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What's Terrorism Got to Do With It? The Perils of Prosecutorial Misuse of Terrorism Offenses

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THE PERILS OF PROSECUTORIAL MISUSE
OF TERRORISM OFFENSES

Michal Buchhandler-Raphael

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

MICHAL BUCHHANDLER-RAPHAEL*

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* Visiting Assistant Professor of Law, Washington and Lee School of Law, S.J.D. University of Virginia School of Law (2010). The author would like to thank the editors at the *Florida State University Law Review* for their diligent editing and thoughtful comments. This Article is dedicated to the memory of my friend, Orit Ozarov, who was twenty-eight years old when she was killed in a terrorist attack in Jerusalem, Israel. On March 9, 2002, a suicide bomber detonated a powerful explosive device at Cafe Moment, resulting in the death of Orit and another ten civilians.

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I. 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.² Over several months, Bond attempted to harm Haynes by spreading these chemicals in her house, on her car door handles, and in her mailbox.³ Haynes complained to local law enforcement, but they did not further pursue her complaint.⁴ 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. § 229.⁵ Bond pleaded guilty to the charges and was sentenced to six years in prison.⁶

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 “violate[d] principles of federalism embodied in [the] Constitution and the fair notice requirements of its Due Process Clause.”⁷ The Third Circuit held that as a private party attempting to claim a violation of state sovereignty under the Tenth Amendment, Bond lacked standing.⁸ 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.⁹

The Court rejected the Government’s position, holding that there was “no basis in precedent or principle to deny [Bond’s] standing to raise her claims” that the statute she was charged with was beyond

1. United States v. Bond, 581 F.3d 128, 131 (3d Cir. 2009), *rev’d*, 131 S. Ct. 2355 (2011).

2. *Id.*

3. *Id.* at 132.

4. *Id.*

5. *Id.*; see 18 U.S.C. §§ 229(a), 229F(1) (2006).

6. *Bond*, 581 F.3d at 133.

7. *Id.* at 132.

8. *Id.* at 137-38.

9. *Bond*, 131 S. Ct. at 2360.

Congress's constitutional authority to enact.¹⁰ The Court expressed no view on the merits of Bond's challenge to the statute's validity, which is to be considered by the Court of Appeals on remand.¹¹

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.¹²

Federal and state legislation does not contain explicit "terrorism" offenses per se.¹³ 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 population. This legislative approach creates ambiguity with regard to whether these offenses are limited to the terrorism context or cover additional crimes, which

10. *Id.* at 2366-67 (holding that "where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government").

11. *Id.* at 2367.

12. *Id.* at 2360 ("The Act implements provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, a treaty the United States ratified in 1997."); see Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 6701 (2006); 18 U.S.C. § 229 (2006).

13. See NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 93-96 (3d ed. 2008) (noting that "neither the word terrorism nor any of its variants appears in" the definition of 18 U.S.C. § 2332).

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.¹⁴ This 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.

This 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 September 11 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.¹⁵ Rather than define the substantive elements of the criminal prohibitions, the statutory definitions of terrorism impact mainly “procedural, investigation authorization, or punishment

14. 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.

15. See Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1623, 1627-29 (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 United States”).

enhancement.”¹⁶ The majority of terrorism-related federal offenses remained intact since the comprehensive legislative amendments of 1986 and 1996, and the legislative amendments that followed September 11 made almost no changes in substantive federal criminal law.¹⁷ Most scholarship on the criminal law against terrorism thus focuses on criticizing the investigatory and procedural aspects of prosecuting terrorism.¹⁸

This Article suggests that such critique typically overlooks the implications of the failure to make terrorism’s 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 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.¹⁹ The failure to make terrorism an

16. See WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 58 (2007).

17. See generally Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (codified as amended in scattered sections of 22 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). The picture is different, however, at the state level, as many state legislatures passed terrorism-related prohibitions following 9/11. See *infra* p. 818.

18. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1108-09 (2008) (discussing two competing models for detention—the military detention and the civilian criminal trial model—and noting that the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has established the capacity to convict terrorists based on criteria that come close to associational status).

19. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (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”).

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 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 the unconstrained discretion of prosecutors, 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.

II. 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.²⁰ To date, there exists no consensus on the definition of terrorism, and this term is used in different ways in various contexts.²¹ 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.²²

Scholars, both legal and nonlegal, have long debated the question of what constitutes terrorism.²³ Leading terrorism scholar Martha Crenshaw argues that terrorism "is a method or system used by a revolutionary organization for specific political purposes. Therefore

20. See, e.g., MARTHA CRENSHAW, *EXPLAINING TERRORISM: CAUSES, PROCESSES, AND CONSEQUENCES* 1-32 (2011) (discussing the ambiguities in defining terrorism).

21. See ABRAMS, *supra* note 13, at 62-75 (noting that there is no unanimous definition of terrorism and the definitions of terrorism differ in what they include); Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 462 (1992) ("[T]errorism has 'no precise or widely accepted definition.'"); BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 13 (2006) ("Terrorism is simply the name of a technique: intentional attacks on innocent civilians."); M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937-2001)* 16 n.48 (2001). This Article, however, focuses solely on the implications of defining terrorism for the purposes of enforcing domestic criminal law, an area characterized by significant ambiguity regarding not only what terrorism is, but also how it should be reflected in legal provisions.

22. See Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 446-48 (2007).

23. See MCCORMACK, *supra* note 16, at 8-9 (discussing different scholarly views on what conduct counts as terrorism).

neither one isolated act nor a series of random acts is terrorism.”²⁴ 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.²⁵

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 the pursuit of political change.”²⁶ Leading legal scholar Philip Heymann describes terrorism as “violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state.”²⁷ 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.”²⁸

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.²⁹ However, scholars have also noted the increasing role of unaffiliated terrorists, who may not directly be affiliated with a group but still associate themselves with extremist movements.³⁰

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.³¹

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

24. See CRENSHAW, *supra* note 20, at 22.

25. See, e.g., CHRISTOPHER C. HARMON, *TERRORISM TODAY* 7, 32 (2008) (defining terrorism as “[t]he deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends”). This definition was first adopted in an international conference on terrorism in 1979, and was further embraced by many authors; for example, Harmon here quotes Benjamin Netanyahu, in *TERRORISM: HOW THE WEST CAN WIN* 9 (Benjamin Netanyahu ed. 1986). See also ALEX P. SCHMID & ALBERT J. JONGMAN, *POLITICAL TERRORISM: A NEW GUIDE TO ACTORS, AUTHORS, CONCEPTS, DATA BASES, THEORIES & LITERATURE* 34-37 (2005) (providing a list of various academic definitions of terrorism, including the political motivation element).

26. BRUCE HOFFMAN, *INSIDE TERRORISM* 40 (2006).

27. See PHILIP B. HEYMAN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 6 (1998) (discussing different features of terrorism).

28. *Id.* at 8.

29. See *id.* at 7.

30. See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 437-46.

31. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 12 (2002).

characteristics.³² 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.³³

B. The Doctrinal Problem: Terrorism Is Not an Element of the Offenses

Since September 11, the American criminal justice system has rested on the premise that terrorism is the most significant national security threat.³⁴ A Department of Justice document, “Department of Justice Goals and Objectives: Fiscal Years 2007-2012,” states as one of its objectives to “[p]rosecute those who have committed, or intend to commit, terrorist acts in the United States.”³⁵ 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 nonlegal) 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.³⁶ These definitions, however, do not play a significant role in

32. See Alex Schmid, *Terrorism – The Definitional Problem*, 36 CASE W. RES. J. INT’L L. 375, 408 (2004) (noting the negative approach to terrorism, namely, defining what terrorism is not: the definition excludes certain types of assassinations, where “the direct victim is the only target, as opposed to de-individuated murder where the victim serves only as message generator to reach a wider audience”).

33. *Id.* at 403-04 (summarizing key characteristic elements of terrorism, including “[t]he predominantly political character of the act”).

34. See generally Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 852 (2007).

35. OFFICE OF THE ATTORNEY GENERAL, U.S. DEP’T OF JUSTICE, FISCAL YEARS 2007-2012: STRATEGIC PLAN: STEWARDS OF THE AMERICAN DREAM 13 (2007), available at http://www.justice.gov/archive/mps/strategic2007-2012/strategic_plan20072012.pdf.

36. See, e.g., 18 U.S.C. § 2331 (2006) (stipulating that “international terrorism” must “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State” and must “appear to be intended . . . to intimidate or coerce a civilian population; . . . to influence the policy of a government by intimidation or coercion; or . . . to affect the conduct of a government by mass destruction, assassination, or kidnapping . . .”). The U.S. Department of State designates a “foreign

the criminal justice system, because the actual use of the term “terrorism” in the criminal prohibitions themselves is very limited.³⁷ 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.³⁸ 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.³⁹ Erik Luna notes the ambiguity of terrorism offenses by asking, “What makes an individual a terrorist: Is it the severity of his acts such as the infliction of massive indiscriminate harm or is it targeting innocent civilians?” While federal criminal law does not contain explicit “terrorism” offenses per se, various statutes use different legislative techniques to criminalize terrorism-related crimes.⁴⁰ 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.⁴¹ However, nothing in the definition of these

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. Immigration and Nationality Act (INA) § 219, 8 U.S.C. § 1189 (2006). The term “terrorism” is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2006). 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 Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 256-61 (discussing various criminal codes definitions of terrorism).

37. *See* MCCORMACK, *supra* note 16, at 58-59 (discussing various terrorism prohibitions).

38. *See* NORMAN ABRAMS & SARA SUN BEALE, 2004 SUPPLEMENT TO FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 89 (3d ed. 2004) (“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.”).

39. *See* Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 110-14 (2009).

40. MCCORMACK, *supra* note 16, at 58.

41. 18 U.S.C. §§ 2331-2332a (2006).

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.⁴² The offense proscribes any form of use, threat to use, or attempt to use chemical weapons,⁴³ 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.”⁴⁴ 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.”⁴⁵ Another example in that category proscribes the unlawful and intentional use of explosives or other lethal devices in public places.⁴⁶

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 of the statutes 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

42. 18 U.S.C. § 229 (2006).

43. *Id.* (stating in relevant part that “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 or conspire to violate paragraph (1)”).

44. 18 U.S.C. § 229F(1) (2006).

45. 18 U.S.C. § 229F(8) (2006).

46. 18 U.S.C. § 2332f (2006) (“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 . . . with the intent to cause death or serious bodily injury, or . . . with the intent to cause extensive destruction of such a place, facility, or system . . . shall be punished . . .”).

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.⁴⁷ 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 the terrorism definitions in § 2331—demonstrate that these prohibitions were enacted to combat terrorism and therefore ought to cover only crimes of terrorism.⁴⁸

2. *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 the civilian population *or, alternatively*, with intent to coerce governments. Following September 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.⁴⁹ It provides that

47. See ABRAMS, *supra* note 13, at 75-76 (discussing several applications of terrorism definitions to demonstrate the ambiguities concerning what conduct qualifies as terrorism).

48. *Id.* at 8-21 (describing the legislative history leading to the amendment of terrorism offenses).

49. New York 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 New York Penal Law section 490.05(3)(a) (including any violent felony offense defined in New York 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 committing a specified offense as a crime of terrorism is subject to a substantial enhancement of the penalty, as

“[a] person is guilty of a crime of terrorism when” he or she commits a specified offense “with intent to intimidate or coerce a civilian population”⁵⁰

Several scholars have lodged criticism against the criminal prohibitions on terrorism, noting their overbroad nature and unlimited scope.⁵¹ Erwin Chemerinsky criticizes the broad scope of the definition of terrorism, focusing on the element of intent to intimidate civilians or coerce governments.⁵² Chemerinsky contends:

This is an incredibly broad definition. Many lawful protests might be seen as trying to coerce or intimidate government or civilian populations. If they are large enough, they might even be seen as dangerous to human life. 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.⁵³

Chemerinsky further expresses his concerns over the government’s extensive powers under the Patriot Act, which may expand above and beyond the limited terrorism context.⁵⁴ Moreover, Chemerinsky notes that similarly broad criminal statutes are often used in additional contexts that exceed the legislatures’ intent, and that the government uses the Patriot Act’s provisions in cases that are unrelated to terrorism as this term is commonly understood.⁵⁵

Nora V. Demleitner also critiques the broad definition of terrorism offenses, noting that some of the defendants charged under anti-terrorism statutes do not fit the characteristics of typical terrorists.⁵⁶ She argues that the different definitions of “terrorism” have resulted in prosecutorial disagreement over what offenses are prosecuted as crimes of terrorism and why, noting, for example, that federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorism cases.⁵⁷ Demleitner further notes that while the distinctive feature of a terrorism crime is that it is politically motivated, different statutes, even within federal law,

provided in New York Penal Law section 490.25(2). N.Y. PENAL LAW §§ 490.25, 490.05 (McKinney 2012).

50. *Id.*

51. *See, e.g.*, Chemerinsky, *supra* note 15, at 1623-24.

52. *Id.*

53. *Id.* at 1624 (suggesting that the broad definitions of terrorism are able to cover a variety of factual contexts unrelated to terrorism).

54. *Id.*

55. *Id.*

56. Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT’G REP. 38, 39 (2003).

57. *Id.*

use various definitions of the term, leading to confusion over what crimes amount to terrorism.⁵⁸

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.⁵⁹ 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, certain criminal activity by its very nature has the effect of “intimidating” significant parts of the population.⁶⁰ Moreover, many “ordinary” defendants also intend their coercive acts to influence not only their immediate victims, but also 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,

58. *Id.* at 38. Demleitner 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.” *Id.* at 39.

59. See Chemerinsky, *supra* note 15, at 1623-27 (noting the breadth of terrorism offenses and their ability to cover a wide variety of situations).

60. *Id.* at 1624.

particularly the federal system.⁶¹ Many scholars have long criticized the overbroad nature of federal criminal prohibitions.⁶² In a series of papers, Sara Sun Beale elaborately addresses the overbreadth of federal criminal prohibitions, noting that too many federal offenses cover too much conduct and many individual offenses are overbroad and badly drafted.⁶³ 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.⁶⁴ In a series of influential articles, the late criminal law scholar William J. 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.⁶⁵ Broader criminal codes, argued Stuntz, allow police and prosecutors to enjoy the benefits of criminal law enforcement techniques in a wider range of situations.⁶⁶

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 or her political motivation or 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.

61. See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (discussing the problems of over-federalization of the American criminal justice system).

62. See, e.g., PETER W. LOW, *FEDERAL CRIMINAL LAW 4-7* (2d ed. 2003) (discussing the overlap of federal and state criminal laws).

63. See Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1506 (2007) [hereinafter Beale, *Unique*]; Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 768-73 (2005) [hereinafter Beale, *Many Faces*]; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997-98 (1995) [hereinafter Beale, *Too Many*].

64. See Beale, *Many Faces*, *supra* note 63, at 754 ("As a result of . . . recent legislation, the bulk of federal criminal provisions now deal with conduct also subject to the states' general police powers.").

65. See William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7-15 (1996) (discussing the effects of changes in procedural criminal law on the scope of substantive criminal law).

66. See Stuntz, *supra* note 19, at 509 ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors.").

III. 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.

A. *The Technical Measures*

Should the measures used to carry out a violent attack determine the nature of the crime as terrorism, given the easy accessibility of weapons associated with warfare or terrorism?⁶⁷ 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. *United States v. Bond*

In *United States v. Bond*, the case mentioned in the Introduction, federal prosecutors placed a heavy premium on the technical measures used by the defendant—chemical weapons—by charging her with a terrorism offense.⁶⁸ 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.⁶⁹ Moreover, the case was prosecuted under federal law rather than under state law.⁷⁰

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.

67. See ABRAMS, *supra* note 13, at 94-96 (discussing the prohibition against weapons of mass destruction and raising doubts whether this prohibition is a terrorism offense “[i]n 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?”).

68. See *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009).

69. See *id.* at 131-32.

70. *Id.* at 132-33.

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, the political motivation, the organizational affiliation, and the perpetrator's intent to coerce governments to change their policies. These defining characteristics are missing in the *Bond* scenario: Bond specifically targeted an identified individual; her actions were motivated by personal rage and jealousy; she was not associated with any terrorist organization; and her acts were not intended to influence governments.

During oral arguments at 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 former friend by pouring a bottle of vinegar in the friend's goldfish bowl . . . , that 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.⁷¹ 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 case in *Bond*. 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.⁷² 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. United States v. Ghane

The federal prosecution of Hessam S. Ghane demonstrates another example in which the severe federal prohibition against possessing and using chemical weapons was wrongly applied.⁷³ Ghane, a naturalized U.S. citizen of Iranian descent, was admitted to

71. See Transcript of Oral Argument at 29-30, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1227.pdf.

72. See *Bond*, 131 S. Ct. at 2360 (noting that before she started using the chemicals, Bond also engaged in harassing conduct of the victim and for that she was charged and convicted under state law of a minor offense).

73. See *United States v. Ghane*, Criminal Action No. 03-171-HKV, 2011 WL 529645 (W.D. Mo. Feb. 7, 2011), *aff'd*, No. 11-1556, 2012 WL 752330 (8th Cir. 2012); *United States v. Ghane*, 392 F.3d 317 (8th Cir. 2004).

an emergency room after contacting a suicide hotline.⁷⁴ Ghane told the physician he had cyanide in his apartment that he had acquired during his work as a chemist.⁷⁵ When asked if he would turn in the cyanide he refused, stating that he “might want to use it later.”⁷⁶ In a psychiatric evaluation, Ghane expressed anger toward government officials and told the psychiatrist, “you know I have access to chemicals.”⁷⁷ The hospital notified the police, who then conducted a search of Ghane’s apartment and found a bottle with white powder that contained seventy-five percent pure potassium cyanide.⁷⁸

Ghane was prosecuted for possession of chemical weapons, in violation of 18 U.S.C. §§ 229 (a)(1) and 229A(a)(1). At trial, Ghane “testified that he never intended to use the cyanide to harm anyone[,] . . . assert[ing] that he suffered from severe depression, and that he [kept] the cyanide in case he ever decided to commit suicide.”⁷⁹ After the court held that the defendant was competent to stand trial,⁸⁰ the jury convicted him of criminal possession of potassium cyanide. The court rejected the claims that § 229 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, and the conviction was upheld.⁸¹

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.⁸² It should be noted that § 229 prohibits both the possession as well as the use of chemical weapons and that Ghane was charged under the former element. Moreover, while the unlawful conduct under § 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 *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 *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.

74. *Ghane*, 392 F.3d at 318.

75. *Ghane*, 2011 WL 529645, at *1.

76. *Id.*

77. *Id.* at *2.

78. *Id.*

79. *Id.*

80. *United States v. Ghane*, 593 F.3d 775, 776 (2009).

81. *See Ghane*, 2011 WL 529645 at *7.

82. *See id.* at *2.

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.⁸³ Under this theory, greater harm justifies placing greater criminal liability on the defendant.⁸⁴ 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 ought to determine the classification of certain offenses as terrorism-related crimes. If so, where should the legal boundary be drawn between crimes of mass killings, such as shooting sprees in public places, and terrorist crimes? For example, the recent rampage killing in a Colorado movie theater sharpens the distinction between acts of terrorism and massive killings.⁸⁵ In this case, James Holmes is accused not only of killing 12 people and injuring 58 others, but also of laying explosive booby traps in his Aurora apartment that appeared designed to kill police officers who arrived at the scene.⁸⁶ Holmes faces multiple murder charges, rather than terrorism charges.⁸⁷ However, while the prevailing paradigm is that mass or serial killers are not typically considered terrorists, several prosecutorial attempts have been made to challenge this paradigm in cases where the state argued that shooting rampages in public places amounted to acts of terrorism.⁸⁸

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 or coerce a 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.⁸⁹ Recall also that many prohibitions criminalize, as one form of terrorism offenses, a wide array of conducts which are committed with "intent to intimidate or coerce a civilian

83. See, e.g., Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 614 (contending that the scope of the harm intended or inflicted ought to determine the criminal liability or the grading of an offense).

84. *Id.*

85. Dan Frosch & Jack Healy, *Suspect in Colorado Theater Shooting Appears in Court*, N.Y. TIMES, July 23, 2012, <http://www.nytimes.com/2012/07/24/us/suspect-in-colorado-shooting-in-court.html>.

86. *Id.*

87. *Id.*

88. See MCCORMACK, *supra* note 16, at 8 n.11.

89. See *supra* Part I.A.1.

population.”⁹⁰ The precise reading of this open-ended phrase, however, remains unclear, as the following cases demonstrate.

1. United States v. Muhammad

In *Muhammad v. Commonwealth*,⁹¹—commonly referred to as “the Beltway Snipers” case—a Virginia jury convicted Muhammad, the mastermind behind a 47-day-long shooting spree, of terrorism offenses under the Virginia terrorism statute, in addition to convicting him of “ordinary” murder charges.⁹² Muhammad was also tried and convicted of six counts of first-degree murder by a Maryland county court, and his sentences were to be served consecutively with the Virginia court’s death sentence.⁹³ Muhammad appealed his conviction but the Maryland Court of Special Appeals upheld it.⁹⁴ The minor co-perpetrator, seventeen-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.⁹⁵

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.⁹⁶ Revisiting the facts of this case, however, casts significant doubts on the accuracy of this account.⁹⁷

In his testimony, Malvo said that Muhammad had acquainted him with the teachings of Islam and had trained him in shooting high-

90. See *supra* Part I.B.2.

91. *Muhammad v. Commonwealth*, 619 S.E.2d 16, 24 (Va. 2005).

92. VA. CODE ANN. § 18.2-46.4 (West 2011) (defining an act of terrorism as “an act of violence . . . committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States . . .”) (emphasis added). 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 a Virginia state terrorism statute.

93. *Muhammad v. State*, 934 A.2d 1059, 1059 (Md. Ct. Spec. App. 2007).

94. *Id.* at 1060.

95. *Id.* at 1078 (“The only inconsistency in Malvo’s statements . . . concerned the detail of whether he or Muhammad had been the actual triggerman on various occasions.”).

96. See *Muhammad*, 619 S.E.2d, at 35-36. “[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.” MCCORMACK, *supra* note 16, at 19.

97. See MCCORMACK, *supra* note 16, at 19 (suggesting that the *Muhammad* prosecution exemplifies the “potential for definition confusion”).

powered rifles, including sniper tactics.⁹⁸ Malvo further testified that Muhammad took him to Washington D.C. where Muhammad's ex-wife and kids lived, and told him that they were going to "terrorize these people."⁹⁹ Malvo further described how Muhammad had chosen Montgomery County, Maryland as "the perfect area to terrorize" because "it was lower to upper middle class, well-off, mostly whites."¹⁰⁰ Malvo then proceeded to testify how he and Muhammad chose their targets, and described in detail each of the shootings.¹⁰¹

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.

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

The facts of this case may, however, point to a hate crime. A hate crime requires the prosecution to establish that the victim was selected by reason of his or her race, color, religion, national origin, or sexual orientation.¹⁰² 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.

98. *Muhammad*, 934 A.2d at 1076.

99. *Id.* at 1077.

100. *Id.*

101. *Id.* at 1078. Muhammad 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 four other victims in Virginia, Alabama, and Washington, D.C., for which they were also convicted. *See Muhammad v. Commonwealth*, 619 S.E.2d 16, 24 (Va. 2005).

102. *See Wisconsin v. Mitchell*, 508 U.S. 476, 484-85 (1993) (upholding the constitutionality of a statute which enhanced a defendant's sentence whenever the defendant intentionally selects his victim based on the victim's characteristics such as race or nationality).

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.¹⁰³ The case involved a shooting rampage at Case Western Reserve University on May 9, 2003.¹⁰⁴ A video surveillance camera recorded Halder, a sixty-four year-old former student, carrying two handguns into the University building.¹⁰⁵ In the video, Halder was seen shooting the first person he encountered, proceeding to shoot indiscriminately both at random occupants in the building as well as at police forces who arrived at the scene.¹⁰⁶ Halder further held hostage all the occupants of the building, for about eight hours, eventually surrendering to the police.¹⁰⁷

Initially, a grand jury returned a 338 count indictment against Halder, including, among others, aggravated murder with firearm, felony murder, mass murder, terrorism specifications, and multiple counts of attempted murder.¹⁰⁸ 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."¹⁰⁹ The 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."¹¹⁰ The *Halder* prosecution thus

103. State v. Halder, 2007-Ohio-5940, No. 87974, 2007 WL 3286904, at *4 (Ohio Ct. App. Nov. 8, 2007).

104. *Id.* at *1.

105. *Id.* at *1-2.

106. *Id.* at *1.

107. *Id.*

108. *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." *Id.* Prior to the commencement of trial, the trial court dismissed [136] counts of the indictment," leaving intact a 202-count indictment. *See id.* at *4.

109. Thomas J. Sheeran, *Judge: Case Western Rampage Not Terrorism*, AP ONLINE REGIONAL - US (Dec. 15, 2005), available at http://www.accessmylibrary.com/coms2/summary_0286-12053336_ITM.

110. OHIO REV. CODE ANN. § 2909.21 (LexisNexis 2011); *see also id.* § 2909.24. 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." *Id.* § 2909.21. Having defined an "act of terrorism," the Ohio Code criminalizes "terrorism," stating that "[n]o person shall commit a specified

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.¹¹¹ After the suit he filed against the employee was thrown out of court, and ten days after the court dismissed his appeal, Halder went on the shooting spree.¹¹² Despite his diagnosed mental disorders and delusional beliefs, Halder was found competent to stand trial.¹¹³

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, since doing so conflates the phenomenon of terrorism with the verb "terrorize," which can be too broadly construed.

3. Edgar Morales v. New York

The *Morales* case demonstrates a prosecutorial attempt to use, for the first time, New York State's antiterrorism law to prosecute a gang member who killed an innocent bystander in a gun battle over dominance in a Mexican-American neighborhood in the Bronx.¹¹⁴ Following a fight between members of rival Mexican American gangs, shots were fired, leading to the death of a 10-year-old girl and the paralysis of another man. The evidence pointed at defendant Edgar Morales, who was a member of one of these gangs, as having committed these shootings.¹¹⁵

Morales was charged with first-degree manslaughter as crime of terrorism, second-degree attempted murder as crime of terrorism,

offense with purpose to do any of the following: (1) [i]ntimidate or coerce a civilian population; (2) [i]nfluence the policy of any government by intimidation or coercion; (3) [a]ffect the conduct of any government by the specified offense." *Id.* § 2909.24.

111. *Halder*, 2007 WL 3286904, at *2.

112. *Id.*

113. *Id.* at *4.

114. *People v. Morales*, 924 N.Y.S.2d 62 (N.Y. App. Div. 2011). I thank Professor Eric Luna for bringing my attention to this important decision.

115. *Id.* at 63.

and second-degree criminal possession of weapon as crime of terrorism.¹¹⁶ The prosecution's choice to charge Morales with crimes of terrorism rested on the theory that an offense, which is committed with the intent to "intimidate or coerce a civilian population" amounts to terrorism.¹¹⁷ The prosecution argued that the defendant's acts were aimed at intimidating the "civilian population," which comprised Mexican-Americans residing in the area of the Bronx in which his gang sought to assert its dominance.¹¹⁸

The jury convicted Morales of all charges, and he appealed. The Court of Appeals rejected the prosecution's theory, by holding that the prosecution had not proved that Morales's actions were committed with the intent required under New York's antiterrorism statute, thus turning his offenses into crimes of terrorism.¹¹⁹ Furthermore, the court held that even under the assumption that the Mexican American residents of the particular neighborhood may qualify as 'a civilian population' under the above statute, the evidence did not establish that Morales committed his crimes with the intent to intimidate or coerce that 'civilian population' generally, as opposed to the very limited group of members of rival gangs.¹²⁰ Consequently, the court substituted convictions for lesser-included offenses for the terrorism charges and remanded for resentencing.¹²¹

The significance of the *Morales* decision lies in thwarting the prosecutorial attempt to expand the scope of antiterrorism law to cover "ordinary" street crime. Unlike the majority of criminal cases, which resolve in plea bargains,¹²² the *Morales* case was resolved in a jury trial, and ultimately the terrorism charges were reduced 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' convictions of terrorism offenses 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

116. In addition, Morales was charged with second-degree conspiracy. *Id.*

117. See N.Y. PENAL LAW § 490.25(1) (McKinney 2012) ("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.").

118. *Morales*, 924 N.Y.S.2d at 64.

119. *Id.* at 66.

120. *Id.* at 68.

121. *Id.* at 65.

122. See *infra* note 151 and accompanying text.

terrorism, the “civilian population” targeted by the actor must be a group of people *other* than the direct victims of the crime.¹²³ The court further notes that construing the term “with intent to intimidate or coerce a civilian population” to include the intent to intimidate or coerce the direct victims of a particular crime would result in viewing any specified offense involving intimidation or coercion of a group of people, such as a bank robbery, as a crime of terrorism.¹²⁴

Second, the court examined the specific context of the Anti-Terrorism Act, holding that the statutory language weighs against expanding its scope to include a narrowly defined subcategory of individuals.¹²⁵ The court cites the legislative history of the statute to support this construction, noting that the Legislature’s intent was to cover exceptional crimes perpetrated for the purpose of intimidating a broad range of victims, not a narrowly defined group of specific individuals whom the defendant views as his rivals.¹²⁶ The court stressed that in light of the legislative history, the term ‘to intimidate or coerce a civilian population,’ implies an intention to create a pervasively terrorizing effect on individuals living in a particular area, directed either to all residents of that area or to all residents of that area who are members of a broadly defined group, such as a gender, race, nationality, ethnicity, or religion. The court therefore held that a gang member’s intention to intimidate members of rival gangs, without an additional intention to intimidate or coerce the broader community, does not meet the requisite statutory standard.¹²⁷

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

4. State of New York v. Ferhani

On May 11, 2011, the New York Police Department arrested Ahmed Ferhani and Mohamed Mamdouh for conspiring to attack a Manhattan synagogue and for buying gun, ammunition and an inert

123. *Morales*, 924 N.Y.S.2d at 67.

124. *Id.* at 66 n.8.

125. *Id.* at 67.

126. *Id.*

127. *Id.* at 68.

grenade to carry out the attack.¹²⁸ 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.¹²⁹ According to the court complaint, Ferhani suggested disguising himself as an observant Jew so he could infiltrate a synagogue and leave a bomb inside.¹³⁰

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.¹³¹ While the terrorism and hate crime charges remained, the conspiracy charges were reduced to a fourth-degree offense.¹³²

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 September 11, and the U.S. Attorney's office is well-known for its successful prosecution of several high-profile terrorism cases.¹³³ 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.¹³⁴

The institutional allocation of authority between federal and local law enforcement in this case calls into question the New York prosecutors' classification of the crime 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

128. Criminal Complaint, *People v. Ferhani*, No. 02461-2011 (N.Y. Sup. Ct. May 12, 2011), available at <http://www.scribd.com/doc/55306836/Ferhani-Mamdouh-Complaint>.

129. *Id.*

130. *Id.*

131. See William K. Rashbaum & Colin Moynihan, *Most Serious Charges are Rejected in Terror Case*, N.Y. TIMES, June 16, 2011, at A28.

132. See Indictment, *People v. Ferhani*, No. 02461-2011 (N.Y. Sup. Ct. June 2011), available at http://www.investigativeproject.org/documents/case_docs/1592.pdf.

133. See Tom Hays, *FBI's Absence from NYPD Terror Bust Raises Questions*, NBC N.Y. (May 13, 2011), <http://www.nbcnewyork.com/news/local/FBIs-Absence-from-NYPD-Terror-Bust-Raises-Questions--121814244.html>.

134. See, e.g., N.Y. PENAL LAW § 490.25 (criminalizing acts of terrorism). Following 9/11, many states, N.Y. among them, adopted legislation that is modeled after federal terrorism crimes.

early stages, without crossing the line between preliminary planning and a criminal conspiracy.¹³⁵

The common thread characterizing the prosecution's theory in the above cases is the 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.¹³⁶ 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.

IV. PROSECUTORIAL DISCRETION: IMPLICATIONS OF MISCLASSIFICATION

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

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.¹³⁷ Scholars have noted that "[prosecutorial] discretion is

135. See Tom Hays, *FBI No-Show in NYC Terror Probe Raises Questions*, ABC NEWS (May 14, 2011), <http://abcnews.go.com/US/wireStory?id=13601067#.T1g2R5h3J4E>.

136. See *supra* Part I.

137. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123-24 (1998) (discussing the common critique of American

necessary in criminal justice administration because of the immense variety of factual situations faced at each stage of the system 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.¹³⁸

Constitutional constraints generally do not impede the enormous discretionary power of prosecutors in the criminal justice system.¹³⁹ In particular, prosecutorial charging decisions are not subject to legal constraints, and legality doctrines such as vagueness and overbreadth typically have not served to constrain prosecutorial authority regarding charging decisions in general, and prosecutorial discretion in the context of antiterrorism law.¹⁴⁰ Reaching a constitutional level requires a showing of a Due Process violation or a discretionary decision that violates equal protection, such as a charging decision that used impermissible criteria such as race or religion.¹⁴¹ Terrorism prosecutions, however, typically do not reach that level.¹⁴²

The main issue, therefore, is not whether these prosecutorial decisions are lawless or unconstitutional, but whether they are wise, prudent, and warranted.¹⁴³ 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 the overbreadth of federal criminal offenses, noting that such legislation

criminal justice system that “the prosecutor is the controlling figure in the typical criminal case”).

138. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 683 (4th ed. 2004); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1422-23 (discussing the range of prosecutorial discretion not to prosecute and the authority to prosecute).

139. See *United States v. Armstrong*, 517 U.S. 456, 470-71 (1996) (holding that a defendant is not entitled to a discovery claim for a selective prosecution argument); *Wayte v. United States*, 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).

140. *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).

141. See *Connick v. Thompson*, 131 S. Ct. 1350, 1366 (2011).

142. See *supra* Part I.

143. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 838 & n.4.

“gives federal prosecutors too much unchecked [unreviewable, and virtually unlimited] discretion to select the few cases that will be prosecuted and which offense or offenses to charge.”¹⁴⁴

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.¹⁴⁵ Stuntz challenges the prevailing assumption that substantive criminal law, as amended by legislatures, defines in advance the conduct punished by the state. He argues 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.”¹⁴⁶ 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.¹⁴⁷ These prosecutorial choices are critically important because only a relatively small number of cases can be prosecuted in the federal system, and criminal law is mostly enforced on the local level.¹⁴⁸ 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.¹⁴⁹ Federal prosecutors pursue particular cases because they find them interesting or because they believe that they would best advance their professional careers.¹⁵⁰

Rachel E. Barkow contends that prosecutors serve as de-facto adjudicators in the vast majority of criminal cases because ninety-five percent of cases resolve in plea bargains rather than in jury trials.¹⁵¹ Prosecutors thus control the terms of confinement in the current penal system.¹⁵² 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.¹⁵³

144. See Beale, *Unique*, *supra* note 63, at 1509.

145. See Stuntz, *supra* note 19, at 519 (noting that criminal law is “defined by law enforcers, by prosecutors’ decisions to prosecute and police decisions to arrest”).

146. *Id.* at 506 (noting the role of prosecutors in the criminal justice system).

147. *Id.* at 542-46 (discussing the increased prosecutorial discretion of federal prosecutors).

148. See *id.* at 544 (noting that federal prosecutions amount to less than five percent of total prosecutions).

149. *Id.* at 543 (explaining how federal prosecutors are able to choose cases based on their “personal and professional gain and growth”).

150. *Id.* at 546 (suggesting that federal prosecutors are free to pursue high profile cases or other professionally rewarding cases).

151. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

152. *Id.*

153. *Id.*

Moreover, no effective legal checks exist to police the manner in which prosecutors exercise their discretion to bring charges and negotiate pleas.¹⁵⁴ This practice, in which prosecutors are the final adjudicators of their own law enforcement policies, violates the separation of power principle.¹⁵⁵

*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 the 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 “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.¹⁵⁶ 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.¹⁵⁷ 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 are they well equipped to carry out

154. *Id.*

155. *Id.*

156. See Luna, *supra* note 39, at 114 (“[L]aw 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.”).

157. *Id.* at 109 (“Government officials sometimes employed sweeping definitions of ‘terrorism’ in classifying cases.”).

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.¹⁵⁸

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 traditionally focused on a punitive approach, combining retributive and utilitarian justifications for punishing defendants for their past crimes.¹⁵⁹ The emerging terrorist threats and the acknowledgement that dangerous conduct must be prevented before harm occurs have resulted in a preventive model aimed at avoiding future harms by thwarting dangerous conduct even before a crime occurs.¹⁶⁰

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.¹⁶¹ However, this approach aggravates the risks of prosecutorial errors or misuse of prosecutorial power, as it incapacitates individuals based on some future danger they may pose.¹⁶² Employing the criminal justice system before a crime has

158. See Transactional Records Access Clearinghouse Reports, *Who Is a Terrorist? Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk*, Sept. 28, 2009, available at <http://trac.syr.edu/tracreports/terrorism/215/>.

159. See generally Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) (noting that "during the past several decades, the [criminal] justice system's focus has shifted from punishing past crimes to preventing future violations"). See also Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 668 n. 401 (1998) (noting that "[a]t the end of the day, moreover, the best conclusion is that our system of criminal liability is a 'mixed' regime in which courts and legislatures draw on both retributive and utilitarian principles to justify criminal punishment").

160. See generally Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 429 (2007) (describing the Department of Justice's policy of prevention and early intervention before terrorist attacks occur).

161. See generally Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003). "While preventive detention is generally inconsistent with a preference for autonomy when criminal punishment is an option, it is acceptable both for those who are unaware of the criminality of their actions [(the mentally ill)] and for those who are committed to crime and are aware that this commitment will very likely mean a significant loss of freedom or death [(terrorists and particularly suicide bombers)]." *Id.* at 62. In other words: those who are undeterred. Undeterrable conduct justifies preventive detention.

162. See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 696, 704 (2009) (discussing objections to a preventive

been committed risks the abuse of prosecutorial expansive discretion and the misuse of the preventive model itself. Recall the prosecution of Ahmed Farhani and Mohamed 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, focusing on the right to Due Process of law in criminal trials.¹⁶³ Prior to September 11, threats to national security were not a main enforcement priority,¹⁶⁴ therefore the idea of granting deference to the government’s national security considerations was largely foreign to the criminal justice system. Since September 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

detention model, including the risk of error, and institutional abuses under a preventive detention approach).

163. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (noting that: “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects”); see also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 304 (1988) (stressing the justice system’s commitment to protecting individual liberties).

164. See, e.g., PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 4 (2003) (“[B]efore September 11, the U.S. was dealing with a terrorist problem that . . . posed [only] minimal risks at home. The harm to U.S. citizens abroad from much more troublesome international terrorism was also very small.”).

hand, and national security considerations on the other.¹⁶⁵ 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.¹⁶⁶ The U.S. Supreme Court in *Padilla v. Kentucky* squarely acknowledges this reality, with Justice Stevens noting that “[p]leas account for nearly 95% of all criminal convictions.”¹⁶⁷

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 get reviewed at the appellate level. “[While] the plea rate for terrorism cases is [somewhat] lower than the plea rate for other federal offenses, which on average . . . remain[s] above 95% . . . , a plea rate in excess of 80% is [still] remarkably high. . . .”¹⁶⁸ Consequently, there is a very small body of criminal case law dealing with terrorism prosecutions.¹⁶⁹

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

165. See Kent Roach, *Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 *CARDOZO L. REV.* 2151, 2151 (2006).

166. Only approximately 5%, or 3,365 out of 77,145, of federal criminal prosecutions go to trial. See BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2005).

167. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010).

168. Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 *GA. ST. U. L. REV.* 239, 241 (2011).

169. *Id.* at 241-42 (noting that “[i]t is estimated though that there have been several hundred convictions” of terrorism crimes, mostly under the prohibition against providing material support, “of which over 80% resulted from a 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 now force defendants to accept plea bargains for which they alone . . . determine[] the appropriate punishment.” See *id.* at 242. In contrast, the shadow-of-a-trial theory suggests that “both prosecutors and defendants participate in the plea bargaining process . . . [like a] contractual negotiation.” See *id.*

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.¹⁷⁰ 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 and 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 the government's use of electronic surveillance, loosen the secrecy that attaches to grand jury 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 arrest and prosecution.¹⁷¹

The government's overbroad investigational and procedural powers under existing terrorism-related statutes have been discussed

170. See generally ABRAMS, *supra* note 13, at 11-21.

171. *Id.* at 11.

in great detail elsewhere;¹⁷² 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.

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” toward the enactment of additional crimes and the criminal justice system’s harsher criminal sanctions.¹⁷³ 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.¹⁷⁴

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 disproportionately severe penalty. It is indisputable that Bond committed several crimes violating several Pennsylvania statutes, including statutes that criminalize simple assault,¹⁷⁵ aggravated assault¹⁷⁶ and harassment.¹⁷⁷ Federal prosecutors, however, chose to charge Bond with a serious terrorism offense, thereby significantly increasing the severity of the crime and the penalty.

Using the terrorism classification to increase the severity of punishment is legislatively guided: under the Sentencing Guidelines, terrorism serves to enhance the severity of the penalty.¹⁷⁸ The sentencing commission promulgated section 3A1.4, which provides for increasing a felony offense by twelve levels if the offense “was intended to promote . . . a federal crime of terrorism.”¹⁷⁹ To determine

172. See, e.g., Cole, *supra* note 162, at 694-95.

173. See Stuntz, *supra* note 19, at 509 (discussing the heavy-handed approach and the over-criminalization trend).

174. See generally William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970-74 (2008) (discussing the reasons for inequality as a core feature of American criminal justice system).

175. 18 PA. CONS. STAT. § 2701 (2011).

176. *Id.* § 2702.

177. *Id.* § 2709.

178. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022. Under the 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.” *Id.*

179. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 3A1.4. (2011).

what constitutes a “federal crime of terrorism” for the purpose of applying the terrorism enhancement, courts must look to the statutory definition in 18 U.S.C. § 2332b(g) which defines the term as “an offense . . . calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and . . . is a violation of one of [a list of thirty-nine other criminal statutes].”¹⁸⁰

In *United States 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.’”¹⁸¹ 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.”¹⁸² 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 *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.¹⁸³

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.

180. 18 U.S.C. § 2332b(g)(5) (2006).

181. See *United States v. Thurston*, Nos. CR 06-60069-01-AA, CR 06-60070-01-AA, CR 06-60071-01-AA, CR 06-60078-01-AA, CR 06-60079-01-AA, CR 06-60080-01-AA, CR 06-60120-01-AA, CR 06-60122-01-AA, CR 06-60122-02-AA, CR 06-60123-01-AA, CR 06-60124-01-AA, CR 06-60125-01-AA, CR 06-60126-01-AA, 2007 WL 1500176, at *7 (D. Or. May 21, 2007).

182. *Id.*

183. *Id.* at *9.

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.¹⁸⁴ The choice between the two, however, can generate dramatically different sentencing results, as defendants often fare significantly worse under federal-law prosecution than state-law prosecution.¹⁸⁵ The excessive discretion inherently built into the criminal justice system thus creates unwarranted sentencing disparities among similarly situated defendants.¹⁸⁶ 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.¹⁸⁷ The District Court granted the Government’s request and sentenced Bond to six years in prison.¹⁸⁸ “By comparison, had [Bond] been convicted under [Pennsylvania] state law for aggravated assault, she likely would have faced a prison [term] of [up to] twenty-five months.”¹⁸⁹

Sentencing disparities among similarly situated defendants and lack of uniformity and 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.¹⁹⁰ However, the problem is further exacerbated in terrorism cases due to the fact that the decision as to

184. See Beale, *Too Many*, *supra* note 63 at 997-98; *id.* at 1015 (arguing that increase in federal prosecutions overloads the federal courts system and inevitably results in unjustified disparities); 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”).

185. See Beale, *Too Many*, *supra* note 63, at 997 (noting the serious inequalities among similarly situated defendants with regard to sentencing, and stressing that those selected for federal prosecution are subjected to much harsher sentences).

186. See Beale, *Unique*, *supra* note 63, at 1510 & nn.34-35.

187. *United States v. Bond*, 581 F.3d 128, 140 (3d Cir. 2009); see also Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 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).

188. *Bond*, 581 F.3d at 133.

189. Brief for Petitioner at 11, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227); see 18 PA. CONS. STAT. § 2702(a)(4); 204 PA. CODE § 303.13.

190. See Luna & Wade, *supra* note 187, at 1416-18, 1507-08 (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).

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.¹⁹¹

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.¹⁹² 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.¹⁹³ 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?

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 decisionmaking.”¹⁹⁴ 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.”¹⁹⁵ However, the general requirement for prosecutorial neutrality does not provide a

191. See, e.g., Stuntz, *supra* note 174.

192. See Nathaniel Stewart, *Ohio's Statutory and Common Law History with "Terrorism"—A Study in Domestic Terrorism Law*, 32 J. LEGIS. 93, 93-95 (2005).

193. *Id.*

194. See Green & Zacharias, *supra* note 143, at 850.

195. Beale, *Unique*, *supra* note 63, at 1510.

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.¹⁹⁶

Terrorism prosecutions provide a prominent example in which ethnic biases and nationality-based prejudices might infiltrate the prosecutorial decisionmaking process regarding the charges brought against a defendant whose conduct inflicted harm on a large number of victims. The September 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.¹⁹⁷ 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.¹⁹⁸ Additionally, research has demonstrated that individuals have subconscious biases that can negatively affect perceptions, behaviors, and judgments towards minorities.¹⁹⁹ Given the lack of statutory guidance on what conduct amounts to terrorism, prosecutors are free to decide whether a crime qualifies as terrorism based on their own personal beliefs and inclinations.

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 J. 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."²⁰⁰ 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

196. See Green & Zacharias, *supra* note 143, at 859-60.

197. See generally PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 101-08 (2005); Daphne Barak-Erez, *Terrorism and Profiling: Shifting the Focus from Criteria to Effects*, 29 CARDOZO L. REV. 1 (2007); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

198. See, e.g., R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004).

199. 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).

200. See Stuntz, *supra* note 19, at 546-57 (discussing legislatures' incentives in expanding the scope of substantive criminal law).

safeguards but also to an excessive ratcheting-up of the harshness of substantive criminal law.²⁰¹ 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.²⁰²

In the terrorism context, state legislatures have been quick to adopt measures to address the threats of terrorism. Following September 11, state legislatures in thirty-three states and the District of Columbia amended their criminal codes to include terrorism-related offenses.²⁰³ This type of legislation, typically modeled after federal terrorism-related offenses, adopted expansive, vague, and undefined prohibitions. Similar to federal legislatures, and largely motivated by a political incentive to appear “tough on terrorism” by expanding the scope of antiterrorism statutes and allowing for them to cover broader factual contexts, state legislatures also avoided including a definition of terrorism as an element of antiterrorism offenses.

These legislative measures resonate with legislatures’ political incentives for “fighting 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.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ The selection and retention of

201. Stuntz, *supra* note 65 at 7-15.

202. *Id.* at 7-20.

203. See, e.g., N.Y. PENAL LAW § 490.40 (McKinney 2012); OHIO REV. CODE ANN. § 2909.21 (West 2012); VA. CODE ANN. § 18.2-31 (West 2012).

204. See generally Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 507 (2007).

205. *Id.*

206. See generally Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 391-413 (2009) (discussing the history of the Office of U.S. Attorney).

chief prosecutors is markedly political in nature.²⁰⁷ Both federal and state prosecutors are selected through partisan political processes: U.S. attorneys are political appointees who are subordinate to the Attorney General—a political appointee of the U.S. president.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ This reality results in the political accountability of prosecutors, at the local, state, and federal level.

Prosecutors' political incentives are not unique to terrorism prosecutions.²¹¹ Indeed, the risks associated with the infiltration of political incentives into the prosecutorial decisionmaking process demonstrate another aspect of the general requirement of prosecutorial neutrality.²¹² 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 political dynamics, and classifying crimes as terrorism carries clear political implications. In addition, characterizing crimes as terrorism brings on extensive

207. See *id.* at 409-12 (discussing the appointment and removal of U.S. Attorneys); Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 309 (2009) ("[B]ecause federal prosecutors' political accountability runs through the President, they are less directly accountable than their locally elected state counterparts.").

208. See Beale, *supra* note 206, at 409-10.

209. See H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?* 61 LAW & CONTEMP. PROBS. 129, 142-44 (1998) ("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.").

210. See John Paul Stevens, Retired Justice, Address at Equal Justice Initiative Dinner Honoring Justice Stevens (May 2, 2011), available at <http://online.wsj.com/public/resources/documents/stevens.pdf> (addressing the U.S. Supreme Court decision in *Connick v. Thompson*).

211. See, e.g., Beale, *supra* note 206, at 382-83 (discussing improper partisan political considerations that influenced prosecutorial discretion).

212. See Green & Zacharias, *supra* note 143, 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 STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 71 (3d ed. 1993) ("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 to a desire to enhance his or her record of convictions.").

media coverage and public attention, which provides prosecutors with publicity and fame they would not have enjoyed had “ordinary” criminal charges been brought instead.²¹³

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.²¹⁴ Daniel M. Filler suggests that since the September 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.²¹⁵ Erik 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.”²¹⁶ More specifically, Luna uses the example of America’s “war on terror” to demonstrate the way in which powerful emotions, particularly hatred and fear, often prevail over rational legal doctrines, resulting in “significant deviations in criminal law and procedure.”²¹⁷

The terrorism classification, along with the “war on terrorism” rhetoric, may also affect juries’ and judges’ 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 a juror’s decisionmaking process.²¹⁸ Under this theory, individuals tend to conform their perceptions of legally consequential facts to their defining group commitments.²¹⁹ In the context of

213. See, for example, the extensive media coverage of the recent terrorism prosecution of Ahmed Ferhani and Mohamed Mamdouh. See, e.g., Karen Freifeld, *Two Indicted, Plead Not Guilty in Plot to Bomb Synagogues*, BLOOMBERG BUSINESSWEEK (June 15, 2011, 3:31 PM), <http://www.businessweek.com/news/2011-06-15/two-indicted-plead-not-guilty-in-plot-to-bomb-synagogues.html>.

214. See, e.g., Demleitner, *supra* note 56, at 42 (“[T]he increased application of the term [terrorism] may augment public insecurity and create unnecessary alarm over run-of-the-mill criminal activity.”).

215. See generally Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL’Y & L. 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. See *id.* at 345-46.

216. See Luna, *supra* note 39, at 73-74.

217. *Id.* at 74.

218. See, e.g., Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010).

219. See *id.* at 753-67.

terrorism prosecutions, personal dispositions, biases, and emotions may prove stronger than legal doctrines in making decisions about innocence and guilt; jurors may 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 “[t]he defining characteristic[s] of [the] American criminal [justice system] . . . is its localism.”²²⁰ Scholars note that the American criminal justice system relies more on local than centralized decisionmaking in law enforcement, resulting in a dispersed and decentralized criminal court system.²²¹ On the other hand, federal offenses cover a wide array of conduct that is already criminalized under state law.²²² 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.²²³

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 J. 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.²²⁴ Therefore, local prosecutors are bound to prosecute “bread and butter” crimes such as murder, robbery, and

220. See William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 665 (2002).

221. See generally Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545-64 (2011) (noting that states may vest authority in either state attorneys or local district or county attorneys).

222. See Beale, *Many Faces*, *supra* note 63, at 754-55, 768 (arguing that “overfederalization . . . tips the federal-state balance”).

223. See Stuntz, *supra* note 19, at 543-46.

224. *Id.* at 543.

rape. In contrast, federal agencies, being less constrained, are not accountable to the public and therefore less attentive to its needs and concerns.²²⁵ 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.²²⁶ 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.²²⁷

Rachel E. Barkow considers the question of “when criminal enforcement responsibility should rest with local [law enforcement] and when it should reside with more . . . centralized actor[s]” such as federal or state prosecutors.²²⁸ Barkow contends that “[t]he debate over the federalization of a crime . . . boils down to a question of sentencing policy and 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.”²²⁹

Indeed, different sentencing policies among the federal and the state criminal justice systems are conspicuous in the federal prosecution in *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 twenty-five months in prison under Pennsylvania law were severely punished with a six year prison term. The consequential nature of the choice between federal and

225. *Id.*

226. *Id.* at 543-44.

227. See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 407-16 (2006) (examining the federal, state, and local relations in the law enforcement sphere, particularly after the 9/11 attacks, as a means of understanding present tensions and the demands that federal agencies place on local police that are inconsistent with their crime fighting mission).

228. Barkow, *supra* note 221, at 519.

229. *Id.* at 579 (discussing the policy choice between local and centralized law enforcement).

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 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 exceeds 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.²³⁰ 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.²³¹ The phrase "war on drugs" was coined to address law enforcement's vigorous fight against drug use.²³² Interestingly, the "war on drugs" has often been phrased in terms of a substantial risk to national security.²³³ 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,

230. See *supra* Part II.

231. See generally FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE 217-302 (2007).

232. See *id.* at 217-18.

233. See, e.g., *US: Mexico's Drug War Posing Growing Threat to U.S. National Security*, HOMELAND SECURITY NEWSWIRE, Sept. 13, 2010, <http://www.homelandsecuritynewswire.com/us-mexicos-drug-war-posing-growing-threat-us-national-security> ("The Obama administration sees the drug-related violence sweeping Mexico as a growing threat to U.S. national security . . ."); see also Mortimer B. Zuckerman, *Mexican Drug Cartels Threaten American National Security*, US NEWS, Mar. 9, 2009, <http://www.usnews.com/opinion/mzuckerman/articles/2009/03/09/mexican-drug-cartels-threaten-american-national-security> (discussing the connection between Mexican drug cartels and threats to national security).

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.²³⁴ The broad wording of the prohibition against bombing places of public use suggests that this conduct meets the elements of this offense.

A bill recently introduced in Congress further supports this theory; the bill proposes that six Mexican drug cartels be added to the list of foreign terrorist organizations.²³⁵ These drug cartels would be designated “terrorist organizations” as this term is understood in the Immigration and Nationality Act.²³⁶ 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 A. MacKinnon compares the “war on terrorism” paradigm with violence against women.²³⁷ MacKinnon points out that in both cases, nonstate actors commit violence against innocent civilian targets in acts that are premeditated and involve “ideological and political rather than criminal motive[s],” as sexual violence is one practice of socially organized male power.²³⁸ MacKinnon further contends that both patterns of violence resemble dispersed armed conflict, but the world’s response to them has been markedly different: while “[t]he post-September 11th paradigm shift . . . permitt[ed] potent response[s] to massive nonstate violence against civilians,”²³⁹ international law fails to address violence against women as one form of terrorism or war crimes.²⁴⁰ MacKinnon further argues that just as acts of terrorism “are crimes against humanity . . . , [so] is much violence against women, making both internationally illegal”²⁴¹ and justifying international response under the genocide legal category.²⁴²

MacKinnon’s arguments are undoubtedly controversial, making it unlikely that the international community will declare “violence

234. See ABRAMS, *supra* note 13, at 76.

235. See H.R. 1270, 112th Cong. (2011).

236. See Immigration and Nationality Act § 212, 8 U.S.C. § 1182(a)(3)(B) (2006).

237. Catharine A. MacKinnon, *Women’s September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1, 1-2 (2006).

238. *Id.* at 11-12.

239. *Id.* at 3.

240. *Id.* at 13-14 (“If women were seen to be a group, capable of destruction as such, the term genocide would be apt . . .”).

241. *Id.* at 13.

242. *Id.* at 15-26.

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

However, despite the marked differences, international sex trafficking implicates other defining features that characterize terrorism, as McKinnon notes. Using a terrorism offense in a particular case does not require embracing the “violence against women as terrorism” paradigm as a whole. Instead, unlimited prosecutorial discretion provides prosecutors with a theory that may be invoked once a plausible case presents itself. Take, for instance, a hypothetical in which a sex trafficking organization escalates the measures it employs by using bombing for the purpose of trafficking prostitutes from Mexico to the U.S. Again, nothing in the broad statutory language prevents prosecutors from charging the defendants with bombing places of public use by invoking the theory that using bombs for the purposes of trafficking prostitutes meets the elements of this offense.²⁴³ Using the broadly worded terrorism prohibitions to prosecute a specific international sex trafficking case is therefore not an implausible scenario.

V. 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.²⁴⁴ Scholars have long proposed that courts exercise heightened judicial review of prosecutorial charging decisions,²⁴⁵ 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.²⁴⁶ Scholars have also suggested that internal prosecutorial guidelines provide a

243. See generally 18 U.S.C. § 2332f (2006).

244. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (noting a list of factors that are not readily susceptible to the type of analysis the courts are competent to engage in; therefore, recognizing that prosecutorial decisions are “particularly ill-suited to judicial review”).

245. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1568-72 (1981) (advocating heightened judicial review on prosecutorial discretion).

246. *Wayte*, 470 U.S. at 607.

mechanism to cabin prosecutorial discretion.²⁴⁷ 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.²⁴⁸

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 overinclusive 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 change their actions and policies.

247. See, e.g., Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 200-02 (2004) (discussing internal guidelines as a means to limit prosecutorial discretion).

248. See Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1636-38 (2011) (discussing the shortcomings of internal guidelines).

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 or 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.²⁴⁹ Scholars today question the famous statement that "hardly any rule of penal law is more definitely settled than that motive is irrelevant."²⁵⁰ 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.²⁵¹ The relationship between motive and intent "has caused the theorists considerable difficulty for years," and the distinction between a defendant's allegedly irrelevant motive and his legally relevant intent is often ambiguous.²⁵² 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.²⁵³ Prominent criminal law scholar Paul H. Robinson argues that motive ought to be, and commonly is, an element in determining liability or grade of offense.²⁵⁴ Robinson contends that "every time an offense definition contains the phrase 'with the purpose to . . . ,' the law takes as an offense element the [defendant's] motive, the cause of his or her act."²⁵⁵

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

249. See, e.g., Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1 (2002).

250. See *Id.* at 45-65 (quoting JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 88 (The Lawbook Exchange ed., 2d ed. 2005) (1960)); see also ALAN NORRIE, *CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 36 (Butterworths ed., 2d ed. 2001) ("It is as firmly established in legal doctrine as any rule can be that motive is irrelevant to responsibility . . .").

251. See, e.g., GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 463 (Oxford Univ. Press ed. 2000) (1978).

252. See WAYNE R. LAFAVE, *CRIMINAL LAW* 272 (5th ed. 2010).

253. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 121 (3d ed. 2001).

254. See Robinson, *supra* note 83, 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").

255. *Id.* at 606-07.

law.²⁵⁶ 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. . . . ‘[S]pecific intent’ crime . . . could be recast as a crime defined by motive.”²⁵⁷ Moreover, scholars include specific intent crimes as examples of when the criminal law treats motive as relevant.²⁵⁸ 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.²⁵⁹ Using the defendant’s political motivation as an element of the crime creates special difficulties in implementation and application.²⁶⁰ 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 on the prosecution 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, which in the case of terrorism is the intention to influence and affect government actions and policies.²⁶¹ This specific intent

256. See, e.g., DRESSLER, *supra* note 253 (“A defendant’s motive is often relevant in the criminal law.”).

257. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 594 (2007).

258. See Elaine M. Chiu, *The Challenge of Motive in the Criminal Law*, 8 BUFF. CRIM. L. REV. 653, 668 (2005).

259. *But cf.* Robinson, *supra* note 83, at 606-09.

260. *But cf. id.* at 608.

261. *See id.* at 608 & n.5.

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 a less objectionable option 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.²⁶² 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.

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 or her actual or perceived race, color, religion, national origin, or sexual orientation. As Andrew E. Taslitz has suggested, "Hate criminals generally use their criminal conduct to express their contempt for, and perceived superiority over,

262. See, e.g., N.Y. PENAL LAW § 490.25(1) (McKinney 2012) ("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.").

various identifiable groups, based on, for example, their race, ethnicity, gender, religion, or sexual orientation.”²⁶³

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.²⁶⁴ The Supreme Court, however, reversed these decisions, holding that states could lawfully enhance punishment for conduct based on disfavored motive.²⁶⁵

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.²⁶⁶ 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.²⁶⁷ In sharp contrast with the view that motives do not affect the scope of the harm, Paul H. Robinson contends that hate crimes increase the scope of the harm intended or inflicted by the offense.²⁶⁸ Robinson suggests that hate crimes ought to “focus [on] the greater harm caused and intended by [these crimes] than would occur in an analogous offense without the hate-motivation.”²⁶⁹ “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.”²⁷⁰ 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.²⁷¹ Indeed, disfavored political motive is a distinct feature common to both hate crimes and terrorism, as one scholar writes, “[Hate crimes] are

263. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1284 (2000).

264. See, e.g., *State v. Mitchell*, 485 N.W.2d 807, 814 (Wis. 1992) (“The statute is directed solely at the subjective motivation of the actor—his or her prejudice. Punishment of one’s thought, however repugnant the thought, is unconstitutional.”).

265. *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

266. See FLETCHER, *supra* note 251.

267. See MCCORMACK, *supra* note 16, at 19.

268. Robinson, *supra* note 83.

269. *Id.*

270. *Id.*

271. See generally Cynthia Lee, *Hate Crimes and the War on Terror*, in 5 HATE CRIMES: RESPONDING TO HATE CRIME 139-66 (Barbara Perry & Frederick M. Lawrence eds. 2009) (addressing one aspect of the relationships between hate crimes and the war on terror).

assaults aimed at the expressive goals of demeaning . . . a victim because of membership in this group.”²⁷² Another scholar stresses that “[t]errorism and torture both share some characteristics with hate crimes.”²⁷³

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.

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. “[T]errorist activity” is defined in the Canadian Criminal Code, in part, as follows:

An act or omission . . . that is committed . . . in whole or in part for a political, religious or ideological purpose, objective or cause, and . . . in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act²⁷⁴

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 apolitical, religious or ideological purpose, objective, or cause significantly narrows the potential scope of terrorism offenses.

²⁷² Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1040 (2008).

²⁷³ Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 17 (2008) (noting that “[b]oth torture and terror 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 many”).

²⁷⁴ Canada Criminal Code, R.S.C. 1985, c. C-46, § 83.01(1).

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, or 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.²⁷⁵ “A common feature of post-9/11 anti-terrorism laws has been [the adoption of] very broad definitions of terrorism that go beyond the murder and maiming of civilians.”²⁷⁶ 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 the conduct or harm” that “causes death or serious bodily [injury] . . . , endangers a person’s life, . . . or causes a serious risk to” public health or safety.”²⁷⁷

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 or 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 “[b]y focusing

275. See Canada Criminal Code, R.S.C. 1985 c. C-46, § 83.01(b)(ii).

276. Roach, *supra* note 165, at 2173.

277. See Canada Criminal Code, R.S.C. 1985 c. C-46, § 83.01(b)(ii).

on the additional harms” that acts of terrorism cause and intend to cause “as a basis for greater liability.”²⁷⁸ 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 cause greater harm to a greater number of people.²⁷⁹ 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.

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.²⁸⁰ 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 overinclusive. Making intent to intimidate civilians an element of terrorism, as many provisions currently do, fails to

278. See Robinson, *supra* note 83.

279. Various state statutes prohibit bias-motivated crimes, such as unlawful cross burning, intended to intimidate a group of people on the basis of race, ethnicity, or another bias-motivated feature. See, e.g., ARIZ. REV. STAT. ANN. § 13-1707 (2012); 720 ILL. COMP. STAT. ANN. 5/12-7.6 (West 2012); MO. ANN. STAT. § 565.095 (West 2012); WASH. REV. CODE. ANN. § 9A.36.080(2) (West 2012); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 484-85 (1993) (upholding a criminal statute which enhanced a defendant’s sentence whenever the defendant intentionally selects his victim based on the victim’s race or nationality). See generally DRESSLER, *supra* note 253.

280. See *supra* Part I.

capture its essence and ultimately results in an overinclusive definition.²⁸¹ 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.²⁸² 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 decisions in classifying what types of conduct fall under terrorism prohibitions, thus curbing prosecutorial discretion in this area. Furthermore, adopting the proposal would result in reducing the potential for misusing terrorism prohibitions in the wrong cases, for the wrong reasons. The specific intent element would serve as a practical bar 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 for 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

281. See, e.g., 18 U.S.C. § 2331(5)(B) (2006).

282. See *supra* Part II.

features of terrorism, such as political motivation, are lacking, “ordinary” criminal law would come into play, enabling prosecution.

VI. CONCLUSION

This Article has adopted the underlying premise supporting antiterrorism law: 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.

