaller than we suppose, and generally targeted to empower prosecutors, who are the criminal justice system’s real lawmakers.\textsuperscript{105} Stuntz further contends that this broad prosecutorial discretion is especially sweeping in the context of federal law enforcement, due to the enormous number of federal crimes that prosecutors choose from, many which are broadly and vaguely defined.\textsuperscript{106} These prosecutorial choices are critically important because

\begin{itemize}
  \item \textsuperscript{100} Connick v. Thomason, 130 S. Ct. 1880 (2010)
  \item \textsuperscript{101} See, supra Part I.
  \item \textsuperscript{102} See, Bruce A. Green and Fred C. Zacharias, Prosecutorial Neutrality, 2004 Wis. L. Rev. 837, at 838, and accompanying footnote 4.
  \item \textsuperscript{103} See, Sun Beale, Is Corporate Criminal Liability Unique, \textit{supra} note 52, at 1509 (noting that the over-breadth of the federal criminal code gives federal prosecutors too much unchecked discretion to select the few cases that will be prosecuted and which offenses to charge).
  \item \textsuperscript{104} See, Stuntz, Pathological Politics, \textit{supra} note 11, at 519 (noting that criminal law is defined by law enforcers, by prosecutors’ decisions to prosecute and police decision to arrest).
  \item \textsuperscript{105} Id, at 506 (noting the role of prosecutors in the criminal justice system).
  \item \textsuperscript{106} Id, at 533-34 (discussing the increased prosecutorial discretion of federal prosecutors).
\end{itemize}
only a relatively small number of cases can be prosecuted in the federal system, and criminal law is mostly enforced on the local level. Stuntz suggests that since federal prosecutors are not bound by local law enforcement’s obligations and community pressure to prosecute “bread and butter” crimes, they are free to pursue prosecutions based on personal and political agendas. Federal prosecutors pursue particular cases because they find them interesting or because they believe that they would best advance their professional careers.

Rachel Barkow contends that prosecutors serve as de-facto adjudicators in the vast majority of criminal cases, because 95% of cases resolve in plea bargains, rather than in jury trials. Prosecutors thus control the terms of confinement in the current penal system. Barkow further argues that the risks of abuse of prosecutorial power are aggravated due to the combination of law enforcement and adjudicative roles in a single actor. Moreover, no effective legal checks exist to police the manner in which prosecutors exercise their discretion to bring charges and negotiate pleas. This practice, in which prosecutors are the final adjudicators of their own law enforcement policies, violates the separation of power principle.

B. The Heightened Role of Prosecutorial Discretion in Terrorism Cases

Arguably, many of the problems identified above are not necessarily unique to the terrorism context: In fact, they also characterize many other areas in criminal law enforcement, particularly federal criminal law. However, those general problems that characterize American criminal justice system are particularly exacerbated in the context of terrorism prosecutions, for several reasons:

First, the problem of overbroad prosecutorial discretion becomes especially critical in the terrorism context due to the lack of legislative guidelines for what conduct constitutes

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107 Id, at 544 (noting that federal prosecutions amount to less that 5% of total prosecutions).
108 Id, at 543 (explaining how federal prosecutors are able to choose cases based on their personal and professional gain and growth).
109 Id, at 546 (suggesting that federal prosecutors are free to pursue high profile cases or other professionally rewarding cases).
111 Id, Barkow.
112 Id, Barkow
113 Id, Barkow
114 Id, Barkow
“terrorism”, and to the unique role that prosecutors play in classifying crimes. Conventional wisdom holds that these decisions should rest with legislatures whose role is to statutorily define crimes of terrorism. In stark contrast with “ordinary” crime, however, legislatures have not clearly defined what crimes qualify as terrorism, failing to reach an understanding about the scope of this term. In the absence of statutory constraints restricting the application of terrorism offenses only to the context of terrorism, prosecutors are left with enormous discretion to make these critical classifications, resulting in the unchecked use of terrorism statutes against common criminals.\textsuperscript{115} Prosecutors invoke the terrorism characterization based on features they choose and are free to charge defendants with terrorism offenses without establishing a causal link between the defendant’s conduct and actual acts of terrorism. Given this leeway in making judgments, prosecutors decide not only which crimes fall under the “terrorism” category, but also who is considered a terrorist.\textsuperscript{116} Consequently, prosecutors are granted unwarranted authority to shape criminal law against terrorism by drawing the boundaries of terrorism crimes. Furthermore, prosecutors are neither the proper institutional actors to make these classifications nor well equipped to carry out such a task: if legislatures cannot agree upon a definition of terrorism, why should prosecutors be more successful? Indeed, a recent report found that federal entities classifying cases agreed less than ten percent of the time that terrorism was involved in a given prosecution.\textsuperscript{117}

Second, the increasing role of a preventive approach in criminal law enforcement further explains why the problem of enormous prosecutorial discretion is aggravated in the terrorism context: The justice system’s “war on terrorism” has resulted in a paradigmatic shift in law enforcement policy. The American criminal justice system has always focused on a punitive approach, combining retributive and utilitarian justifications for punishing defendants for their past crimes. The emerging terrorist threats and the acknowledgement that dangerous conduct must be prevented before harm occurs have resulted in a preventive model

\textsuperscript{115} See, Luna, Criminal Justice and the Public Imagination, \textit{supra note} 32 at 114 (noting that: “law enforcement has been exercising its war-on-terror powers at an increasing rate, with agents across the country using terrorism provisions against seemingly common criminals”).

\textsuperscript{116} Id, Luna, at 114-115 (noting that “government officials sometimes employed sweeping definitions of “terrorism” in classifying cases”).

aimed at avoiding future harms by thwarting dangerous conduct even before a crime occurs.

The early intervention and preventive approach has been used in many other legal contexts, such as civil commitment of individuals with severe mental disorders who pose a danger to society, and commitment of sexual predators based on predicting their future dangerousness. However, this approach aggravates the risks of misuse of prosecutorial power, as it incapacitates individuals based on some future danger they may pose. Employing the criminal justice system before a crime has been committed risks the abuse of prosecutorial expansive discretion and the misuse of the preventive model itself. Recall the prosecution of Ahmed Farhani and Mohamad Mamdouh: While the defendants were charged with conspiracy and terrorism charges, it seems unclear whether their aspirational plot actually amounted to operational conspiracy. Charging these defendants with terrorism offenses expands criminal liability above and beyond conspiracy liability, based on employing the preventive model to counter the risks of terrorism.

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

The failure of the criminal justice system to clearly distinguish between “ordinary” crime and terrorism begs the following questions: Why does accurate classification matter for practical purposes and why is it important to distinguish between terrorism and “ordinary” crime as long as both are covered by existing criminal provisions? Indeed, in the vast majority of criminal cases in which terrorism charges are pursued, the question is not whether a conduct is indeed a crime but rather what kind of crime, namely, whether it is a crime of terrorism or merely “ordinary” crime. In addition, terrorists commit both terrorism-related crime as well as “ordinary” crime.

One reason why proper classification is critical concerns the decreased protection of defendants’ liberty rights. Historically, American jurisprudence has been committed to protecting individual liberties in general and criminal defendants’ rights in particular, 

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118 See, generally, Christopher Slobogin, A Jurisprudence of Dangerousness, 98 NW U. L. Rev. 1 (2003) (suggesting that while preventive detention is generally inconsistent with a preference for criminal punishment, it is acceptable both for those who are unaware of the criminality of their actions (mentally ill) and for those who are committed to crime and are aware that this commitment will very likely result in a significant loss of freedom or death (terrorists and particularly suicide bombers). In other words: those who are undeterred. Undeterrable conduct justifies preventive detention.
focusing on the right to Due Process of law in criminal trials. Prior to 9/11, threats to national security were not a main enforcement priority, and the idea of granting deference to the government’s national security considerations was largely foreign to the criminal justice system. Since 9/11, most discussions on antiterrorism law have been based on the premise that trade-offs must exist between civil rights and individual liberties, on the one hand, and national security considerations on the other. In a criminal justice system that places a premium on fighting the “war on terrorism”, the delicate balance between these two important values often results in instances in which national security considerations prevail at the expense of individuals’ liberty rights. Classifying more crimes as “terrorism” tilts this balance in favor of national security considerations.

The prevalence of guilty pleas and lack of data on the scope of terrorism-related prosecutions further highlights the importance of adopting a legal mechanism to better distinguish between terrorism and ordinary crime. The overwhelming majority of criminal cases in American criminal justice system are resolved in plea bargains. The U.S. Supreme Court in Padilla v. Kentucky squarely acknowledges this reality, with Justice Stevens noting that: “Pleas account for nearly 95% of all criminal convictions”.

While the fact that most criminal cases resolve in guilty pleas is hardly any news, it carries additional risks for the purposes of enforcing the criminal law against terrorism because of the unique role that prosecutors play in this area by classifying crimes as “terrorism” or “ordinary” crime. Most of the cases in which individuals are prosecuted under terrorism offenses typically resolve in plea bargains and therefore neither go to trial nor are being reviewed at the appellate level. While the plea rate for terrorism cases is somewhat lower than the plea rate for other offenses, which on average remain above 95%, a plea rate in excess of 80% is still remarkably high. Consequently, there is a very small body of criminal case law dealing with terrorism prosecutions.

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121 Padilla v. Kentucky, 130 S. Ct. 1473, 1486.
123 Id, Dervan (noting that it is estimated that there have been several hundred convictions of terrorism crimes, mostly under the prohibition against providing material support, which over 80% resulted from a
The potential dangers of limited case law on terrorism prosecutions are far-reaching. To begin with, the scope of prosecutorial misclassification of “ordinary” crimes as terrorism cannot be easily quantified due to a lack of empirical data and the absence of judicial decisions that interpret the substantive elements of terrorism statutes. Moreover, in a criminal justice system dominated by plea bargains, courts are deprived of the opportunity to exercise meaningful oversight on prosecutorial discretion regarding the use of terrorism statutes. In the majority of cases, the trial courts’ acceptance of plea bargains leaves prosecutorial power to misclassify crimes as terrorism beyond the scope of appellate court review. The only caveat is when defendants reserve their rights to appeal. Consequently, neither legislatures nor the judiciary defines what conduct amounts to terrorism, leaving prosecutors to shape the substantive scope of the criminal law against terrorism.

Misclassifying “ordinary” crimes as terrorism, however, raises both theoretical and practical concerns. Charging defendants with terrorism offenses in cases unrelated to terrorism is a risky practice that may lead to unintended consequences concerning both substantive criminal law as well as criminal procedure law. Existing scholarship, however, focuses mainly on the latter aspects, noting the implications of using the expansive investigatory and procedural authority granted to the Government under terrorism-related offenses in “ordinary” crime, unrelated to terrorism. 124 Norman Abrams, for example, critiques the broad use of the PATRIOT Act, noting that unlike previous terrorism-related legislation, “the PATRIOT Act did not add very much to the body of anti-terrorism crimes. The main thrust of the Act was rather directed to broadening and strengthening law enforcement tools of investigation and procedures and methods that can be used to attack terrorist groups or activities. While many of the Act’s provisions are restricted to being used in terrorism-related investigations, some of the tools can be used as well against ordinary criminals and criminal activity. The Act includes provisions that loosen the restrictions on government’s use of electronic surveillance, loosen the secrecy that attaches to grand jury plea of guilty. Dervan further elaborates on the two theories dominating scholarship regarding the plea bargaining process: The administrative theory argues that prosecutors have become so powerful that they force defendants to accept plea bargains in which they alone determine the appropriate punishment. In contrast, the shadow-of a–trial theory suggests that both prosecutors and defendants participate in the plea bargaining process like a contractual negotiation.)

124 See, generally, Abrams, supra note 6, at 11-21.
deliberations, add to its authority to address money laundering, give it additional procedural power in certain kinds of immigration matters, and facilitate cooperation between government agents focused on intelligence gathering and those whose goal is arrests and prosecution.\textsuperscript{125}

The Government’s overbroad investigational and procedural powers under existing terrorism-related statutes have been discussed in great detail elsewhere;\textsuperscript{126} thus, its implications for misclassifying “ordinary” crime as terrorism will not be repeated here. Instead, the following discussion will focus on some of the substantive aspects of misclassifications and on its less explored risks and unintended consequences, including the following features:

\textbf{1. Enhancing the Severity of the Crime and the Penalty}

The most apparent implication of classifying a crime as terrorism concerns granting prosecutors the authority to increase the severity of both the crime and penalty. Scholars often criticize what has been famously described as the “one-way-ratchet-up” toward the enactment of additional crimes and the criminal justice system’s harsher criminal sanctions.\textsuperscript{127} Scholars further argue that the tendency towards being “tough on crime” is unwarranted and unjust, contending that it results in inequalities in the criminal justice system, since harsh penalties affect mainly minorities and underprivileged defendants.\textsuperscript{128}

The Bond prosecution aligns with this national trend of “getting tough-on-crime”. The case demonstrates how a relatively minor crime has morphed into a serious federal crime, which carries a disproportionally severe penalty. It is indisputable that Bond committed several crimes, violating several Pennsylvania statutes, including statutes that criminalize simple assault,\textsuperscript{129} aggravated assault\textsuperscript{130} and harassment.\textsuperscript{131} Federal prosecutors, however, chose to charge Bond with a serious terrorism offense, therefore significantly increasing the

\textsuperscript{125} Abrams, id, at 11.
\textsuperscript{126} See, e.g., David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 Cal. L. Rev. 693 (2009).
\textsuperscript{127} See, generally, Stuntz, Pathological Politics, supra note 11, at 509 (discussing the heavy-handed approach and the over-criminalization trend).
\textsuperscript{129} 18 Pa. Const. Stat. § 2701
\textsuperscript{130} 18 Pa. Const. Stat. § 2702
\textsuperscript{131} 18 Pa. Const. Stat. § 2709
severity of the crime and the penalty.

Using the terrorism classification to increase the severity of punishment is legislatively guided: under the Sentencing Guidelines, terrorism serves to enhance the severity of the penalty.\textsuperscript{132} The sentencing commission promulgated 3A1.4, which provides for increasing a felony offense by 12 levels or if the offense was intended to promote a “federal crime of terrorism.”\textsuperscript{133} To determine what constitutes a “federal crime of terrorism”, for the purpose of applying the terrorism enhancement, courts must look to the statutory definition in 2332b (g) which defines the term as an offense “calculated to influence or affect the conduct of a government by intimidation or coercion or to retaliate against government conduct”, and (B) is a violation of one of a list of 39 other criminal statutes.\textsuperscript{134}

In \textit{U.S. v. Thurston} the court held that the plain and unambiguous language of the enhancement does not require conviction of an offense defined as a “federal crime of terrorism.”\textsuperscript{135} Rather, in order to apply the terrorism enhancement, the court must find that the offense of conviction involved, or was intended to promote, an enumerated offense intended to influence, affect or retaliate against government conduct.\textsuperscript{136} Establishing the element “crime of terrorism” is therefore not required in order to apply the terrorism enhancement. In particular, the prosecution is not required to establish evidence that the perpetrators committed the predicate offenses with intent to influence or affect the conduct of a government by intimidation or coercion or to retaliate against government conduct. Instead, the \textit{Thurston} court adopted an expansive interpretation under which in order to apply the penalty enhancement, the prosecution need only prove the defendant committed the underlying offense with intent to promote a federal crime of terrorism.\textsuperscript{137}

\begin{thebibliography}{137}
\bibitem{132} Pub. L. 103-322 section 120004 (Congress passed the Violent Crime Control and Law Enforcement Act of 1994. Under that Act, Congress directed the Sentencing Commission to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.
\bibitem{133} USSG section 3A1.4, 18 U.S.C.A
\bibitem{134} 18 U.S.C. § 2332 (b) (g) (5) (B)
\bibitem{135} See, United States v. Thurston, 2007 WL 1500176 (D. Or. 2007)
\bibitem{136} 2007 WL 1500176.
\bibitem{137} \textit{Id}.
\end{thebibliography}
2. **Sentencing Disparities, and Lack of Consistency and Uniformity**

A direct result of prosecutors’ authority to enhance the severity of the crime and penalty based on the terrorism classification is increasing sentencing disparities among similarly situated defendants. Thus, one of the perils of prosecutorial misuse of terrorism offenses is that it dangerously compromises the criminal justice system’s uniformity and consistency regarding charging decisions and the ensuing penalties in similar factual contexts. Furthermore, treating similarly situated defendants differently exacerbates arbitrariness and inequality in the criminal justice system.

The overlap of federal and state criminal laws generally promotes sentencing disparities among defendants, as a wide spectrum of criminal conduct is now potentially subject to either federal or state prosecution.\(^{138}\) The choice between the two, however, can generate dramatically different sentencing results. Defendants often fare significantly worse under federal-law prosecution than state-law prosecution. The excessive discretion inherently built into the criminal justice system thus creates unwarranted sentencing disparities among similarly situated defendants.\(^{139}\) The *Bond* case provides an example in which the federalization of a clearly local crime significantly increased the sentence, creating disparities between this defendant and others whose conduct inflicted similar harm. In *Bond*, the government requested a sentencing enhancement on the grounds that although Bond was a low-level technician, she had used “special skill” in selecting the chemicals used to carry out her crime.\(^{140}\) The District Court granted the government’s request and sentenced Bond to six years in prison. By comparison, had Bond been convicted under Pennsylvania state law for aggravated assault, she likely would have faced a prison term of up to 25 months.\(^{141}\)

Sentencing disparities among similarly situated defendants and lack of uniformity and

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\(^{138}\) See, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, supra note 52, at 997-98 (arguing that increase in federal prosecutions overloads the federal courts system and inevitably results in unjustified sentencing disparities); *See, also*, Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 647–48, 668 (1997) (noting that: “disparities ”are most striking in cases involving frequently charged duplicative federal statutes, like drug and firearms prosecutions”).

\(^{139}\) See, Sun Beale, *Is Corporate Liability Unique*, *supra note 52*, at 1510, and accompanying footnotes.

\(^{140}\) *U.S. v. Bond* 581 F.3d 128. *See, also*, Eric Luna and Marianne Wade, Prosecutors as Judges, 67 Wash. & Lee L. Rev. 1413, at 1416 (2010) (discussing the Weldon Angelos case, in which instead of bringing state charges, the defendant was prosecuted under federal law, resulting in incredibly harsh sentence).

\(^{141}\) 18 Pa. Const. Stat. 303.13
consistency in charging decisions are not unique to the terrorism context. Rather, these problems are common in other areas in the criminal justice system, which is generally dispersed and decentralized, therefore resulting in inherent disparities in charging decisions. However, the problem is further exacerbated in terrorism cases due to the fact that the decision what conduct amounts to terrorism is not legislatively guided, but rather rests solely in the hands of prosecutors. Moreover, it is noteworthy that many of the defendants charged with terrorism offenses are ethnic minorities, often naturalized American citizens of Middle Eastern descent. As scholars have long noted, minorities and underprivileged defendants are those who are most affected by sentencing disparities in the current criminal justice system.

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

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142 See, Luna and Wade, supra note 140, at 1416-17 (arguing that current sentencing practices compromise the integrity of the criminal justice system, transferring sentencing authority from trial judges to federal prosecutors who may pre-set punishment through creative investigative and charging practices, producing troubling punishment differentials among offenders with similar culpability).

143 See, William Stuntz, Unequal Justice, supra note 128.

144 See, generally, Nathaniel Stewart, Ohio’s Statutory and Common Law History with Terrorism – A Study in Domestic Terrorism Law, 32 J. of Legislation 93 (2005)
3. Prosecutorial Bias and Prejudice

Many commentators have addressed the need for prosecutorial neutrality, including the notion that prosecutors should not be biased in their decision-making. Generally speaking, the requirement for neutrality means that prosecutors may not act out of racial or ethnic prejudice or against a particular religious group for reasons of its beliefs. As one scholar has put it: “Unreviewable and unchecked prosecutorial discretion invites improper considerations such as bias, prejudice or political considerations”. However, the general requirement for prosecutorial neutrality does not provide a workable legal standard for how prosecutors should act, particularly in cases in which religion may be a relevant factor to the charges, such as in hate crimes.

Terrorism prosecutions provide a prominent example in which ethnic biases and nationality-based prejudices might infiltrate the prosecutorial decision-making process regarding the charges brought against a defendant whose conduct inflicted harm on a large number of victims. The 9/11 attacks and other crimes of terrorism where particular groups are significantly more represented, namely Muslims of Middle-Eastern descent, have brought the issue of ethnic profiling in terrorism prosecutions to the forefront of legal scholarship. Scholars have expressed concerns over the increased risks of racial, religious or ethnic profiling in terrorism prosecutions, worrying that such factors may expose individuals to harsher legal treatment. Additionally, research has demonstrated that individuals have subconscious biases that can negatively affect perceptions, behaviors and judgments towards minorities. Given the lack of statutory guidance on what conduct amounts to terrorism, prosecutors are free to decide whether a crime qualifies as terrorism based on their own

145 See, Green, and Zacharias, supra note 102, at 860.
146 See, e.g. Sun Beale, Is Corporate Criminal Liability Unique? supra note 52 at 1510
147 See, Green, and Zacharias, supra note 102, at 860
150 See, generally, L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 Minn. L. Rev. 2035 (2011) (discussing the role of subconscious biases in the fourth amendment context).
personal beliefs and inclinations.

4. Political Incentives

The intersection between political considerations and the enforcement of criminal law is particularly salient in the area of terrorism-related prosecutions in two respects. The first concerns political influence on legislatures’ incentives to adopt terrorism-related offenses. In a series of landmark articles on the relationship between substantive criminal law and criminal procedure, the late William Stuntz argued that state, federal and local politics regarding criminal justice policy are infamous for their highly reactive nature, demonstrating “the pathological politics of criminal law.”\(^{151}\) Stuntz argued that the combination of robust procedural protections and a political commitment to social regulation through crime control has led not only to pervasive exceptions to procedural safeguards but also to an excessive ratcheting-up of the harshness of substantive criminal law.\(^{152}\) The one-way-ratchet occurs because politicians typically perceive procedural protections as interfering with the effective regulation of crime, giving legislatures a strong political incentive to pass overbroad criminal statutes allowing law enforcement to exercise their authority in a wider range of situations.\(^{153}\)

In the terrorism context, state legislatures have been quick to adopt measures to address the threats of terrorism. Following 9/11, state legislatures in 33 states and the District of Columbia amended their criminal codes to include terrorism-related offenses.\(^{154}\) This type of legislation, typically modeled after federal terrorism-related offenses, adopted expansive, vague, and undefined prohibitions. Acknowledging that the concept of terrorism is too contested, legislatures avoided making terrorism an element of the offenses while having a political incentive to expand the scope of the crimes by allowing for the prohibitions to cover broader factual contexts.

These legislative measures resonate with legislatures’ political incentives for “fighting

\(^{151}\) See, Stuntz, Pathological Politics, supra note 11, at 547-57 (discussing legislatures’ incentives in expanding the scope of substantive criminal law).

\(^{152}\) See, Stuntz, Substance, Process and the Civil-Criminal Line, supra note 54 at 7-9.

\(^{153}\) Id, Stuntz, Substance, process, at 7-15.

\(^{154}\) See, e.g., New York, Virginia, Ohio.
the war on terrorism” in order to satisfy the American people’s demand that aggressive steps be taken to reduce the catastrophic risks of terrorism and ensure their safety.\footnote{See, generally, Cass R. Sunstein, On Divergent American Reactions to Terrorism and Climate Change, 107 Colum. L. Rev. 503, 506.} Legislatures, politically committed to respond to the public’s deep fear and outrage by passing broad laws that build on these perceptions of terrorism’s risks, further rely on the public’s willingness to support these aggressive measures and on the public’s perception that adopting broad terrorism-related prohibitions provides significant benefits at acceptable cost.\footnote{Id, Sunstein.}

Political incentives, however, play a prominent role not only in shaping legislatures’ policies concerning their criminal laws, but also in affecting prosecutorial discretion regarding charging decisions due to the unique political nature of prosecutors’ offices. An important feature that characterizes the American criminal justice system is prosecutors’ political accountability.\footnote{See, generally, Sara Sun Beale, Rethinking the Identity and Role of U.S. Attorneys, 6 Ohio St. J. Crim. L. 369, 391 (2009) (discussing the history of the office of U.S. attorneys).} The selection and retention of chief prosecutors is markedly political in nature.\footnote{See, generally, Michael A. Simons, Prosecutors as Punishment Theorists Seeking Sentencing Justice, 16 George Mason L. Rev. 303 (2009) (noting that federal prosecutors political accountability runs through the president, thus they are less directly accountable than their locally elected state counterparts).} Both federal and state prosecutors are selected through partisan political processes: U.S. attorneys are political appointees who are subordinated to the Attorney General – a political appointee of the U.S. president.\footnote{See, Sun Beale, supra note 157, at 409-410 (discussing the appointment and removal of U.S. attorneys).} District attorneys and state attorneys are elected by their communities in a partisan ballot. Scholars note that the risk of political considerations influencing prosecutorial discretion is heightened in a system in which prosecutors are both politically ambitious and ideological.\footnote{See, H.W. Perry, Jr., United States Attorneys- Whom Shall They Serve? 61 Law & Contemp. Prob., 129, at 144 (1998) (noting that a person who is seeking high profile cases and is particularly ideological might be more tempted to use the power of the office for partisan reasons).} Furthermore, the nature of the American criminal justice system, where prosecutors’ electoral incentives are particularly notable, creates a problem of imbalances in incentives, because elected chief prosecutors often run on tough-on-crime platforms; thus, the pressures to ensure convictions outweigh the rewards for respecting defendants’ rights.\footnote{See, speech of retired Justice Paul Stevens, addressing the U.S. Supreme Court decision in Connick v. Thomson available at http://online.wsj.com/public/resources/documents/stevens.pdf} This reality results in the political accountability of prosecutors, both at the local and state as well as at the federal level.
Prosecutors’ political incentives are not unique to terrorism prosecutions. Indeed, the risks associated with the infiltration of political incentives into the prosecutorial decision making process demonstrate another aspect of the general requirement of prosecutorial neutrality. However, political incentives play a premium role in terrorism prosecutions because of the high-profile nature of these cases and their inherently political nature. Arguably, the “war on terrorism” is heavily affected by politics dynamics, and classifying crimes as terrorism carries clear political implications. In addition, characterizing crimes as terrorism brings on extensive media coverage and public attention, which provides prosecutors with publicity and fame they would not have enjoyed had “ordinary” criminal charges been brought instead.

5. The Terrorism Label and the Effect of Fear on Juries’ Perceptions

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

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162 See, generally, Sun Beale, Supra note 157, Rethinking the Identity, at 382-3 (discussing improper partisan political considerations that influenced prosecutorial discretion).
163 See, Green and Zacharias, supra note 102, at 869 (stating that one element of prosecutorial neutrality is nonpartisanship, and that the decision whether and when to bring charges in individual cases should be made regardless of partisan politics). See, also, ABA Comm. on Criminal Justice Standards, ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd ed. 1993) (stating that: “in making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or a desire to enhance his or her record of convictions). 
164 See, e.g. the extensive media coverage in the recent terrorism prosecution in State of New York v. Ahmad Farhani and Mohammad Mamdouh
165 See, e.g. Demleitner, supra note 47 (suggesting that the increased application of the term “terrorism” may augment public insecurity and create unnecessary alarm over run-of-the-mill criminal activity).
166 See, generally, Daniel Filler, Terrorism, Panic and Pedophilia, 10 Va. J. of Social Policy & the Law 345, 367-69 (2003) (addressing the potential links between terrorism and pedophilia, a connection that stems from using the sexual predators rhetoric with respect to terrorists. Filler fears that social anxieties and moral panics may lead to application of anti-pedophilia policies to those that the public associates with terrorism).
167 See, Luna, Criminal Justice and the public Imagination, supra note 32 at 74
way in which powerful emotions, particularly hatred and fear, often prevail over rational legal doctrines, resulting in significant deviations in criminal law and procedure. 168

The terrorism classification, along with the “war on terrorism” rhetoric, may also affect juries’ and judicial perceptions regarding the adjudication of terrorism crimes. The public’s deep fear of “terrorists” plays a significant role in institutional actors’ perceptions of crime. Invoking the terrorism rubric, along with labeling the defendant a “terrorist,” may trigger emotional responses that affect jurors’ decisions regarding conviction and punishment.

Prominent scholars have addressed the role of cultural cognition theory on jurors’ decision-making process.169 Under this theory, individuals tend to conform their perceptions of legally consequential facts to their defining group commitments.170 In the context of terrorism prosecutions, personal dispositions, biases and emotions may prove stronger than legal doctrines in making decisions about innocence and guilt; jurors might either identify themselves with the large group of Americans who fell prey to terrorism, or view themselves as potential targets of future terrorist attacks. Moreover, labeling defendants as “terrorists” effectively increases the chances of conviction, because jurors are likely to grant deference to national security considerations and accept government policy judgments regarding what types of conduct constitute threats to national security, as well as to their own personal security.

6. Tilting the Balance Between Localism and Federalism

Terrorism prosecutions provide a poignant example of the complex relationship between local and federal law enforcement. On the one hand, one of the defining characteristics of American criminal justice system is its localism.171 Scholars note that the

168 Id, Luna.
170 Id, Kahan, at 753-767
171 See, William Stuntz, Terrorism, Federalism and Police Misconduct, Harvard J. of Law and Public Policy, at 1
American criminal justice system relies more on local than centralized decision-making in law enforcement, resulting in a dispersed and decentralized criminal court system.\textsuperscript{172} On the other hand, federal offenses cover a wide array of conduct that is already criminalized under state law.\textsuperscript{173} While federal law authorizes the prosecution of many forms of localized crime, federal prosecutors are able to handle only a small fraction of these cases, leaving the vast majority of criminal cases to local prosecutors.\textsuperscript{174}

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

The implications of favoring federal law enforcement over a localized criminal justice system are far-reaching: William Stuntz noted that local law enforcement is constrained by both budget and politics and is accountable for its prosecutorial policy in the eyes of the local community.\textsuperscript{175} Therefore, local prosecutors are bound to prosecute “bread and butter” crimes such as murder, robberies, rape, etc. In contrast, federal agencies, being less constrained, are not accountable to the public and therefore less attentive to its needs and concerns.\textsuperscript{176} Consequently, argued Stuntz, federal prosecutors are free to pursue different agendas, which are often related to their personal preferences, such as the advancement of their professional careers or their personal interest in enforcing particular type of crime.\textsuperscript{177} Scholars further note that the federal emphasis on terrorism prosecutions has increased the reliance on states’ investigative resources, both to coordinate with federal investigators in terrorism investigations and to make up for the diversion of federal investigations from other kinds of cases.\textsuperscript{178}

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\item \textsuperscript{172} See, generally, Rachel E. Barkow, Federalism and Criminal Law: What the Feds Can Learn from The States, 109 Mich. L. Rev. 519, 522 (2011) (noting that states have the option of vesting authorities on either state attorneys or local district or county attorneys).
\item \textsuperscript{173} See, Beale, Many Faces, supra note 52 at 755, 768 (arguing that overfederalization tips the federal-state balance).
\item \textsuperscript{174} See, Stuntz, Pathological Politics, supra note 11, at 543-46.
\item \textsuperscript{175} Id, Stuntz.
\item \textsuperscript{176} Id, Stuntz.
\item \textsuperscript{177} Id, Stuntz.
\item \textsuperscript{178} See, Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Justice 377, at 407-416 (2006) (examining the federal, state and local relations in the law enforcement sphere,
\end{itemize}
Rachel Barkow considers the question of when criminal enforcement responsibility should rest with local law enforcement and when it should reside with more centralized actors such as federal or state prosecutors. Barkow contends that the debate over the federalization of a crime boils down to a question of sentencing policy, namely, whether and when it is appropriate for the federal government to step into an area of traditional local authority over crime because of a differing view of sentencing policy.

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

7. Slippery Slope: Additional Applications of Terrorism Statutes

The combined effect of unlimited prosecutorial discretion and the broad language of terrorism offenses may lead to additional expansions of these prohibitions in factual contexts that are unrelated to terrorism. Moreover, since rhetoric plays a crucial role in the public’s

\footnote{See, Barkow, supra note 172, at 579 (discussing the policy choice between local and centralized law enforcement).}

\footnote{Id, Barkow.}
understanding of crime, using the slogan “War on Terrorism” potentially opens the door for additional targets. This possibility raises significant concerns that terrorism statutes may be further misused in additional contexts, which exceed legislatures’ primary intent to combat politically motivated crimes. One notable example for such an attempt includes prosecuting gang members under terrorism-related offenses, as the Morales case demonstrates. While the New York Court of Appeals rejected the prosecution’s theory that the terrorism-related prohibition may stretch to include gang crimes, the criminal justice system is likely to face some additional attempts in which the prosecution would employ creative theories to bring terrorism-related charges against “ordinary” criminals. Drug and sex trafficking are natural candidates for such an expansive reading of terrorism-related offenses.

**a. Drug Trafficking**

In the last decades, the criminal regulation of drug trafficking has become a major goal of the American criminal justice system. The phrase “War on Drugs” was coined to address law enforcement’s vigorous fight against drug use. Interestingly, the “War on drugs” has often been phrased in terms of a substantial risk to national security. The parallels between the “war on drugs” and the “war on terrorism” suggest that prosecutors may try to use terrorism offenses to prosecute drug traffickers by invoking the theory that drug trafficking is one form of international terrorism. Take, for instance, a hypothetical in which a drug trafficking organization escalates the measures it employs by using bombs for the purpose of trafficking drugs from one country to another. The broad wording of the prohibition against bombing of places of public use suggests that this conduct meets the

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181 See, supra, Part II
183 Id, at 218
185 See, Abrams, supra note 6 at 76.
elements of this offense.

A bill recently introduced to Congress further supports this theory; The bill proposes that six Mexican drug cartels be added to the list of foreign terrorist organizations.\(^{186}\) These drug cartels would be designated “terrorist organizations” as this term is understood in the Immigration and Nationality Act.\(^{187}\) The Bill is premised on the assumption that international drug trafficking constitutes a threat to the safety and security of the U.S. and its people, similar to other forms of terrorism. Adopting a bill that equates drug trafficking with terrorism carries far-reaching practical implications that exceed the scope of this Article.

b. Sex Trafficking

In a provocative paper, Catharine MacKinnon compares the “war on terrorism” paradigm with violence against women.\(^{188}\) MacKinnon points out that in both cases, non-state actors commit violence against innocent civilian targets in acts that are premeditated and involve ideological and political, rather than criminal motives, as sexual violence is one practice of socially organized male power.\(^{189}\) MacKinnon further contends that both patterns of violence resemble dispersed armed conflict, but the world’s response to them has been markedly different: while the post 9/11 paradigm shift permitted potent responses to massive non-state violence against civilians, international law fails to address violence against women as one form of terrorism or war crimes.\(^{190}\) MacKinnon further argues that just as acts of terrorism are crimes against humanity, so is much violence against women, making both internationally illegal, and justifying international response under the genocide legal category.\(^{191}\)

MacKinnon’s arguments are undoubtedly controversial, making it unlikely that the international community will declare “violence against women” as one form of international

\(^{186}\) See, H.R. 1270—To direct the Secretary of State to Designate as foreign terrorist organizations certain Mexican drug cartels, introduced in House on March 30, 2011. Available at: http://thomas.loc.gov/cgi-bin/query/z?c112:H1270:

\(^{187}\) See, section 212 (a) (3) (B) of the Immigration and Nationality Act (8 U.S.C. 1182 (a) (3) (B).


\(^{189}\) Id, MacKinnon

\(^{190}\) Id, at 13-14 (noting that: “if women were seen to be a group, capable of destructing them, the term genocide would be apt”).

\(^{191}\) Id.
terrorism.” Arguably, MacKinnon’s account fails to address the substantive differences between terrorism and violence against women, particularly the fact that a major feature defining terrorism is the specific intent to coerce governments to change their policies and actions. This political motivation is clearly lacking in the context of violence against women.

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

IV. NARROWING THE SCOPE OF TERRORISM OFFENSES

The risks of unconstrained prosecutorial discretion warrant the adoption of measures to curb prosecutorial authority and reduce the potential for misusing it. However, these risks generally remain beyond the scope of judicial scrutiny. Scholars have long proposed that courts exercise heightened judicial review of prosecutorial charging decisions, but these proposals have been rejected. Proposing judicial oversight of prosecutorial charging decisions in the area of terrorism prosecutions is an unrealistic solution because courts typically uphold the prosecutorial practice of unconstrained discretion in deciding whether to prosecute defendants, who to prosecute, and what offenses to charge with. Scholars have

192 18 U.S.C §2332f
also suggested that internal prosecutorial guidelines provide a mechanism to cabin prosecutorial discretion.\textsuperscript{196} These types of proposals are also unlikely to constrain prosecutorial discretion in terrorism prosecutions, as they are merely internal guidelines, rather than law, and the scope of their adherence as well as the ability to enforce them remain unclear.\textsuperscript{197}

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

A. Specific Intent to Coerce Governments As Terrorism Offenses’ Mental State

The proposal advocated in this section rests on the premise that political motivation is the distinct feature separating “ordinary” crime from terrorism. However, in terrorism-related legislation the defendant’s political motivation does not play any role in the definition of the offenses, resulting in over-inclusive offenses, which are sometimes misused by prosecutors. The following proposal thus advocates the adoption of a critical element to narrow the scope of terrorism-related prohibitions by incorporating the defendant’s political motivation into the definition of these offenses. However, rather than making the defendant’s motive an element of the offense, I suggest that the defendant’s specific intent to coerce governments to change their actions and policies be made a necessary element of all terrorism offenses. In other words, to win a conviction, the prosecution would have to prove that the defendant engaged in violent acts that typically characterize terrorism with the intent to coerce governments to

\textsuperscript{197} See, Ellen S. Podgor, Pleading Blindly, 80 Mississippi L. J. 1633, 1636-38 (2011) (discussing the shortcomings of internal guidelines)
change their actions and policies.

1. General: The Relationship Between Intent and Motive

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

Criminal law theorists continue to debate the role of motives in determining liability or grade of an offense.198 Scholars today question the famous statement that: "hardly any rule of penal law is more definitely settled than that motive is irrelevant."199 Traditional criminal law theory asserts that while specific intent in committing a crime is a legally permissible element, motives ought not be relevant to criminal liability or grading of an offense.200 The relationship between motive and intent has caused theorists considerable difficulty for years, and the distinction between a defendant’s allegedly irrelevant motive and his legally relevant intent is often ambiguous.201 Moreover, in contrast with the traditional view that motives are always irrelevant, scholars have argued that they are a relevant factor in many existing offenses.202 Prominent criminal law scholar Paul Robinson argues that motive ought to be, and commonly is, an element in determining liability or grade of offense.203 Robinson contends that every time an offense definition contains the phrase “with the purpose to,” the law takes into account, as an offense element, the defendant’s motive, the cause of his or her act.204

199 See, Jerome Hall, General Principles of Criminal Law, at 153 (1947); see also Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law 37 (1993) (noting that: "It is as firmly established in legal doctrine as any rule can be that motive is irrelevant to responsibility.").
200 See, e.g., George Fletcher, Rethinking Criminal Law, 463 (1978)
201 See, Wayne LaFave, Criminal Law, §3.6 (a) at 241-42 (3rd ed. 2000)
202 See, Joshua Dressler, Understanding Criminal Law, (3rd. ed. 2001)
203 See, Robinson, Hate Crimes, supra note 64 at 608 (noting that motive “should alter liability if, and only if it alters an actor’s blameworthiness for the prohibited act. Some motives alter our judgments of blameworthiness, others do not; distinguishing between the two is the challenge put to criminal code drafters.”)
204 Id, Robinson.
Furthermore, despite the scholarly controversy regarding motive's role in criminal law, most scholars agree that as a practical matter, criminal law often does reflect a perpetrator's reasons for acting, noting the various ways that motives already influence the criminal law.\textsuperscript{205} Scholars further note that criminal law’s use of motive in defining offense liability often goes undisputed when other terms are used to obfuscate the role of motive.\textsuperscript{206} Specific intent crimes could also be recast as a crime defined by motive.\textsuperscript{207} Moreover, scholars include specific intent crimes as examples of when the criminal law treats motive as relevant.\textsuperscript{208} The proposal to narrow terrorism offenses by making the defendant’s specific intent a necessary element of terrorism offenses is therefore neither inconsistent nor objectionable from the standpoint of current criminal law theory, and examining an array of specific intent statutes demonstrates the weakness of the “motive is always irrelevant” claim in determining criminal liability.

2. Why Is Specific Intent Preferable to Motive?

While relying upon the defendant’s motive may be consistent with traditional criminal law theory, it does not follow that making political motivation an element of the crime is necessarily the best criterion for defining terrorism offenses.\textsuperscript{209} Using the defendant’s political motivation as element of the crime creates special difficulties in implementation and application.\textsuperscript{210} Proving motive is extremely challenging, as it involves the defendant’s internal personal drive to commit a crime. Making political motivation an element of terrorism offenses would therefore impose an unworkable hurdle and infringe on the nation’s endeavors in fighting the actual risks of terrorism.

While criminal law theory would permit the use of political motivation as an element of terrorism offenses, an alternative -- and more prudent legislative strategy -- would be to incorporate this requirement indirectly by making specific intent to coerce governments a

necessary element of terrorism offenses. While specific intent to coerce government actions or policies is inherently driven by political motivation, motive itself is not made an explicit element in defining the crime of terrorism. Moreover, in contrast with motive which focuses on the defendant’s internal personal drive to act, intent implicates the more objective reason behind committing the act, and in the case of terrorism: the intention to influence and affect government actions and policies.  

This specific intent may be proven by providing evidence about a defendant’s violent political activities or affiliations with a designated terrorist organization. Proving the objective intention to bring about political change through violent conduct is therefore not only less objectionable from a traditional criminal law theory perspective, but also a pragmatically feasible requirement.

Furthermore, making specific intent to coerce governments to change their actions or policies an element of terrorism offenses is already incorporated into the criminal codes of several state and Federal provisions. These prohibitions, however, fall short of making specific intent to coerce governments to change their policies or actions a necessary element of all terrorism-related offenses. Instead, such specific intent is only made an alternative requirement: the prosecution can choose between establishing the defendant’s specific intent to intimidate a civilian population or the defendant’s specific intent to coerce governments. Moreover, many other terrorism-related offenses do not incorporate any form of specific intent as an element of the offense, relying instead on the massive harm typically inflicted to infer the terrorism classification. The result is an over-inclusive prohibition that allows for the prosecution of a wide range of criminal conducts not necessarily related to the terrorism context. The proposal advocated here would make specific intent to coerce governments to change their actions or policies a necessary element of terrorism crimes, and the specific intent requirement would be made an element of all terrorism-related prohibitions.

211 See, Robinson, Hate Crimes, supra note 64, at 5 and accompanying footnotes.

212 See, e.g. New York Penal Law section 490.25 (1) providing that: “A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.”
3. The Parallels Between Hate Crimes and Terrorism

Hate crimes provide an illustrative analogy to terrorism offenses, supporting the rationales behind the proposal to make specific intent to coerce governments a part of the defendant’s mental state. To convict a defendant with a hate crime the prosecution must prove that the crime was motivated by an anti-group motive, and that the victim was selected by reason of his/her actual or perceived race, color, religion, national origin or sexual orientation. As Andrew Taslitz has suggested: “Hate criminals generally use their criminal conduct to express their contempt for, and perceived superiority over, various identifiable groups, based on, for example, their race, ethnicity, gender, religion, or sexual orientation.”

Admittedly, a main feature of hate crimes is the motive requirement. Moreover, hate crimes are highly controversial precisely because of motive’s critical role in defining this crime: Several state courts have struck down these laws as unconstitutional, holding that criminal law could not punish motives. The Supreme Court however, reversed these decisions, holding that states could lawfully enhance punishment for conduct based on disfavored motive.

Scholars have debated whether motive affects the scope of harm inflicted by the crime: Some scholars argue that motive is irrelevant to criminal liability, because it does not generally affect the harm inflicted by the criminal conduct. Wayne McCormack, for example, contends that motive ought not be an element of terrorism offenses because it does not affect the extent of the harm intended and inflicted, and it does not influence the understanding of the criminal activity. In sharp contrast with the view that motives do not affect the scope of the harm, Paul Robinson contends that hate crimes increase the scope of the harm intended or inflicted by the offense. Robinson suggests that hate crimes ought to

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214 State v. Mitchell, 485 N.W. 2d 807, 813 (Wis. 1992)
216 See, Fletcher, supra note 200, at 463
217 See, McCormack, supra note 15 at 19
218 See, Robinson, supra note 64.
focus on the greater harm caused and intended by these crimes than would occur in an analogous offense without the hate motivation.219 A greater harm to a greater number of people, contends Robinson, is more likely to result when the conduct seeks to intimidate an identifiable group than in instances where the same conduct does not target a particular group.220

Some scholars suggest that hate crimes can be viewed as a close cousin to terrorism in that the target of an offense is selected on the basis of group identity, not individual behavior, and because the effect of both is to wreak terror on a greater number of people than those directly affected by the violence.221 Indeed, disfavored political motive is a distinct feature common to both hate crimes and terrorism; as one scholar writes: “They are assaults aimed at the expressive goals of demeaning a victim because of membership in this group”.222 Another scholar stresses that “both hate crimes and terrorism involve the infliction of extreme suffering often on a victim chosen on a basis which may include discriminatory motives, often with a message intended for a broad audience and meant to impact the lives of others.”223

Therefore, a common argument to support both hate crimes and terrorism legislation is that these crimes merit enhanced punishment due to the greater harm they cause, and because both crimes are committed with an underlying intent to harm and influence others, beyond those specific victims who are directly affected. Indeed, hate crimes are justified precisely because they rest on the premise that a defendant’s discriminatory motive to commit the crime results in inflicting greater harm. Applying a similar rationale in the terrorism-related context demonstrates that separately criminalizing violent conduct intended to coerce governments is justified because this form of crime typically results in greater harm to a greater number of individuals, thus justifying harsher penalties.

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219 Id, Robinson.
220 Id, Robinson.
221 See, generally, Cynthia Lee in Hate Crimes and the War on Terror, in Hate Crimes: Perspectives and Approaches, Barbara Perry Ed. 2008) (addressing one aspect of the relationships between hate crimes and the war on terror).
B. Narrowing the Scope of Terrorism Offenses in Comparative Law

Comparative law provides an additional perspective supporting the proposal to incorporate political motivation as a necessary element of terrorism crimes. Canadian law offers an illustrative example. “Terrorist activity” is defined in the Canadian Criminal Code as:

224 Canada Criminal Code, R.S.C, ch. C-46, section 83. 01

In contrast with American antiterrorism law, Canadian law explicitly makes political, ideological or religious motivation a part of the definition of terrorist crimes. Incorporating the requirement for political, religious or ideological purpose, objective or cause significantly narrows the potential scope of terrorism offenses. Furthermore, it effectively limits the prosecutorial authority to use terrorism offenses in cases unrelated to the terrorism context.

Moreover, as noted earlier, American terrorism prohibitions make intent to intimidate a civilian population and intent to coerce governments alternative, rather than cumulative requirements, thus allowing prosecutors to invoke the terrorism theory based solely on establishing the “intent to intimidate civilians” element. In contrast, Canadian law requires the prosecution to separately prove two elements: both the political/religious/ideological motivation as well as the intent to intimidate civilians or the government. This legislative approach offers a limiting mechanism, ensuring that terrorism charges are used only in the terrorism context.

Furthermore, Canadian law provides an additional legislative measure to narrow the scope of terrorism offenses by limiting the harm inflicted by the offenses to that of human lives. A common feature of American antiterrorism law has been the adoption of broad definitions of terrorism that go above and beyond the murder and maiming of civilians.

225 See, Roach, supra note 119, at 2173.
This legislative strategy enables prosecutors to bring charges under terrorism-related offenses in cases involving crimes against government property that fall short of causing death or serious bodily injury. In contrast, Canadian law does not define “terrorist activity” to include property damage. Rather, the Canadian definition of “terrorist activity” is limited to harm to life or serious bodily injury. Canadian law does, however, criminalize politically or religiously motivated damage to property “if causing such damage is likely to result in harm or conduct that causes death or serious bodily injury, endangers a person’s life, or causes a serious risk to public health or safety”. 226

C. The Proposal’s Advantages

The proposal to make specific intent to coerce governments to change their actions or policies the required mens rea for convicting a defendant with terrorism offenses carries several important advantages. First, basing criminal liability for terrorism crimes on the specific intent element is consistent with one of the key premises of criminal law theory, that is, punishing a defendant according to the extent of the harm caused, risked or intended by his/her criminal conduct, and thus greater harms justify imposing greater liability.

The proposal advocated here seeks to build on this premise, suggesting that crimes of terrorism ought to be defined by focusing on the additional harms that acts of terrorism cause and intend to cause as a basis for greater liability. 227 Conduct intended to coerce governments to change their actions or policies is inherently intended to cause greater harm on a greater number of victims. The criminal law often makes the defendant’s intent a relevant element in defining criminal liability or grading an offense, where the defendant commits an underlying crime with a purpose to commit an additional crime or additional harm in order to inflict greater harm on a greater number of victims. 228 Proposing to add the specific intent element to the definition of terrorism offenses is consistent with this legislative strategy, because an inherent feature of terrorism is its likeliness to result in greater harm to a greater number of people due to its double-target: terrorist acts are committed to coerce governments’ actions and policies by intimidating the citizens of those governments.

226 See, Canada Criminal Code, R.S.C. ch. C-46, section 83.01 (b) (ii) (D).
227 See, Robinson, Hate Crimes, supra note 64, at
228 See, Dressler, supra note 202, at 121
Second, focusing on specific intent to coerce governments as the focal point of the offense of terrorism provides a significant limiting mechanism, ensuring that terrorism charges are brought only when the defendant commits politically-motivated crimes. This legislative strategy effectively constrains the overbroad reach of terrorism offenses. In order to successfully limit the reach of terrorism offenses, the defendant’s political intent to coerce governments ought to be made a necessary element of these offenses. Currently, while many scholars agree that terrorism is a pattern of conduct motivated by political aspirations, that it is intended to coerce governments to change their policies and actions, these features are not made elements of terrorism offenses, resulting in a gap between the common understanding of terrorism and its criminal prohibitions.\(^229\) Adopting a specific intent element would fill this gap by confining prosecutorial authority to use terrorism prohibitions only upon proving that the defendant engaged in violent acts with the intent to coerce governments to change their actions and policies.

Moreover, the proposal’s focus on specific intent to coerce governments rather than on a more generalized requirement such as intent to intimidate civilians further ensures that terrorism offenses are not over-inclusive. Making intent to intimidate civilians an element of terrorism, as many provisions currently do, fails to capture its essence and ultimately results in an over-inclusive definition.\(^230\) What distinguishes terrorism from other crime is its specific intent to coerce governments, while intimidating an unidentifiable group of victims is merely the means to achieve this end. Making specific intent an element of terrorism offenses, therefore, adds a critical feature that is unique to the terrorism context.

Third, grounding terrorism statutes in the requirement of political intent to coerce governments would provide a necessary measure for accurately classifying crimes. Recall that under current law, the distinction between “ordinary” crime and “terrorism” is often murky, with no clear legal standard to distinguish between them.\(^231\) Making specific intent to coerce governments an element of terrorism offenses ensures that terrorism offenses are used to prosecute only terrorism crimes and helps facilitate prosecutorial decision in classifying what types of conduct fall under terrorism prohibitions, thus curbing prosecutorial discretion in this

\(^{229}\) See, supra, Part I. 
\(^{230}\) See, 18 U.S.C 2331 (5) (B) 
\(^{231}\) See, supra, Part II.
area. Furthermore, adopting the proposal would result in reducing the potential for misusing terrorism prohibitions in the wrong cases, for the wrong reasons. The specific intent element would serve as a practical bar to legislatively prevent prosecutors from using terrorism offenses to prosecute cases that are unrelated to terrorism.

Fourth, making specific intent to coerce governments an element of terrorism crimes is a feasible requirement. A potential objection to the proposal is that it would impose an unworkable burden on the prosecution and jeopardize government endeavors to combat terrorism. Therefore, one might argue that making specific intent an element of terrorism offenses is unwarranted. Indeed proving the defendant’s specific intent in committing a crime often creates an onerous hurdle on the prosecution. However, adding this requirement as a necessary element in terrorism offenses is already a common element in other contexts, such as larceny, which requires intent to steal; kidnapping, which requires intent to hold for ransom; and attempt and conspiracy, which require intent to commit a crime. While there are evidentiary difficulties in establishing the specific intent element, convictions are still obtained under these offenses. Evidentiary hurdles thus should not stand in the way of making specific intent to coerce government an element of all terrorism offenses. Finally, adopting the proposal would not compromise the effective enforcement of criminal law: Crimes that do not meet the definition of the narrower terrorism offenses would not remain outside the scope of criminal regulation. Rather, when the defining features of terrorism, such as political motivation, are lacking, “ordinary” criminal law would come into play, enabling prosecution.

**CONCLUSION**

This article has adopted the underlying premise supporting antiterrorism law: that terrorism poses significant threats to America’s national security. Therefore, it has endorsed the conclusion that politically motivated crimes that inflict (or are intended to inflict) substantial harm on a large number of people, and are intended to coerce governments to change their actions or policies, ought to be severely prosecuted and punished under specialized terrorism offenses. However, at the same time, the article has posited that in order to successfully combat the real risks of terrorism, the criminal justice system ought to clearly
distinguish between “ordinary” crime and terrorism by accurately classifying the type of conduct that meets the definition of actual terrorism.

This article has demonstrated the criminal justice system’s failure at this classification task due to two reasons: first, the defining features of terrorism -- mainly the defendant’s political motivation in committing the crime -- are not made elements of terrorism offenses. Second, the authority to make the classification is placed solely in the hands of prosecutors who sometimes misuse terrorism statutes in cases that are unrelated to terrorism. The Article has elaborated on the perils of this prosecutorial practice, contending that its continuance carries critical implications for the enforcement of criminal law.

The article has suggested that to alleviate these problems, the authority to classify which crimes amount to terrorism ought to be reserved to legislatures, and that legislative reform is needed to limit the scope of terrorism offenses by making specific intent to coerce governments to change their policies and actions an element of terrorism offenses. This legislative strategy would ensure not only that prosecutors are able to charge defendants with terrorism prohibitions only in terrorism-related cases, but would also prevent them from using such offenses in the wrong cases, for the wrong reasons.