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THE VAST GULF BETWEEN ATTEMPTED MASS SHOOTINGS AND ATTEMPTED MATERIAL SUPPORT

Heidi R. Gilchrist*

My son is not a terrorist.

—The parents of many terror suspects

I'm going to be a professional school shooter.

—A comment left on a YouTube video by a user named Nikolas Cruz

INTRODUCTION

When news of a mass shooting breaks, the question in the news media quickly turns to whether it was terrorism or not. Why is this the immediate concern? If tens of people are dead, does it really matter to the general public, in the immediate aftermath, whether the person was motivated by ISIS¹ or some other reason? The shooter who killed seventeen students at a high school in Parkland, Florida “preened with guns and knives on social media, bragged about shooting rats with his BB gun and got kicked out of school—in part because he had brought bullets in his backpack,

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¹ I use the term ISIS to refer to the terror group, although it is also referred to as ISIL and IS due to a confusion on how best to translate the group’s name. See Faisal Irshaid, *Isis, Isil, IS or Daesh? One Group, Many Names*, BBC NEWS (Dec. 2, 2015), <https://www.bbc.com/news/world-middle-east-27994277>.

according to one classmate,”² and even began introducing himself as “a school shooter.”³ People contacted law enforcement about him at least three times with concerns that he could carry out a mass shooting.⁴ However, there was no attempt crime and there was nothing that law enforcement could do.⁵ Conversely, when a young man or woman, often of Arab descent or Muslim, writes about jihad online and makes inquiries about traveling to Syria or buys a ticket to a country that can be a conduit to Syria, he or she can be found guilty of attempted material support and sentenced for up to twenty years in prison.⁶

Much has been written about the murky law of material support, what it exactly is and how it criminalizes some minor actions or even speech. Attempt law has a long history and literature about its beguiling nature.⁷ Together we have the murkiest of laws—attempted material support which makes criminal the attempt to do something that itself would generally not even be considered criminal. This Article will be the first to examine and isolate attempted material support specifically.

In Section I, this Article gives background to the material support laws and what they criminalize. It then looks specifically at attempted material support and what “actions” can lead to a conviction for attempted material support. Many of the cases follow a similar pattern where an individual tweets or posts on social media something positive about ISIS or another terrorist group and is then contacted by an FBI informant. The defendant then expresses interest in joining ISIS and either buys a plane ticket to a country where they could then reach Syria or goes to an airport where they are arrested. They can be sentenced for up to twenty years in prison, sometimes in solitary confinement. In Section II, this Article looks at attempt law

² Connie Ogle et al., *Florida School Shooting Suspect Was Ex-Student Who Was Flagged as Threat*, MIAMI HERALD (Feb. 14, 2018), <http://www.miamiherald.com/news/local/community/broward/article200126034>.

³ Dakin Andone, *The Warning Signs Almost Everyone Missed*, CNN (Feb. 26, 2018), <https://www.cnn.com/2018/02/25/us/nikolas-cruz-warning-signs/index.html>.

⁴ Washington Post Staff, *Red Flags The Troubled Path of Accused Parkland Shooter Nikolas Cruz*, WASH. POST (Mar. 10, 2018), https://www.washingtonpost.com/graphics/2018/national/timeline-parkland-shooter-nikolas-cruz/?utm_term=.ff5c143843a4.

⁵ *Id.*

⁶ See generally Robin White, *Despite Trump’s Guantanamo Threats, Americans Who Joined ISIS Are Quietly Returning Home*, NEW YORKER (June 11, 2010), <https://www.newyorker.com/news/news-desk/americas-isis-members-are-coming-home>.

⁷ See Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 789 (1940).

more broadly and discusses how murky preventative prosecutions can be as a general matter.

Section III examines sentencing for attempted material support and possibilities for rehabilitation or counseling. As the individuals in the attempted material support cases have often done nothing that is actually criminal, the long sentences for “terrorism” crimes are especially harsh. Therefore, attempted material support is an area that is especially attractive for rehabilitation or counseling, although few inroads have been made in this area.

Finally, in Section IV, the Article details some cases of mass shooters and all of the red flags they left behind as they went about their lethal plots and how there is often no law enforcement response or law enforcement is unable to act. If mass shooters are killing as many or more people than “terrorists,” should law enforcement have the same tools to try to prevent them? Or do we accept mass shooters in a way we do not accept “terrorists”? Why is there such a gulf between the two, even when in many of the attempted material support cases the defendant may be mentally ill, isolated, looking for a cause, or even a criminal, but is not a “terrorist”? As our federal gun laws do not seem to be changing, no matter how many people die and, as we do not want mass shootings to continue, there is a call to expand the definition of terrorism to include domestic terrorism and therefore enable law enforcement to investigate and prosecute individuals domestically who are planning an attack.⁸ There is strong appeal in this suggestion, but this Article urges caution, as predicting who will be a terrorist or mass shooter is a difficult business especially in the age of social media where tweets and postings can be misconstrued.

I. WHAT IS ATTEMPTED MATERIAL SUPPORT?

A. *Material Support Background*

The material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, were originally enacted in the 1990s in response to domestic terror attacks.⁹ However,

⁸ Mary B. McCord & Jason Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism>.

⁹ See Federal Code and Rules (Historical and Statutory Notes sections after each code section). Section 2339A was passed as part of the Violent Crime Control and Law Enforcement Act of 1994. Then, it was amended and 2339B was added as part of the Antiterrorism and Effective Death Penalty Act of 1996. In 2001, after the attacks of September 11th, two sections of the Patriot Act were amended to increase the maximum term of imprisonment from ten to fifteen years, to add “expert advice or assistance” as a form of material support, and to make attempts and conspiracies subject to the same maximum penalties as the substantive violation of the section. The Intelligence Reform and Terrorism Prevention Act of 2004

their use dramatically increased after the September 11, 2001 attacks.¹⁰ The central idea of the statutes is to be preventative; as the Supreme Court stated in *Holder v. Humanitarian Law Project*, “it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.”¹¹ Section 2339A has an intent requirement, meaning the person must give the aid or attempt or conspire to do so, knowing or intending that the aid is used in preparation for or carrying out of a terrorist act.¹² However, in Section 2339B, the only intent requirement is that the person “knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so” and they can be fined or imprisoned up to twenty years, or both.¹³ The statute further defines the knowledge requirement as “knowledge that the organization is a designated terrorist organization” or “that the organization has engaged or engages in terrorist activity” or “that the organization has engaged or engages in terrorism.”¹⁴ There are currently sixty-five designated foreign terrorist organizations (“DFTOs”).¹⁵ As the Supreme Court has pointed out, “Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”¹⁶

The reasoning for this expansion of the criminal law was based on “the fungibility of financial resources and other types of material support.”¹⁷ The idea that

amended the definition of “material support or resources” for both sections. In 2015, Congress increased the maximum penalty for violations of Section 2339B from imprisonment for not more than fifteen years to imprisonment for not more than twenty years.

¹⁰ U.S. DEP’T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 14 (2006), <https://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

¹¹ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).

¹² 18 U.S.C. § 2339A (2018) (“Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out a violation of [various terrorism offenses] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both.”).

¹³ 18 U.S.C. § 2339B (2018).

¹⁴ *Id.*

¹⁵ *Foreign Terrorist Organizations*, U.S. DEPT. OF STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited June 22, 2019). See also 8 U.S.C. § 1189 (2018).

¹⁶ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16–17 (2010).

¹⁷ H.R. REP. NO. 104-383, at 81 (1995).

any money or material support given to a designated terrorist organization, for any purpose, could help advance its terrorist aims. “Allowing an individual to supply funds, goods, or services to an organization . . . helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.”¹⁸ Therefore, even funds given to support the humanitarian aims of an organization could fall under the material support statute. In *Holy Land Foundation for Development and Relief v. Ashcroft*, the Fifth Circuit found that money given to Hamas’s social wing, which provides critical social services like education and healthcare for the needy, also helped its terrorist aims by winning the “hearts and minds” of Palestinians and freeing up resources for its military and political aims.¹⁹

However, now, many cases are not about money at all but about providing oneself or attempting to provide oneself to a terrorist organization. “Material support” is broadly defined in the statute and includes:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.²⁰

“Provision of personnel” is further defined as:

knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself)

¹⁸ *Id.*

¹⁹ *United States v. El-Mezain*, 664 F.3d 467, 485–86 (5th Cir. 2011); see AMERICAN CIVIL LIBERTIES UNION, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing”* 8 (2009) (“In interviews with American Muslim donors, the ACLU documented a pervasive fear that they may be arrested.”). The government’s actions have created a climate of fear that chills American Muslims’ free and full exercise of their religion through charitable giving, or Zakat, one of the five pillars of Islam and a religious obligation for all observant Muslims. *Id.* The American Civil Liberties Union, through their interviews with American Muslims, that many were afraid of being prosecuted, targeted for law enforcement interviews, subpoenaed, deported, or denied citizenship or a green card because of charitable donations made in fulfillment of their sacred duty to give Zakat (charity or alms). *Id.*

²⁰ 18 U.S.C. § 2339A (2018).

to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.²¹

Therefore, the material support statute “criminalizes providing personnel through self-recruitment (i.e. volunteering oneself to serve under the direction of a terrorist organization).”²² The Second Circuit framed it as follows: “when a person supplies himself as the bomber or pilot or doctor sought by the terrorist organization, he provides—or certainly attempts to provide—material support in the form of personnel as soon as he pledges to work under the direction of the organization.”²³ This is true, even when “they may not be called upon to render any particular service for months, years, or at all.”²⁴ Using this reasoning, many of the attempted material support cases involve persons who want or try to join ISIS even though they may have actually *done* nothing at all. Their tweets, online postings, or statements to undercover law enforcement can be used to show that they have “pledge[d] to work under the direction of the organization.”²⁵

The Supreme Court, in *Holder v. Humanitarian Law Project*, has considered a challenge to the statute based on the First Amendment and stated that Congress has only prohibited “material support, which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups” when the speaker knows that the organization is a terrorist organization.²⁶ The Court concluded, “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.”²⁷ They also further clarified that Congress

²¹ *Id.*

²² *United States v. Farhane*, 634 F.3d 127, 151 (2d Cir. 2011).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 152.

²⁶ 561 U.S. 1, 26 (2010).

²⁷ *Id.* at 39.

could not extend the same prohibition on material support at issue in the case to domestic organizations.²⁸

In the same opinion, the Supreme Court also considered a challenge based on freedom of association:

The Court of Appeals correctly rejected this claim because the statute does not penalize mere association with a foreign terrorist organization. As the Ninth Circuit put it: “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. . . . What [§ 2339B] prohibits is the act of giving material support.” Plaintiffs want to do the latter. Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite.²⁹

In *Holder v. Humanitarian Law Project* (“HLP”), the material support that the plaintiffs wanted to give was:

(1) train[ing] members of [the Partiya Karkeran Kurdistan] on how to use humanitarian and international law to peacefully resolve disputes; (2) engag[ing] in political advocacy on behalf of Kurds who live in Turkey; and (3) teach[ing] [Partiya Karkeran Kurdistan] members how to petition various representative bodies such as the United Nations for relief.³⁰

However, in the attempted material support realm, the “material support” is the individual offering themselves to the group which sounds a lot like being a member of a group or, in many of the cases, wanting to be a member of a terrorist organization. And the proof against the individuals is generally tweets and social media postings.

Professor Robert Chesney has written extensively on the material support statute, pointing out both “the utility of § 2339A as a foundation for such early stage

²⁸ *Id.*

²⁹ *Id.* at 39 (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133 (9th Cir. 2000)).

³⁰ *Id.* at 14–15 (citations omitted).

prosecutions and the risks that such an approach entails.”³¹ The fear created after September 11th led to an expansion of the criminal law:

In cases involving potential terrorists who cannot be linked to specific plans to commit violent acts—i.e., suspected “sleepers”—prosecutors have evolved a capacity for preventive criminal prosecutions. In particular, prosecutors have creatively interpreted existing laws banning the provision of assets and other forms of support to terrorist organizations and individuals in order to make it a crime to be an active member of or to receive training from such groups.³²

Professor Tom Stacy has called it a criminal “strict liability offense” that “eliminates the culpability the criminal law traditionally requires . . . without materially advancing security.”³³ The tension with free speech has been written on extensively.³⁴ Others have looked at issues of entrapment as so many of the material support cases use informants.³⁵ On the other side, scholars have considered the use

³¹ Robert Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 492 (2007).

³² Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 1–2 (2005).

³³ Tom Stacy, *The Material Support Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 477 (2005).

³⁴ See Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT’L L. 1, 60 (2005) (“By these values, whether Western or universal, when does a person commit a crime by urging action in pursuit of his or her side of a culture clash? Western liberalism has struggled for centuries with trying to forestall violent or other harmful conduct while permitting maximum play of individual freedom. This tension is inherent in attempts to penalize inchoate crime Limits on precursor crimes such as incitement or material support can be found in the related value of free expression. All of these values point to the same difficulty: a person is responsible for ‘incitement to imminent lawless action.’”); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 653–54 (2017) (“The First Amendment dilemma arises because classic doctrines prohibit the state from repressing offensive expressions but permit restrictions on incitement. Terrorist communications on the internet often contain both elements, challenging the scope and applicability of traditional incitement jurisprudence I argue that the Free Speech Clause of the First Amendment is not a bar against the limitation of intentionally inciting, truly threatening, and coordinated terrorist activity.”).

³⁵ See Wadie Said, *The Terrorist Informant*, 85 WASH U. L. REV. 687 (2010); Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH U. L. REV. 979 (2014).

of the material support statute against social media companies as a way of stopping terrorist content online.³⁶

Judges have also expressed discomfort with the use of material support to prosecute those who have not actually done anything wrong. A Ninth Circuit dissent reasoned:

To paraphrase a famous line, in this case, the government has concluded that it is not for it to say what offense Hamid Hayat has committed, but it is satisfied that he committed some offense, for which he should be punished. This case is a stark demonstration of the unsettling and untoward consequences of the government's use of anticipatory prosecution as a weapon in the "war on terrorism." [T]he government asks a jury to deprive a man of his liberty largely based on dire, but vague, predictions that he *might* commit unspecified crimes in the future.³⁷

Similarly, in *United States v. Farhane*, the majority found that defendant Sabir could be found guilty of attempted material support for "swearing an oath of allegiance to al Qaeda" with a person who was actually an undercover agent in the Bronx and "providing contact numbers for al Qaeda members to reach him in Saudi Arabia."³⁸ Sabir is a medical doctor and gave his phone number as a way to permit those needing medical assistance to contact him when he was in Riyadh.³⁹ As the dissent pointed out, "I find no case, in any court, that even remotely supports the majority's conclusion that a defendant attempts a crime simply by agreeing to commit the crime and providing a phone number."⁴⁰

Here, this Article will look specifically at attempted material support and its use as a tool to prosecute those individuals who may hope to join ISIS or another terrorist group or have only indicated such a desire on social media or to an informant. I examine what actions, or lack thereof, can lead to an attempted material support prosecution that carries up to a twenty-year sentence.

³⁶ See Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605 (2017).

³⁷ *United States v. Hayat*, 710 F.3d 875, 904 (9th Cir. 2013) (Tashima, J., dissenting).

³⁸ *United States v. Farhane*, 634 F.3d 127, 150 (2d Cir. 2011).

³⁹ *Id.* at 133.

⁴⁰ *Id.* at 177 (Dearie, C.J., dissenting).

According to the George Washington University Program on Extremism, from March 2014, when the first arrests occurred, until April 2018, 106 individuals were charged in the United States with offenses related to the Islamic State.⁴¹ Of those, 41% were accused of attempting to travel or successfully traveling abroad, and 56% were charged in an operation involving an informant and/or an undercover agent.⁴² In a study of terrorism cases from 2001–2011, all federal criminal cases that the Justice Department claims are terror related, approximately 88.2% of all resolved cases in that timeframe have resulted in a conviction.⁴³ Therefore, if you are accused of attempted material support for wanting to join a terror group, it is more likely that you have been talking to an FBI informant and most likely that you will be convicted. And, almost half of terror-related cases involve wanting to join or joining a terror group.⁴⁴ This enforcement action is a powerful tool indeed that needs to be constantly evaluated.

B. *Attempted Material Support*

Many attempted material support cases follow a pattern. The person is observed on social media making a comment in favor of ISIS. They are then contacted by an FBI online covert employee (“OCE”) to see if they would like to go to Syria to join ISIS and, if the person seems amenable, they make a plan to do so. When the person either buys a plane ticket or goes to the airport, they are then arrested and can subsequently be sentenced up to twenty years for attempted material support. In many of these cases, there are themes of an isolated, and often mentally ill, individual. This Article will explore a few of the cases in more detail below.

In *United States v. Sheikh*, the evidence against Mr. Sheikh was based entirely on records from Facebook, Skype, Time Warner Cable, and an FBI OCE.⁴⁵ Under the Bail Reform Act, a defendant may be detained pending trial when the government shows “that no condition or combination of conditions will reasonably assure the

⁴¹ *GW Extremism Tracker: Terrorism in the United States*, GEO. WASH. U. (Apr. 2018), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Apr2018_Update_TerrorismIntheUS.pdf.

⁴² *Id.*

⁴³ *Terrorist Trial Report Card: September 11, 2001–September 11, 2010*, CTR. ON LAW & SEC., N.Y.U. (Jan. 2010), http://www.lawandsecurity.org/wp-content/uploads/2011/09/01_TTRC2010Final1.pdf [<https://perma.cc/YNW4-ETVN>].

⁴⁴ *GW Extremism Tracker*, *supra* note 40.

⁴⁵ *United States v. Sheikh*, 994 F. Supp. 2d 736, 740–41 (E.D.N.C. 2014).

appearance of the person as required and the safety of any other person of the community.”⁴⁶ The court found that to be the case, stating:

The weight of the evidence presented against defendant is strong. . . . [D]efendant asserted that he held the al-Nusrah group in high esteem, he was aware of their terrorist activity, he was aware they had been designated by the United States as a terrorist organization, he wished to join al-Nusrah, he wished to assist the mujahideen in any way possible, he wished to travel to Syria, he wished to fight, and he wished to die a martyr. According to Maslow, defendant devised a plan with the OCE to accomplish these things. Both defendant’s family members and Maslow testified that defendant had traveled in the past to Turkey and was traveling to Lebanon on the day he was arrested.⁴⁷

The court then reiterates “[t]he weight of this expansive evidence is heavy and weighs in favor of defendant’s continued detention.”⁴⁸ No one wants to be wrong and release a terrorist, but to say that there is “expansive” evidence and the “weight is strong” is hard to gel with the facts. The facts are that a seriously mentally ill man wanted and wished to help al-Nusrah.⁴⁹ Whether he had any capacity to actually do so is seriously in doubt. There was a lot of wishing and very little action.

Mr. Sheikh, as the government itself admits, is severely mentally ill. After a doctor found Mr. Sheikh was not competent to stand trial as he was unable to “understand the nature and consequences of the proceedings against him and to assist in his defense,” the government moved to have him involuntarily medicated.⁵⁰ The court remarked that “the nature of the crime here is very serious—Mr. Sheikh is alleged to have provided material support to known terrorist organizations. The more serious a crime, the stronger the government’s interest in prosecution, and the more likely involuntary medication is to be appropriate.”⁵¹ The court decided that the government had met its burden in proving that the involuntary medication of

⁴⁶ *Id.* at 738.

⁴⁷ *Id.* at 740–41.

⁴⁸ *Id.* at 741.

⁴⁹ *Id.* at 740.

⁵⁰ *United States v. Sheikh*, 138 F. Supp. 3d 643, 646 (E.D.N.C. 2015).

⁵¹ *Id.* at 649.

Mr. Sheikh would significantly further the governmental interest in prosecuting him.⁵²

In *United States v. Nagi*, the defendant, Nagi, was charged with attempting to provide material support to a foreign terrorist organization based entirely on texts, Twitter, the purchase of combat gear, and past trips to Turkey.⁵³ In denying a motion to dismiss, the court stated “[t]he line between advocacy and action is, to be sure, a hazy one, particularly in an attempt case such as this one. This is especially true given that the ‘action’ § 2339B(a)(1) criminalizes may be minor or look benign.”⁵⁴ However, after reversing Magistrate Judge Scott’s order for a bill of particulars, the court never clarified what the “action” or “substantial step” Nagi took was.⁵⁵ Judge Scott had ordered the government to particularize, “the conduct and or statements manifesting defendant’s intent to assist ISIS; [and] the overt act(s) that constitute substantial step(s) toward completion of the offense of providing material assistance to a foreign terrorist organization.”⁵⁶ Because it is an attempt crime, should the government not have to say what the substantial step was?

Some of the texts Nagi wrote are as follows: “I’m good not worried I wanted help the Syrian people I feel for them walla my heart bleeds for them.”⁵⁷ “Well did you make it . . . Like with them or wat . . . Yeah right, you hanging with them now . . . I was really spectacle [sic] so was found cuz you weren’t sure so you finally with them. . . . I don’t believe you with them.”⁵⁸ “The complaint contends that these conversations show that the Defendant traveled to Turkey with the goal of entering Syria and joining ISIL.”⁵⁹ However, he did not actually go to Syria, he came back to the United States. The government also details numerous purchases of combat gear including, “a tactical vest with armor plates, combat boots, camouflage clothing, a

⁵² *Id.* at 651.

⁵³ *United States v. Nagi*, 254 F. Supp. 3d 548, 558 (W.D.N.Y. 2017).

⁵⁴ *Id.* at 558.

⁵⁵ *Id.*

⁵⁶ *Id.* at 556.

⁵⁷ *Id.* at 553.

⁵⁸ *Id.*

⁵⁹ *Id.* at 553–54.

Shahada flag, 4 Kevlar ‘Hard Knuckle Tactical Gloves,’ a ‘Military Style Outdoor Mountaineering Backpack,’ a machete, a burn kit, and night-vision goggles.”⁶⁰

They also detail a number of tweets and retweets, stating that he posted:

his “pledge to hear and obey Abu Bakr al-Baghdadi.” [He] also tweeted . . . ISIL-related YouTube videos, messages promoting ISIL, photos of dead Islamic State soldiers, photos of individuals being beheaded, and photos of severed heads. Many of these Tweets were accompanied by text, such as, “Oh, you who are defaming the Islamic State, its soldiers shall be present at time of death. Those who have brains ought think & learn”; and “God is the Greatest. The three heads, those who dug their graves by their own hands.”⁶¹

Finally, the complaint alleged that the defendant followed a number of Twitter handles “that featured profile pictures of ISIL flags, photos of al-Baghdadi or Osama bin Laden, photos of weapons or of individuals in military fatigues, photos of recent beheadings, or other images which could reasonably be described as violent or terrorism-related in nature.”⁶² Nagi pled guilty in January 2018 and had been arrested in July 2013 for threatening to kill his daughter.⁶³ He may be a criminal who admires ISIS, but it is not clear that he is a terrorist.

In *United States v. Shafi*, a father’s worried call to the American Embassy in Cairo when his son disappeared led to the son’s surveillance by the FBI, followed by charges of attempted material support.⁶⁴ When Shafi’s son disappeared, a relative received a text message that his son had gone to “protect Muslims,” but his son ultimately returned to his family in Egypt and then went back to the United States.⁶⁵ The complaint detailed that once back in the United States, Shafi began researching ways to reach Syria through Turkey and e-mailed with others regarding possible

⁶⁰ *Id.* at 554.

⁶¹ *Id.* at 555.

⁶² *Id.*

⁶³ *Lackawanna Man Pleads Guilty to Attempting to Give Resources to Terrorist Organization*, WKBW NEWS (Jan. 22, 2018), <https://www.wkbw.com/news/lackawanna-man-pleads-guilty-to-attempting-to-give-resources-to-terrorist-organization>.

⁶⁴ *United States v. Shafi*, 252 F. Supp. 3d 787, 789–90 (N.D. Cal. 2017).

⁶⁵ *Id.* at 790.

travel to Turkey.⁶⁶ Other evidence against him included that while at home, “Shafi led his two younger brothers in ‘paramilitary style’ training exercises, including calisthenics, running through the neighborhood, and ‘crawling through the mud at a park near their home in Fremont, California.’”⁶⁷ It is not entirely clear how “running through the neighborhood”⁶⁸ became paramilitary training. Also, Shafi “spoke with others via telephone, making statements such as ‘I am completely fine with dying with [an unspecified foreign terrorist organization],’ discussing living in an area in Syria controlled by that foreign terrorist organization, and condemning America as the enemy.”⁶⁹

On June 30, 2015, Shafi purchased a one-way ticket to Istanbul, Turkey, but was intercepted by federal agents at the airport who questioned him.⁷⁰ He denied that he was traveling to Turkey so that he could cross into Syria and join a foreign terrorist organization, but he did “note[] that there were many refugees in Turkey” and that “he would try to help the refugees if he could.”⁷¹ He continued, saying “that some people ‘helped by building a house, while others picked up a gun.’”⁷² Asked if he would “pick up a gun” and become a fighter, Shafi said no.⁷³ With Shafi’s consent, the agent then conducted a search of Shafi’s backpack.⁷⁴ The court recounted:

[T]he agent found personal items along with a copy of the Quran and a “small paper-back book of Islamic prayers,” among other things. . . . After completing the interview and search, the agents escorted Shafi out of the airport to public transit so that he could return to his family’s home. On his way home, Shafi made a phone call that was intercepted by the government. He related his experience at the airport with the agents and expressed that only some “kind of idiot” would say yes in response to the questions asked by the agents regarding his intentions to travel to Syria in order to join a foreign terrorist organization. He then made

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

another phone call, where he expressed similar sentiments about the questions asked by the agents. The person Shafi called asked if he could say where he intended to travel; Shafi responded, “You know where I was going to go. . . . I was going to Turkey.”⁷⁵

He is currently held in solitary confinement awaiting trial and facing twenty years in prison.⁷⁶

The entire case against Keonna Thomas, one of the few cases against a woman, centered on Twitter statements she had made, electronic communications, and the fact that she purchased an airline ticket from Philadelphia to Barcelona after researching online buses from Barcelona to Istanbul.⁷⁷ Some of her tweets from the complaint are as follows:

On or about August 18, 2013, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” re-posted on Twitter a photograph of a young male child wearing firearm magazine pouches and camouflage attire, with the following caption: “Ask yourselves, while this young man is holding magazines for the Islamic state, what are you doing for it? #ISIS.”

On or about December 17, 2013, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” re-posted on Twitter the following statement by another Twitter user: “‘Happiness is the day of my martyrdom’—Sheikh Khalid al Husainan.”

On or about December 23, 2013, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” re-posted on Twitter a video along with text advising that the video constitutes “a message to #muslims in the west from a British brother with #ISIS #Mujahideen [violent jihadi fighter] #Syria.” The video is titled, “A message from a mujahid,” and is accompanied by the following description: “ISIS mujahid gives some advice. Rayat al Tawheed. Official Media of the mujahideen.”

On or about January 1, 2014, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” posted on Twitter the following statement: “I see why the mujahideen [violent jihadi fighters] Sacrifice Dunya [life on earth] for Akhirah [the afterlife] there’s no comparison.”

⁷⁵ *Id.* at 790–91.

⁷⁶ Matt Apuzzo, *Only Hard Choices for Parents Whose Children Flirt With Terror*, N.Y. TIMES (Apr. 9, 2016), <https://www.nytimes.com/2016/04/10/us/parents-face-limited-options-to-keep-children-from-terrorism.html?mcubz=0>.

⁷⁷ *Id.* Complaint at 2–5, United States v. Keonna Thomas, No. 2:15-cr-00171-MMB (E.D. Pa. 2015).

On or about January 4, 2014, KEONNA a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” posted on Twitter the following statement: “Only thing I’m jealous of is when I see the smiles of shuhadaa [martyrs.]”

On or about January 15, 2014, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” posted on Twitter the following statement: “I want these to be my last words.” Accompanying this statement was a photograph of the following text: “By the Lord of the Kaaba [a shrine in Mecca] I have succeeded.”

On or about April 10, 2014, KEONNA THOMAS, a/k/a “Fatayat Al Khilafah,” a/k/a “YoungLioness,” posted on Twitter the following statement, followed by images of a skull, flames, and a gun: “I need a permanent vacation that can only mean one thing.” In response, another user of Twitter posted the following statement: “istishhaadi [martyrdom.]”⁷⁸

In response to an electronic communication stating “[u] [sic] probably want to Istishadee [martyrdom operations] with me,” she replied, “that would be amazing . . . a girl can only wish.”⁷⁹

There are serious worries about racial and even gender biases. When Shannon Maureen Conley, who is white, and a convert to Islam, fell in love with an ISIS fighter and wanted to “wage jihad,” FBI agents met with her numerous times to try to dissuade her as they themselves point out in their press release.⁸⁰ Young minority men are not usually that lucky. The FBI could not convince her, and she was ultimately arrested at the Denver International Airport on her way to Turkey.⁸¹ An FBI agent was recently sentenced to four years in prison for leaking secret documents that described the FBI’s power to recruit potential informants and identify possible extremists.⁸² The agent, according to his lawyer, became disillusioned about

⁷⁸ *Id.* at 2–3.

⁷⁹ *Id.* at 5.

⁸⁰ Press Release, Dep’t of Justice, Colorado Woman Sentenced for Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization (Jan. 23, 2015), <https://www.justice.gov/opa/pr/colorado-woman-sentenced-conspiracy-provide-material-support-designated-foreign-terrorist> (“In fact, on numerous occasions, Special Agents with the FBI met with her in attempts to persuade her not to carry out her plans to travel overseas to provide support to a foreign terrorist organization and to engage in violent jihad.”).

⁸¹ *Id.*

⁸² Charlie Savage & Mitch Smith, *Ex-Minneapolis F.B.I. Agent Is Sentenced to 4 Years in Leak Case*, N.Y. TIMES (Oct. 18, 2018), <https://www.nytimes.com/2018/10/18/us/politics/terry-albury-fbi-sentencing.html>.

“widespread racist and xenophobic sentiments” in the Bureau and “discriminatory practices and policies he observed and implemented.”⁸³

The use of informants and the creation of terrorist plots by the FBI has created concerns of entrapment and enticing people who are not actually terrorists into these plots. However, the entrapment defense has proven incredibly difficult, if not impossible, to use.⁸⁴ Although not an attempted material support case, *United States v. Cromitie* illustrates the inaccuracy of calling many cases “terrorism” and how the use of confidential informants may entice the mentally ill and impoverished into FBI formulated plots.⁸⁵ Cromitie was “‘an impoverished man’ who sustained himself by committing petty drug offenses for which he had repeatedly been caught and convicted.”⁸⁶ During sentencing, the judge in the case said “[t]he essence of what occurred here is that a government understandably zealous to protect its citizens from terrorism came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own,” referring to Cromitie.⁸⁷ Unlike other domestic terror cases, “the government did not have to infiltrate and foil some nefarious plot—there was no nefarious plot to foil. . . . I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept.”⁸⁸ She further opined, “[o]nly the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in its scope.”⁸⁹

The dissent also wrote about Cromitie’s complete inability to be part of terrorist conspiracy:

It is clear that Cromitie in his unmolested state of grievance would (for all the evidence shows, and as the district court found) have continued to stew in his rage and ignorance indefinitely, and had no formed design about what to do. The government agent supplied a design and gave it form, so that the agent rather than

⁸³ *Id.*

⁸⁴ Jessica A. Roth, *The Anomaly of Entrapment*, 91 WASH. U. L. REV. 979 (2014).

⁸⁵ *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013).

⁸⁶ *Id.* at 200.

⁸⁷ Robert Gearty, *Judge Gives Men Convicted in Bronx Synagogue Bomb Plot 25 Years in Prison But Lambasts Government*, N.Y. DAILY NEWS (June 29, 2011), <http://www.nydailynews.com/news/crime/judge-men-convicted-bronx-synagogue-bomb-plot-25-years-prison-lambasts-government-article-1.125706>.

⁸⁸ *Id.*

⁸⁹ *Id.*

the defendant inspired the crime, provoked it, planned it, financed it, equipped it, and furnished the time and targets. He had to, because Cromitie was comically incompetent, possibly the last candidate one would pick as the agent of a conspiracy. There simply was no evidence of predisposition under our settled definition of that term.⁹⁰

Although a low-level criminal, and perhaps willing to join in a ‘terrorist’ plot for money, Cromitie is not a terrorist. The difference is critical.

The importance of language cannot be underestimated. Labelling someone a “terrorist” is hard to overcome. As terrorism scholar Bruce Hoffman wrote in discussing how hard defining who is a terrorist can be, “[o]n one point, at least, everyone agrees: terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one’s enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore.”⁹¹ Labelling someone a criminal means they are bad, but the term terrorist is worse still. No one wants to be the person that lets a “terrorist” go free—whether they are a juror, law enforcement officer, or judge. Although there is no general, internationally accepted definition of terrorism,⁹² the United States definition of international terrorism is defined as activities that:

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 . . . [that] 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; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear

⁹⁰ United States v. Cromitie, 727 F.3d 194, 230 (2d Cir. 2013).

⁹¹ BRUCE HOFFMAN, INSIDE TERRORISM 31 (1998).

⁹² Geoffrey Levitt, *Is “Terrorism” Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986) (“The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.”). The oft-cited aphorism “one man’s terrorist is another man’s freedom fighter” sums up part of the problem.

intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.⁹³

Many of the attempted material support cases simply do not fit with the terrorism definition. Many of the cases involve an individual “wanting” or “wishing” to join ISIS. Maybe they are mentally ill, isolated, looking for a cause or, in some cases, actually a criminal, but calling them a terrorist is incorrect. And the terrorist label brings with it incredibly harsh sentencing of up to twenty years in prison and diverts law enforcement’s attention from other possible, and greater, threats. Recently, threats from domestic terror probes have led to more arrests than those inspired by Islamic extremists.⁹⁴

By focusing on Muslims, it fuels the narrative of ISIS and other extremist groups of “us” against “them.” These stories will anger and help ensnare new recruits. As Professor Chesney stated, “to the extent that an early stage prosecution is perceived as unjustified, it may have a negative impact on the willingness of members of a critical community—such as Arab—or Muslim-Americans—to cooperate with intelligence and criminal investigators.”⁹⁵ And, as Professor Tung Yin points out, fixating upon Arabs and Muslims as the only source of terrorism “runs the very real risk of missing out on opportunities to use undercover stings and other traditional law enforcement to prevent acts of terrorism by other groups.”⁹⁶

We want parents worried about their children or educators worried about their students to come forward if they see them being brainwashed by ISIS or other terror propaganda. It would be better to counsel and work with these individuals who have not actually done anything wrong up front rather than wait twenty years until they are released. We also do not want people to be afraid to study jihad and think about the appeal of ISIS because they are afraid law enforcement will end up at their door step if they look at terror websites and social media. And we need to study its appeal to a broad range of individuals. We want different voices and viewpoints thinking

⁹³ 18 U.S.C. § 2331 (F. Supp. 2018).

⁹⁴ Devlin Barrett, *Arrests in Domestic Terror Probes Outpace Those Inspired by Islamic Extremists*, WASH. POST (Mar. 9, 2019), https://www.washingtonpost.com/world/national-security/arrests-in-domestic-terror-probes-outpace-those-inspired-by-islamic-extremists/2019/03/08/0bf329b6-392f-11e9-a2cd-307b06d0257b_story.html?utm_term=.a24c07fc72f7.

⁹⁵ Chesney, *supra* note 30, at 434.

⁹⁶ Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists? Race, Religion and the Perception of Terrorism*, 4 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 33, 63 (2013).

about terror groups and their appeal whether in academia or working in the intelligence services. Further, someone might advocate for some form of Islamic governance without in any way condoning terrorism or advocating on behalf of ISIS. Chilling these voices does not help us solve problems.

There are also issues of fairness and justice. People are going to prison without any action, only words and perhaps thoughts and often prodded on with the use of government informants.⁹⁷ Someone may say they want to join ISIS and never actually do so. Is labelling these individuals “terrorists” and putting them in prison for decades making us any safer?

II. ATTEMPT LAW GENERALLY

Although attempt is a crime of general application in every state in the country, there is no generally applicable federal attempt statute.⁹⁸ Indeed, it is not even a crime to attempt to commit most federal crimes.⁹⁹ However, the material support laws explicitly include attempted material support.¹⁰⁰ At the most general level, an attempt is defined as intent and an overt act or substantial step towards completion of the substantive crime.¹⁰¹

⁹⁷ See, e.g., ASSOCIATED PRESS, *Man Who Wanted to Join ISIS, Plotted U.S. Attack Arrested at Montana Gun Range, Feds Say*, NBC NEWS (Apr. 4, 2019), <https://www.nbcnews.com/news/us-news/man-who-wanted-join-isis-plotted-u-s-attack-arrested-n991201>.

⁹⁸ CHARLES DOYLE, CONG. RES. SERV. REP. R42001: ATTEMPT: AN OVERVIEW OF FEDERAL CRIMINAL LAW I (Apr. 6, 2015), <https://fas.org/sgp/crs/misc/R42001.pdf>.

⁹⁹ *Id.*

¹⁰⁰ 18 U.S.C. § 2339A; 18 U.S.C. § 2339B.

¹⁰¹ The Model Penal Code defines attempt as,

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

MODEL PENAL CODE § 5.01 (AM. LAW INST., Proposed Official Draft 1962). National Commission has a similar definition: “A person is guilty of criminal attempt if, acting with the kind of culpability otherwise

Attempt law is murky, we can probably all agree: “We have a much less clear idea than we need of what, exactly, we have criminalized in criminalizing attempt.”¹⁰² The pondering and fascination with attempt law and what constitutes an attempt is not new. In 1940, Jerome Hall wrote:

Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate. At every least step it intrigues and cajoles; like la belle dame sans merci, when solution seems just within reach, it eludes the zealous pursuer, leaving him to despair ever of enjoying the sweet fruit of discovery. For criminal attempt involves the very foundations of criminal liability; before one can conclude even a preliminary analysis, an appraising eye must be cast over almost the entire penal law—the definitions, the types of crime, the nature of “the act,” the sanctions—in order to unravel any thread of reason that can be discovered in the apparently unreasoned conglomeration of case and statute law, and exhibited doctrine.¹⁰³

The fascination with attempt law has a long history because, at its root, it is about predictions and fairness. The very nature of attempt is that the individual has not actually done the crime, so we want to be as certain as possible when convicting someone of attempt that they are dangerously close to the actual crime so that it is fair to send them to prison.

Intent alone is not enough to convict someone of attempt. As the Supreme Court has stated, “[a]s was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct.”¹⁰⁴ And as Justice Holmes stated in *Swift & Co. v. United States*, “[n]ot every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law.”¹⁰⁵ The “second element—the substantial step requirement—ensures that mere thought crimes are not prosecuted.”¹⁰⁶ But the line between preparation and attempt is a very difficult one to draw. We neither want to get someone who would never have actually

required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime.” § 1001(1).

¹⁰² Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 96 (2014).

¹⁰³ Hall, *supra* note 7.

¹⁰⁴ *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007).

¹⁰⁵ *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905).

¹⁰⁶ *United States v. Schell*, 72 M.J. 339, 344 (C.A.A.F. 2013).

acted, nor want to wait too long and have the crime come to fruition. Predictions of the future are inherently just that—predictions—and biases can come into play with someone's life in the balance.

The line between preparation and substantial step is always tricky, but in the attempted material support context, where many of the prosecutions are for attempting to provide oneself to ISIS, it is even murkier. The “act” itself is not something that is generally considered criminal—for example, going to Syria or trying to go to Syria, or even wanting to go to Syria. Much of the basis of the prosecutions is based on speech—speech in support of ISIS or language expressing a desire to join ISIS. And, even in the instances where there is strong support of ISIS online or in Tweets, not all “extremists” progress from words to deeds.¹⁰⁷ In many instances, it is not even clear that the word “extremist” or “terrorist” fits the individual at all. And the substantial step in many of the cases, although not explicitly stated, is going to an airport or buying a ticket.

III. SENTENCING AND POSSIBILITIES FOR REHABILITATION OR COUNSELING

The sentences for these attempted material support ‘crimes’ because given the terrorism label are incredibly harsh, especially considering many have not actually done or attempted to do something that would generally be considered a crime. Consider some of the headlines: “Colorado woman gets 4 years for wanting to join ISIS” a CNN headline reads¹⁰⁸ referring to Shannon Maureen Conley; “Woman Who Sought to Join Islamic State Group Gets 8 Years”¹⁰⁹ referring to Keonna Thomas;

¹⁰⁷ CAN. SEC. INTELLIGENCE SERV., INTELLIGENCE ASSESSMENTS BRANCH, *Mobilization to Violence (Terrorism) Research 4*, https://www.canada.ca/content/dam/ctis-scirs/documents/publications/IMV_-_Terrorism-Research-Key-findings-eng.pdf; see also Hellen Duffy & Kate Pitcher, *Inciting Terrorism? Crimes of Expression and the Limits of the Law*, GROTIUS CTR. WORKING PAPER SERIES (Apr. 4, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156210 (“Early intervention against attempts, preparatory act and forms of conspiracy have all been referred to as ‘good practices’ consistent with a rule of law approach to countering terrorism within the criminal justice framework. Where the use of criminal law continues to reach further back and further out, preventively, it risk falling foul of the criminal law and human rights principles on which its legitimacy depends.”).

¹⁰⁸ Michael Martinez et al., *Colorado Woman Gets 4 Years for Wanting to Join ISIS*, CNN (Jan. 24, 2015), <https://www.cnn.com/2015/01/23/us/colorado-woman-isis-sentencing/index.html>.

¹⁰⁹ *Woman Who Sought to Join Islamic State Group Gets 8 Years*, ASSOCIATED PRESS (Sept. 6, 2017), <https://www.usnews.com/news/best-states/pennsylvania/articles/2017-09-06/woman-who-sought-to-join-islamic-state-group-gets-8-years>.

“US Airforce vet gets 35 years prison for trying to join ISIS”¹¹⁰ (Pugh is the first conviction after trial for attempting to join ISIS);¹¹¹ and “Former Metro police officer sentenced to 15 years in prison for supporting ISIS.”¹¹² These news headlines boil down what many of the attempted material support convictions are for—wanting and trying to join ISIS.

Judges themselves have commented on both the harshness of some of the material support sentences and the fact that there are no standard ways to assess charges and sentences as Karen Greenberg has detailed.¹¹³ One Connecticut judge noted that “no matter how I looked at the cases, there’s absolutely no way to rationalize the sentences that have been imposed around the country, on persons who have given material support or committed terrorists acts.”¹¹⁴ And, attempted material support convictions are even further removed and often have no relation to any terror act at all.

The Terrorism Enhancement provision in the Sentencing Guidelines can also give lengthy sentences to a defendant with no prior record, and in the case of attempted material support, to a defendant who has done nothing criminal.¹¹⁵ As Judge O’Toole in the *Mehanna* case said:

[T]he automatic assignment of a defendant to a Criminal History Category VI is not only *too blunt an instrument to have genuine analytical value*, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this

¹¹⁰ Lauren del Valle, *US Airforce Vet Gets 35 Years Prison for Trying to Join ISIS*, CNN, <https://www.cnn.com/2017/05/31/us/air-force-isis-sentenced-to-prison/index.html> (last updated June 1, 2017, 1:51 AM).

¹¹¹ Matt Zapotosky, *Feds Win First Conviction After Trial of Someone Trying to Join Islamic State*, WASH. POST (Mar. 9, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/09/feds-win-first-conviction-after-trial-of-someone-trying-to-join-islamic-state/?utm_term=.d37ecb2e013b.

¹¹² Rachel Weiner, *Former Metro Police Officer Sentenced to 15 Years in Prison for Supporting ISIS*, WASH. POST (Feb. 3, 2018), https://www.washingtonpost.com/local/public-safety/saying-he-loves-his-country-former-metro-police-officer-gets-15-years-in-prison-in-terrorism-case/2018/02/23/9a13bb3a-167a-11e8-8b08-027a6ccb38eb_story.html?utm_term=.faca6910be6.

¹¹³ Joanna Baltes et al., *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, 8 J. NAT’L SECURITY L. & POL’Y 347, 355 (2016).

¹¹⁴ *Id.*

¹¹⁵ See James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 54 (2010).

case, import a fiction into the calculus. It would impute to a defendant who has had no criminal history a fictional history of the highest level of seriousness. It's one thing to adjust the offense level upward to signify the seriousness of the offense. It is entirely another to say that defendant has a history of criminal activity that he does not, in fact, have.¹¹⁶

The Terrorism Enhancement applies to attempt offenses.¹¹⁷ Although the Sentencing Guidelines usually permit an offense level reduction for incomplete crimes under Section 2X1.1(b), defendants accused of attempting or conspiring to engage in a terrorism offense are treated the same for sentencing purposes as those who actually committed a terrorist act.¹¹⁸ Under the Terrorism Enhancement provision, a defendant's offense level is increased by twelve levels and cannot be lower than thirty-two.¹¹⁹ The criminal history category is increased to Category VI, the highest level.¹²⁰

Solitary confinement is a uniquely terrible form of imprisonment. The psychologically destructive effects of prolonged periods of isolation are well-documented.¹²¹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has said “[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all

¹¹⁶ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012). See George D. Brown, *Notes on a Terrorism Trial: Preventive Prosecution, “Material Support” and the Role of the Judge After United States v. Mehanna*, 4 HARV. NAT’L SEC. J. 1, 54 (2012) (“In rejecting the Enhancement, Judge O’Toole also rejected one possible philosophy on terrorism: that it represents an essentially monolithic entity that must always be treated with the utmost severity Rejection of this view seems to represent an important value of the criminal law: the gradation of offenses. We do not treat a purse-snatcher like a rapist. The Enhancement reflects a different view: a terrorist is a terrorist. Yet it should not be forgotten that Judge O’Toole sentenced Mehanna to 17 and one half years with supervised release. This outcome suggests that the system can differentiate among terrorists generally, as well as among those whose actions fall on different points of the prevention spectrum.”).

¹¹⁷ U.S. SENTENCING GUIDELINES MANUAL § 2X1.1 (U.S. SENTENCING COMM’N 2015).

¹¹⁸ Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1528 (2017).

¹¹⁹ U.S. SENTENCING GUIDELINES MANUAL, *supra* note 116, at § 3A1.4(a).

¹²⁰ *Id.* § 3A1.4(b).

¹²¹ Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 566 (1997).

forms of solitary confinement should be as short as possible.”¹²² Whether called “solitary confinement” or “administrative isolation,” it is an extreme punishment that should only be used, if at all, in the most extraordinary cases. Solitary confinement in the attempted material support realm is disproportionately harsh. Consider the case of a former Metro police officer who was convicted of attempted material support and obstruction of justice and sentenced to fifteen years in prison.¹²³ Within a week of his arrest, he was placed in solitary confinement even though he had no criminal history and, according to the court filing, he was the only prisoner in solitary confinement in Alexandria who did not have a history of violence.¹²⁴ His defense argued that he was allowed to remain as a Metro police officer for the seven years he spent under FBI investigation, suggesting that he posed no threat to others.¹²⁵ Adam Shafi was also placed in solitary confinement for twenty-four hours a day with only five hours of exercise per week.¹²⁶ He also had no criminal record and no history of violence.¹²⁷ In the words of his father who first alerted the government about concerns of his son, “[e]very minute, I just imagine him in that solitary confinement, facing 20 years, because I cooperated with the government,” he said, adding, “[i]t’s a horrible feeling. I can’t get rid of it.”¹²⁸ The terrorism label is hard to escape.

In the days and weeks after September 11, 2001, perhaps we could argue about what we could justify under the “War Against Terror.”¹²⁹ However, now, eighteen

¹²² European Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *2nd General Report on the CPT’s Activities Covering the Period 1 January to 31 December 1991*, CPT ANNUAL GENERAL REPORTS, CPT/Inf 1992 3, at ¶ 56 (Apr. 13, 1992), <https://rm.coe.int/1680696a3f>.

¹²³ Rachel Weiner, *Ex-Metro Police Officer Nicholas Young Challenges Solitary Confinement*, WASH. POST (Sept. 2016), https://www.washingtonpost.com/local/public-safety/ex-metro-police-officer-challenges-solitary-confinement-in-terrorism-case/2016/09/23/98afa2ce-81af-11e6-b002-307601806392_story.html?utm_term=.8fd9740614d0.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Lisa Fernandez, *Fremont Web Developer Linked to Terrorism Charge in Solitary Confinement After ‘Contraband’ Notebook Found in Jail*, NBC LOS ANGELES, <https://www.nbclosangeles.com/news/california/Adam-Shafi-Fremont-Man-Charged-With-Helping-Terrorists-in-Solitary-Confinement-After-Contraband-Notebook-Found-in-Jail-369454722.html> (last updated Feb. 19, 2016, 9:23 PM); see discussion *supra* p. 13.

¹²⁷ Apuzzo, *supra* note 75.

¹²⁸ *Id.*

¹²⁹ Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2018)). In the week after September 11, 2001, Congress authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines

years later, that resolution—the Authorization for the Use of Military Force—underpins wide-ranging United States military operations targeting a diffuse jihadi movement.¹³⁰ Does it justify the expansion of the criminal law to include attempted material support, where individuals are getting long sentences, sometimes in solitary confinement, based on the “terrorism” label when some of them have not actually done anything criminal at all, much less engaged in anything close to an actual terror act? Instead, they want or hope or wish to join ISIS and their ability, in many cases, of actually doing that or becoming a foreign fighter is seriously in doubt.

Since many of these individuals have neither actually done anything criminal nor actually engaged in a terrorist act (or attempted to do so), there should be opportunities for those who actually have been indoctrinated by ISIS or a different terror group to be rehabilitated. In the words of Seamus Hughes, a former National Counterterrorism Center official who once helped implement the Obama administration’s strategy for countering violent extremism, “[t]his is an abject failure, that there is no system in place that doesn’t result in spending 20 years in jail.”¹³¹ Many of the people who are enticed by ISIS are isolated or mentally ill.¹³² “I’m not a [sic] evil or malicious person,” Keonna Thomas, 33, whose case was detailed in Section II, said. “I’m just someone who, I guess, at one point, was impressionable.”¹³³ It is better to work with many of these individuals up front on rehabilitation, rather than to wait ten or twenty years after they are released from prison to do so.

In this rehabilitative process, we should work to understand what allure ISIS held and study how they recruit people online. Many of those who “want” to join ISIS most likely never will, and some of those who actually do may still help further our understanding of the group. The realities of ISIS do not match the online

planned, authorized, committed, or aided the terrorist attacks,” as well as those who “harbored such organizations or persons.” *Id.* § 2(a).

¹³⁰ Zachery Laub, *Debating the Legality of the Post 9/11 ‘Forever War,’* COUNCIL FOREIGN REL. (Sept. 1, 2016), <https://www.cfr.org/expert-roundup/debating-legality-post-911-forever-war>.

¹³¹ Apuzzo, *supra* note 75.

¹³² See Patrick Tucker & Defense One, *Why Join ISIS? How Fighters Respond When You Ask Them*, ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/international/archive/2015/12/why-people-join-isis/419685/>.

¹³³ Anthony Izaguirre, *Woman Who Sought to Join Islamic State Group Gets 8 Years*, WASH. TIMES (Sept. 6, 2017), <https://m.washingtontimes.com/news/2017/sep/6/woman-who-sought-to-join-islamic-state-group-to-be>.

advertising, so some who actually joined ISIS then want to return home.¹³⁴ In one unusual case, someone named “John Doe” (for security reasons) joined ISIS and then became disillusioned and secretly reached out to the FBI.¹³⁵ He gave United States authorities intelligence about terror threats, so they sought leniency for him and he was sentenced to ten years of supervised release.¹³⁶

Even those in law enforcement, including former FBI Director James Comey, are beginning to understand that many of these individuals should not be in the criminal justice system:

What we’re trying to do is, we’re trying to use our good offices to connect providers. Social service providers, medical providers, counseling providers. Who may be in an appropriate situation able to take a referral from us of someone that we’re looking at who we don’t think we need to use the criminal justice system to incapacitate, and see if they can redirect. Especially that young person, troubled person. We see it as trying to foster some sort of off ramp. There won’t be a lot of these cases, but in cases where we find someone we think, “Hope we don’t have to lock that person up. Maybe we can get them the help that they need.” That’s the idea.¹³⁷

As Kelly Berkell has pointed out, “[b]ecause intervention and rehabilitation strategies focus on individuals who attract law enforcement’s attention through suspected criminal conduct, these approaches should trigger fewer concerns about discrimination than prevention models relying on predictive risk assessments.”¹³⁸ Attempted material support cases are attractive for rehabilitation purposes, as the

¹³⁴ Mark Berman, *Young Men Left America to Join ISIS. They Ended Up Cooking and Cleaning for the Caliphate*, WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/02/08/young-men-left-america-to-join-isis-they-fled-when-it-didnt-live-up-to-their-expectations/?utm_term=.92541ab06ed1.

¹³⁵ *The Latest: Islamic State Cooperator Sentenced in NYC*, AP NEWS (June 28, 2018), <https://apnews.com/410785a8062c42018da5f381a2ebaa97>.

¹³⁶ *Id.*

¹³⁷ Press Release, James Comey, Dir., Fed. Bureau of Investigation, Director Comey Remarks During May 11 ‘Pen and Pad’ Briefing with Reporters (May 11, 2016), <https://www.fbi.gov/news/pressrel/press-releases/director-comey-remarks-during-may-11-pen-and-pad-with-reporters>.

¹³⁸ Kelly A. Berkell, *Off-Ramp Opportunities in Material Support Cases*, 8 HARV. NAT’L SEC. J. 1, 20 (2017).

individuals have been enticed by ISIS or other terror groups but have not actually done anything criminal.¹³⁹

The theme of mentally ill individuals who are attracted to ISIS has proliferated and is a separate issue from the general fight against ISIS. Harsh terror laws are not the best place to deal with them. “Imagine you have a 23-year-old son with a history of mental illness going back to childhood. He’s gone ‘off the deep end.’ He’s talking about joining ISIS and fighting in Iraq and Syria.”¹⁴⁰ What do you do? If you go to law enforcement, the child can end up in prison for twenty years. “I think this is a real tragedy from every perspective,” said Cambridge defense attorney Harvey Silverglate, who is one of several voices suggesting there is a better alternative.¹⁴¹ “This is a kid who should have been involuntarily committed in a mental hospital. He would have been no danger to society. He would have been no danger to himself.”¹⁴²

These long sentences for wanting to join ISIS are disproportionate. In the words of Judge Ramirez of the Inter-American Court of Human Rights, the use of the criminal justice system should be a last resort:

In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to “govern with the penal code in the hand,” a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society’s legitimate demand for security. The opposite happens in a “democratic environment”: criminalization of behaviours and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then,

¹³⁹ Tucker & Defense One, *supra* note 131.

¹⁴⁰ David Boeri, *Did the Boston Police Captain Who Warned FBI about His Son Have Other Choices?*, WBUR NEWS (July 20, 2015), <http://www.wbur.org/news/2015/07/20/alexander-ciccolo-father-criminal-versus-civil>.

¹⁴¹ *Id.*

¹⁴² *Id.* Although there is speculation about a link between mental illness and attraction to ISIS. See Rukmini Callimachi & Catherine Porter, *Toronto Attack Revives Debate Over ISIS’ Call to Arms to the Mentally Ill*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/world/americas/islamic-state-mental-health.html>; see also Emily Corner & Paul Gill, *Is There a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?*, CTC SENTINEL (Jan. 2017), <https://ctc.usma.edu/is-there-a-nexus-between-terrorist-involvement-and-mental-health-in-the-age-of-the-islamic-state/>.

and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable.¹⁴³

Not many cases of “attempted material support” end without a large number of years in prison, but one judge in Minnesota is trying some of the ideas of rehabilitation that scholars and counterterrorism experts have put forward, instead of a lengthy sentence, in an appropriate case.¹⁴⁴ Prison, in some of these cases, is not the best answer and could also be part of the problem as some are radicalized in prison.¹⁴⁵ United States District Judge Michael Davis recruited a researcher from Germany to help him evaluate a group of young Somali-American men who attempted to travel abroad to join ISIS.¹⁴⁶ The idea is to understand why each individual became radicalized and how best to deradicalize the individual.¹⁴⁷ Most of the young men had no prior military training and were first exposed to ISIS propaganda through social media.¹⁴⁸ One example has so far been heralded as a success.¹⁴⁹ Abdullahi Yusuf, arrested at nineteen, was released in November 2017 and allowed to return to his parents in a suburb of Minneapolis after a year in a federal halfway house reading philosophy, biography and literature, writing essays and reflecting on life.¹⁵⁰ He will be closely monitored by authorities for the next twenty years and has restrictions on

¹⁴³ *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 16 (July 2, 2014) (concurring opinion by Ramirez, J.), http://www.corteidh.or.cr/docs/casos/articulos/seriec_107_ing.pdf.

¹⁴⁴ See Nicole Hong, *Judge Tries New Approach with Terror Defendants: Deradicalization*, WALL ST. J. (May 8, 2016), <https://www.wsj.com/articles/judge-tries-new-approach-with-terror-defendants-deradicalization-1462751841>.

¹⁴⁵ Lorenzo Vidino & Seamus Hughes, *America’s Terrorism Problem Doesn’t End with Prison—It Might Just Begin There*, LAWFARE (June 17, 2018), <https://www.lawfareblog.com/americas-terrorism-problem-doesnt-end-prison%E2%80%94it-might-just-begin-there> (arguing prison radicalization, already understood to be a problem in Europe where they are releasing prisoners in order to combat the problem, must be recognized and understood in the United States so we can begin to combat the problem) (“Several European countries, faced with an admittedly larger problem than the United States, have long developed rehabilitation programs that, while not perfect, have achieved some positive results. It is high time for authorities in the United States to do the same.”). France plans a new counterterrorism body to track radicalized inmates and better identify extremists at risk of turning to violence. See *France Plans New Counterterrorism Units, as Threat Persists*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/world/europe/france-plans-new-counterterrorism-units-as-threat-persists/2018/07/13/192aa2c2-867d-11e8-9e06-4db52ac42e05_story.html?utm_term=.688d136abb98.

¹⁴⁶ Hong, *supra* note 143.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Joanna Walters, “An Incredible Transformation”: How Rehab, Not Prison, Worked for a US Isis Convert, GUARDIAN (Jan. 4, 2018), <https://www.theguardian.com/us-news/2018/jan/04/american-isis-abdullahi-yousuf-rehabilitation>.

¹⁵⁰ *Id.*

his Internet use, but he hopes to go to college.¹⁵¹ Hopefully, this case is a success and can be used as a model for the future in appropriate cases.

This Article in no way means to underestimate the real threat of terrorist organizations or foreign fighters working for ISIS or other terror groups.¹⁵² We should be vigilant in our work to thwart them, and I commend the work of the many men and women in the intelligence services and FBI. However, we should also want our fight against terrorism to be focused on actual terrorists. And I understand in our era and desire for preventative prosecutions this is not always an easy line to draw.

Interestingly:

Investigators say school shootings have become the American equivalent of suicide bombings—not just a tactic, but an ideology. Young men, many of them depressed, alienated or mentally disturbed, are drawn to the Columbine subculture because they see it as a way to lash out at the world and to get the attention of a society that they believe bullies, ignores or misunderstands them.¹⁵³

Before killing nine people in a community college in Oregon, the gunman wrote, “[o]n an interesting note, I have noticed that so many people like him are all alone and unknown, yet when they spill a little blood, the whole world knows who they are. Seems the more people you kill, the more you’re in the limelight.”¹⁵⁴ We need to examine both mass shootings and terrorism together to work towards finding out what draws individuals to commit such heinous acts and how best to prevent them.

Some European countries have broad laws banning speech that glorifies terrorism, and there is a European Union directive criminalizing traveling with the intent to join a terror group. Obviously, there are First Amendment issues with these laws in the United States, but many of the attempted material support cases fit more neatly under these laws. In France, it is a crime “apologie du terrorisme”¹⁵⁵ to comment favorably on a terrorist act.¹⁵⁶ For example, if the person approves of the

¹⁵¹ *Id.*

¹⁵² Somini Sengupta, *Nations Trying to Stop Their Citizens From Going to Middle East to Fight for Isis*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/middleeast/isis-recruits-prompt-laws-against-foreign-fighters.html>.

¹⁵³ Manny Fernandez et al., *For ‘Columbiners,’ School Shootings Have a Deadly Allure*, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/us/school-shootings-columbine.html>.

¹⁵⁴ *Id.*

¹⁵⁵ Roughly translated as “Apology for terrorism.”

¹⁵⁶ CODE PÉNAL [C. PÉN] [PENAL CODE] art. 421-2-5 (Fr.).

attack¹⁵⁷ and such approval is made publicly,¹⁵⁸ the crime is punishable by up to five years in prison and €75,000 or €100,000 fine if made online.¹⁵⁹ For violating this law, a French teenager was found guilty and received a three-month suspended sentence when he named his Wi-Fi network “Daesh 21.”¹⁶⁰ Daesh is a common way of referring to ISIS.¹⁶¹ Spain also has a law criminalizing “glorifying terrorism” and recently two rappers were each convicted under the law for their lyrics and face prison time.¹⁶² Home Secretary Amber Rudd in the United Kingdom announced people who view terrorist content online could face up to fifteen years behind bars.¹⁶³ A European Union Directive specifically criminalizes “[t]ravelling within, outside or to the European Union for terrorist purposes, e.g., to join the activities of a terrorist group or with the purpose of committing a terrorist attack” and “[t]he organisation and facilitation of such travel, including thorough logistical and material support, such as the purchase of tickets or planning itineraries.”¹⁶⁴

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Romina McGuinness, *French Teen Guilty of ‘Defending Terrorism’ After Naming Wi-Fi Network to ‘Daesh 21,’* EXPRESS (Sept. 22, 2017), <https://www.express.co.uk/news/world/729742/French-teen-Wi-Fi-network-Daesh-21-guilty-defending-terrorism-Dijon-France>.

¹⁶¹ See Irshaid, *supra* note 1.

¹⁶² William Booth & Pamela Rolfe, *Spanish Rappers May Go to Prison for Insulting the King, Glorifying Terrorists*, WASH. POST (Mar. 18, 2018), https://www.washingtonpost.com/world/europe/to-prison-for-singing-spanish-rappers-to-serve-time-for-their-lyrics/2018/03/17/d8e4b88c-18cd-11e8-930c-45838ad0d77a_story.html?noredirect=on&utm_term=.36a521e2bdb2.

¹⁶³ Alan Travis, *Amber Rudd: Viewers of Online Terrorist Material Face 15 Years in Jail*, GUARDIAN (Oct. 2, 2017), <https://www.theguardian.com/uk-news/2017/oct/03/amber-rudd-viewers-of-online-terrorist-material-face-15-years-in-jail>.

¹⁶⁴ *EU Rules on Terrorist Offences and Related Penalties*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133168> (last updated Feb. 6, 2015). The new rules, in the form of a Directive, strengthen and widen the scope of the existing legislation (Framework Decision 2002/475/JHA in particular). The directive criminalizes:

- Travelling within, outside or to the EU for terrorist purposes, e.g., to join the activities of a terrorist group or with the purpose of committing a terrorist attack.
- The organization and facilitation of such travel, including through logistical and material support, such as the purchase of tickets or planning itineraries;
- Training and being trained for terrorist purposes, e.g., in the making or use of explosives, firearms, noxious or hazardous substances mirroring the existing provision of knowingly providing such training;
- Providing or collecting funds with the intention or the knowledge that they are to be used to commit terrorist offences and offences related to terrorist groups or terrorist activities. *Id.*

IV. ATTEMPTED MASS SHOOTING?

Unfortunately, it is only too easy to find examples of how different the situation is for young Muslim men and other young disturbed white men. As I write, the examples pile up. A gunman opened fire at a Waffle House killing four people.¹⁶⁵ It later surfaced he had been arrested at the White House with firearms declaring himself a “sovereign citizen” who wanted to talk to President Trump.¹⁶⁶ Those firearms were confiscated by law enforcement but then returned to his father.¹⁶⁷ Even though he had numerous other run-ins with authorities, he was released soon after his arrest.¹⁶⁸ His father returned the firearms to him and he actually used one of them in his rampage.¹⁶⁹ Once again, there was no attempt crime. The killer in the Las Vegas mass shooting bought thirty-three guns in the twelve months leading up to the mass shooting.¹⁷⁰ However, that was not an attempt crime, apparently did not draw anyone’s attention, and did not even get reported to law enforcement officials.¹⁷¹ Why is there this vast gulf? Are race and religion involved, or do we accept mass shootings in a way we do not accept foreign terrorists? Studies have indicated that individuals from a different racial group than one’s own are more readily associated with an aversive stimulus than an individual from an individual’s own race, among both black and white individuals, in the United States.¹⁷²

¹⁶⁵ Katie Zezima et al., *Waffle House Shooting Suspect Travis Reinking Arrested, Refusing to Answer Questions, Police Say*, WASH. POST (Apr. 23, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/23/waffle-house-shooting-travis-reinking-manhunt-continues-nashville-police-say/?utm_term=.9735d20a31d7.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Kevin Johnson & Rick Jervis, *Las Vegas Shooter Bought 33 Guns in Last 12 Months*, USA TODAY, <https://www.usatoday.com/story/news/nation/2017/10/04/las-vegas-shooter-bought-33-guns-last-12-months/730634001/> (last updated Oct. 4, 2017, 9:44 PM).

¹⁷¹ The Gun Control Act (GCA) of 1968 requires federal firearms licensees (FFLs) to report multiple sales or other dispositions of handguns to the same purchaser. 18 U.S.C. § 923(g)(3) (2018). However, it does not require the owners to report sales of rifles except for certain rifles from licensed firearms dealers in the four border states of Arizona, California, New Mexico and Texas. See *Fact Sheet—Multiple Firearms Sales*, ATF: BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (May 2018), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-multiple-firearms-sales-or-other-disposition-reporting>.

¹⁷² Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCIENCE 785, 785 (July 20, 2005); see also Samantha Bielen et al., *Blame Based on One’s Name? Extralegal Disparities in Criminal Conviction and Sentencing* (May 26, 2018), <https://ssrn.com/abstract=3185444> (A study in Belgium also found that defendants with an Islamic sounding name faced three to five percentage points, on average, greater likelihood of conviction than defendants with a Belgian name. However, if the judge had exposure to Islamic culture, it was an important moderating factor.).

Is there more danger from terrorists, or angry young boys, or white supremacists with access to firearms? And what would we see if we started monitoring their social media, texts, etc. or told them about “plots” and gave them the tools the way we do with FBI informants in the terrorism context with the powerful material support laws? Think about your own texts and social media posts; could any of them be misconstrued? As Warren Buffett said, “[i]f a cop follows you for 500 miles, you’re going to get a ticket.”¹⁷³ Terrorists and many of the followers of ISIS, I posit, are not one and the same. Many of those drawn to ISIS are not even lone wolves, but individuals looking for something to cling on to. Saying you did it for ISIS does not mean you did. And, in the attempt context, many have not actually *done* anything. How many of those prosecuted for wanting or trying to join ISIS really would have? ISIS has managed an appeal beyond what we have understood. Some of those who even kill in the “name of ISIS” do not have any connection at all to the terrorist organization and they seem really similar to mass shooters who may have no discernable motive other than the appeal of the mass shooting. We need to study what this appeal is and how best to stop it.

Researchers found that terrorist attacks perpetrated by Muslims receive “drastically more media coverage than attacks by non-Muslims.”¹⁷⁴ This extensive coverage in turn may make audiences think that these attacks are more common and become more afraid of Muslim terrorists.¹⁷⁵

If there is the same amount of threat, should there be the same amount of scrutiny? Since September 11, 2001, there have been many more deaths at the hands of “mass shooters” than international “terrorists” in the United States.¹⁷⁶ All of these terms are loaded, and we can argue about the exact definitions and numbers.¹⁷⁷ The Stimson Center estimates the United States has spent \$2.8 trillion since September 11, 2001 on counter-terrorism.¹⁷⁸ John Mueller and Mark Stewart have done a risk assessment of terrorism, and found that the risk of death from terrorism

¹⁷³ Warren Buffett *on Driving Violations, Baseball and Jamie Dimon*, N.Y. TIMES (Oct. 16, 2013, 12:42 PM), https://dealbook.nytimes.com/2013/10/16/warren-buffett-on-driving-violations-baseball-and-jamie-dimon/?%20mcubz=3&_r=0.

¹⁷⁴ Erin M. Keams et al., *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, 28 JUST. Q., Jan. 2019, at 22, <https://ssrn.com/abstract=2928138>.

¹⁷⁵ *Id.* at 28.

¹⁷⁶ See *Guns in the US: The Statistics Behind the Violence*, BBC (Jan. 5, 2016), <http://www.bbc.com/news/world-us-canada-34996604>.

¹⁷⁷ *Id.*

¹⁷⁸ *US Counterterrorism Spending Since 9/11*, STIMSON CTR. (May 16, 2018), <https://www.stimson.org/content/us-counterterrorism-spending-911>.

since 9/11 is one in 90 million per year in the United States.¹⁷⁹ Therefore, with such a low risk, they want to start a dialogue about whether the risk matches the \$120 billion the United States spends on counter terrorism.¹⁸⁰

Meanwhile, mass shootings keep happening and we watch, helplessly. The vast majority of guns used in nineteen mass shootings studied by the *New York Times* were bought legally and with a federal background check.¹⁸¹ At least nine of those gunmen either had “criminal histories or documented mental health problems that did not prevent them from obtaining their weapons.”¹⁸² Dylann Roof, who killed nine African-Americans in a Charleston church in 2015, was allowed to buy the .45-caliber handgun he used in the killings despite having previously admitted to drug possession which should have disqualified him from making the purchase.¹⁸³ The judge who dismissed fifteen lawsuits filed against the government for negligent management of criminal databases and performance of background checks said there were “glaring weaknesses” but that the government could claim immunity under a provision that seeks to stop courts from second-guessing what the judge called “even really bad policy choices.”¹⁸⁴

Attempted mass shootings are currently treated completely differently under the law than attempted material support and the former have much deadlier, or at least as deadly, consequences. The horrific attacks in Sandy Hook, Las Vegas, and Parkland (to name a few) have done nothing to change our federal gun laws. In fact, as Professor John J. Donohue has pointed out, recent federal legislative action has been directed at making guns even more available and removing gun regulations.¹⁸⁵ Therefore, should we consider changing our attempted mass shooting laws?

The Vermont legislature changed their law after a student was let free after he expressed interest in a mass shooting at his school on social media, purchased a weapon, and had a plan to carry out the attack. In *State v. Sayer*, the Supreme Court of Vermont stated the evidence as follows:

¹⁷⁹ *Transcript of John Mueller and Mark G. Stewart*, BRENNAN CENTER FOR JUSTICE 5 (Mar. 31, 2016), <https://www.brennancenter.org/transcript-john-mueller-and-mark-g-stewart>.

¹⁸⁰ *Id.*

¹⁸¹ Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html> (last updated Feb. 16, 2018).

¹⁸² *Id.*

¹⁸³ Matt Stevens, *U.S. Judge Harshly Criticizes F.B.I. Over Dylann Roof's Gun Purchase*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/dylann-roof-fbi-lawsuits.html>.

¹⁸⁴ *Id.*

¹⁸⁵ John J. Donohue III, *Another Mass Shooting: An Update on U.S. Gun Laws*, STAN. L. SCH. BLOG (Feb. 18, 2018), <https://law.stanford.edu/2018/02/18/another-mass-shooting-qa-us-gun-laws/>.

Defendant purchased a shotgun and planned to purchase at least one more gun. He planned to conduct surveillance at [Fair Haven Union High School] to determine when the School Resource Officer was not generally present. Defendant had not yet purchased another gun or conducted surveillance at [Fair Haven Union High School]. He sent Facebook messages to the effect that he planned to commit a shooting at [Fair Haven Union High School], and he wrote at length in his journal that he currently planned to commit such an act at some future time. Defendant also kept lists of the items that he needed before actually committing a shooting at the school, many of which he did not have. He researched the [Fair Haven Union High School] calendar to select an optimal date for the planned shooting.¹⁸⁶

The Supreme Court of Vermont found that what he had done was preparation and not attempt under Vermont law.¹⁸⁷ Contrast this with the attempted material support cases, where many had expressed interest in joining ISIS and bought a ticket to an airport that could be a conduit to Syria and were sentenced to many years, sometimes even twenty, in prison. You can see how powerful are the material support laws and “terror” label.

The Vermont Supreme Court found the defendant’s actions were “preparation” not criminal “attempt” under Vermont law: “Each of defendant’s actions was a preparatory act, and not an act undertaken in the attempt to commit a crime. Therefore, as a matter of law, defendant’s acts did not fall within the definition of an attempt.”¹⁸⁸ The court continued, stating that the “defendant undertook no act that was the ‘commencement of the consummation’ of the crimes he is charged with here.”¹⁸⁹ The court stated it was constrained by precedent, including a 1906 Vermont Supreme Court case that concluded an attempt must be “coupled with an act that, but for an interruption, would result in the completion of a crime.”¹⁹⁰ In that case, an inmate’s intention to break out of prison, even with his possession of a bundle of twelve hacksaws was not an attempt to break out of jail.¹⁹¹ The Court ended with a note to the legislature:

[T]his Court has consistently held that preparation alone does not satisfy the high bar required to prove an attempt. The Legislature is tasked with enacting such laws as the people of Vermont think necessary. This Court is bound to apply the

¹⁸⁶ *State v. Sawyer*, 187 A.3d 377, 386 (Vt. 2018).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 382 (referencing *State v. Hurley*, 64 A. 78, 78 (Vt. 1906)).

¹⁹¹ *Id.*

law in agreement with statute and this Court's own earlier decisions. The Legislature can, if it chooses, deviate from this long-established standard by passing a law revising the definition of attempt.¹⁹²

The day of the decision, worried parents rushed to the school to pull their kids out, as they saw a real danger.

In response to this case, the Vermont legislature has passed a domestic terrorism law, House Bill 25, that makes it a crime to “engage in or take substantial steps toward causing death or serious injury to multiple people, or threatening people with violence or kidnapping” and a person convicted can be sentenced up to twenty years in jail.¹⁹³ This law gives incredibly wide discretion to law enforcement. Is this a step forward in the fight against mass shooting or a real step back for civil liberties giving law enforcement too wide a net?

A few cases of attempted murder have gone forward for “would-be school shooters,” but only when coupled with other serious charges. One day before the Parkland school shooting in Florida, a grandmother gave police her son's journal “which allegedly detailed plans for a mass shooting at his high school. . . . She indicated that she was alarmed by the violent sentiments she discovered in the journal—as well as the semi-automatic rifle she found hidden in a guitar case.”¹⁹⁴ According to court documents, the teenager wrote, “I'm preparing myself for the school shooting, I can't wait. My aim has gotten much more accurate. . . . I can't wait to walk into that class and blow all those f---ers away.”¹⁹⁵ However, in addition to attempted murder, he was charged with illegal possession of an explosive device and first-degree robbery.¹⁹⁶

In another case, a Maryland teen accused of carefully planning a violent attack at her high school has been sentenced to twenty years in prison after pleading guilty to possessing explosive material with the intent to create a destructive device.¹⁹⁷ She

¹⁹² *Id.* at 386–87.

¹⁹³ Patrick McArdle, *Vt. Domestic Terrorism Bill Signed into Law*, RUTLAND HERALD (May 22, 2018), <https://www.rutlandherald.com/articles/vt-domestic-terror-bill-signed-into-law/>.

¹⁹⁴ Phil McCausland & Associated Press, *Day Prior to Parkland Grandmother Foiled Grandson's Alleged School Shooting Plans*, NBC NEWS (Feb. 15, 2018), <https://www.nbcnews.com/news/us-news/day-prior-parkland-grandmother-foiled-grandson-s-alleged-school-shooting-n848426>.

¹⁹⁵ *Id.*

¹⁹⁶ Scott North, *Thwarted School Shooter Went to School Costumed as Columbine Killer*, HERALDNET (Mar. 2, 2018), <https://www.heraldnet.com/news/thwarted-shooter-went-to-school-costumed-as-columbine-killer/>.

¹⁹⁷ ASSOCIATED PRESS & NBC WASH. STAFF, *Maryland Teen Sentenced to 20 Years in Alleged School Bomb Plot* (Jan. 31, 2018), <https://www.nbcwashington.com/news/local/Teen-Sentenced-to-20-Years-in-Alleged-School-Attack-Plot-471906243.html>.

had a plan of attack, a date, and was collecting items including a shotgun with ammunition, and bomb making materials that included “pipes with end caps, shrapnel, fireworks, magnesium tape, and fuse material.”¹⁹⁸ If she had only legally purchased firearms would law enforcement have been unable to act? If she had only posted on social media and legally owned guns, that would likely not be enough, as was the case in Vermont. Even in cases with serious red flags, the authorities are unable to do anything under current law because the line between preparation and attempt is a very murky one.

In the Isla Vista rampage, the gunman killed three people and wounded thirteen others before killing himself.¹⁹⁹ In the months leading up to the attack he legally purchased guns and ammo from various stores in Burbank, Goleta, and Los Angeles.²⁰⁰ At the request of the killer’s mother, mental health officials dispatched sheriff’s deputies to her son’s home a month before the killing spree.²⁰¹ However, they saw nothing during the contact with Rodger that gave the deputies reason to believe he was a danger to himself or others.²⁰² In his room, as he spoke with the deputies, he had a stockpile of weapons, purchased legally despite a long history of mental health issues, and disturbing videos that had led his mother to call the deputies in the first place.²⁰³

Conversely, a Mississippi teen who converted to Islam—a former cheerleader and robotics champion—tweeted support of ISIS with her fiancé, and was immediately on the radar of both the FBI and the academics who follow extremism.²⁰⁴ The FBI sent an informant and when she said she wanted to join ISIS and tried to board an airplane, she was convicted of attempted material support and sentenced to twelve years in prison—not quite the “sleeper cell” with terrifying possibilities we envisioned stopping after the 9/11 attacks. But while I argue that we have taken attempted material support a bit too far, we now need to take attempted mass shootings seriously and need to find ways to prevent them before they happen.

¹⁹⁸ Abigail Constantino, *Md. Teen to Serve 20 Years for Plotting Attack at Catoctin High School*, WTOP (Jan. 31, 2018, 2:03 PM), <https://wtop.com/frederick-county/2018/01/md-teen-gets-20-year-jail-time-shooting-plot-catoctin-high-school/>.

¹⁹⁹ Joseph Serna, *Elliot Rodger Meticulously Planned Isla Vista Rampage, Report Says*, L.A. TIMES (Feb. 19, 2015), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-isla-vista-rampage-investigation-20150219-story.html>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Emma Green, *How Two Mississippi College Students Fell in Love and Decided to Join a Terrorist Group*, ATLANTIC (May 1, 2017), <https://www.theatlantic.com/politics/archive/2017/05/mississippi-young-dakhlalla/524751/>.

Senators in New York State are proposing legislation “to allow law enforcement to treat threats against schools, house of worship, [and] places of business as terrorist threats.”²⁰⁵ They want law enforcement to have the same tools to prevent mass shootings as they do to prevent terrorist attacks.²⁰⁶ The United States spends over a trillion dollars a year working to prevent terror attacks, but terror attacks only kill a tiny fraction of the number of people killed by gun crimes not associated with terrorism.²⁰⁷ Maybe some mass shootings are not “terrorism” but something needs to happen to stop the continual succession of mass shootings. After each mass shooting there is a call to change our federal gun laws, but nothing ever actually changes. And looking at “terror” attacks since 9/11, many are not even clearly “terrorism” so it may be even more of a reason to start viewing mass shootings with the same scrutiny.²⁰⁸ And in both arenas, the primary goal should be to understand the allure of mass shootings or a terror group in order to more effectively counter that narrative, then work on avenues of rehabilitation, and only as a last resort, prison.

CONCLUSION

In the words of Albert Camus, “[c]alling things by the wrong name adds to the affliction of the world.”²⁰⁹ Calling the mentally ill, misguided individuals “terrorists” is the wrong title and it is not only incorrect, but adds the full force of our criminal justice system. In many cases in the attempted material support realm, what the

²⁰⁵ See S. 7813A, 238th Sen. (N.Y. 2018); see also Terrence Murphy, *State Legislators: School Shootings are Acts of Domestic Terrorism*, N.Y. STATE SENATE (Mar. 1, 2018), <https://www.nysenate.gov/newsroom/press-releases/terrence-murphy/state-legislators-school-shootings-are-acts-domestic>.

²⁰⁶ See Michael Leiter & Michael A. Sheehan, *Treat Mass Shooting the Way We Treated Terrorism*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/opinions/treat-mass-shootings-the-way-we-treated-terrorism/2018/04/05/e4235e14-375f-11e8-acd5-35eac230e514_story.html?utm_term=.20fdef373b27.

²⁰⁷ *Guns in the US: The Statistics Behind the Violence*, BBC NEWS (Jan. 5, 2016), <http://www.bbc.com/news/world-us-canada-34996604>.

²⁰⁸ See *U.S. Terrorist Attacks Fast Facts*, CNN (Mar. 1, 2018), <https://www.cnn.com/2013/04/18/us/u-s-terrorist-attacks-fast-facts/index.html> (Of the seven terrorist attacks CNN lists since September 11, 2001—at least three or four are not clearly “terrorism”); see also Joel Achenbach, *Terrorism? Workplace Violence? The Search for a Motive in San Bernardino*, WASH. POST (Dec. 3, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/12/03/terrorism-workplace-violence-the-search-for-a-motive-in-san-bernardino/?utm_term=.501cdf0f92cb (“Without a firmly established motive, no one Thursday quite knew how to categorize the San Bernardino massacre. Terrorism? Workplace violence? A hybrid of the two? If terrorism, why target co-workers at an obscure holiday party in a small city that many Americans can’t find on a map? And if the shooters were, in fact, radicalized Islamists, pursuing a jihadist agenda, were they essentially freelancing, or part of a more complex operation that might have also had other targets? If this was workplace violence, why the enormous arsenal of bullets and the dozen pipe bombs in the rented home?”).

²⁰⁹ *The Practical Guide to Humanitarian Law*, MEDECINS SANS FRONTIERES, <https://guide-humanitarian-law.org/content/index/> (last visited Aug. 15, 2019).

defendants have done or attempted to do is not even something that is generally criminal. For some, what they are doing is the French or Spanish concept of “praising terrorism” which in both countries can lead to a sentence of up to two years in prison—not twenty years, sometimes in solitary confinement. Some of those convicted of attempted material support have not done any actions beyond speech, except for buying a ticket to a country that can be a conduit to Syria or going to an airport. They are essentially convicted of “wanting to join ISIS.” Rather than grappling with what to do when these individuals are released after ten or twenty years, it is better to address the issues of rehabilitation and countering terrorist messages now.

Additionally, all cases examined occurred under the Obama administration. President Trump has stated the country’s counterterrorism forces are not strong and quick enough, stating, “[w]e need quick justice and we need strong justice, much quicker and much stronger than we have right now . . . [b]ecause what we have right now is a joke and it’s a laughing stock.”²¹⁰

Material support laws were enacted to try to get terrorists before they act. After 9/11, there were visions of dangerous sleeper cells lurking throughout the United States waiting to attack. We did not know when or where they might act so we wanted to be able to get to them before they got us. Instead, attempted material support laws have sometimes ensnared the mentally ill, the lonely, the isolated and, in some cases the criminal, looking for a cause that is sometimes given to them by an FBI informant. In many of the attempted material support cases, it is unclear whether the individual would have ever actually joined ISIS or simply wanted or wished to. Of course, I do not at all want to minimize the real importance of preventing recruits to ISIS and those travelling abroad to become foreign fighters,²¹¹ but the threat from mass shootings is just as great or even greater. Now that our students are on the frontline, they must report and be vigilant to suspicious activity.²¹² However, we need to carefully consider possible solutions such as defining terrorism more broadly to include possible mass shooters. The American Civil Liberties Union

²¹⁰ Peter Baker, *Trump Declares Suspect Should Get ‘Death Penalty,’* N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/trump-new-york-attack-schumer-visa.html>.

²¹¹ See generally Lorenzo Vidino & Seamus Hughes, *ISIS in America: From Retweets to Raqqa*, PROGRAM ON EXTREMISM GEO. WASH. U. (Dec. 2015), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf>.

²¹² See Ron French & Jim Malewitz, *Did a Michigan Campus Narrowly Avert a Massacre Like the Florida Shooting?*, BRIDGE (Feb. 15, 2018), <https://www.bridgemi.com/quality-life/did-michigan-campus-narrowly-avert-massacre-florida-shooting> (recounting that two friends of a possible gunman contacted police after the student sent a video of himself loading ammunition into an AR-15 to a friend who had previously been an LCC student. He told the friend to stay away from the LCC campus November 29, and if he went to campus, to wear a red shirt and red pants so Walker could identify him. Walker even told the friend to turn on his TV at 3:00 PM on November 29 to see what Walker was planning to do, according to police. Walker also allegedly sent ammunition photos to another friend via Snapchat).

is understandably concerned about the free speech of young people who may send texts or make social media posts that sound incriminating but are actually innocent, just as some of those who have been convicted of attempted material support may have been.

After 9/11 we reached a point of crisis, a “war” against terror that led us to give up some civil liberties, spend trillions of dollars on counter-terrorism, and expand our criminal law in the hopes of preventing attacks. Now, eighteen years later, we need to reevaluate what the greatest threats are and how best to prevent them. We are in an era where Trump’s School Safety Commission will not look at guns according to Education Secretary Betsy DeVos,²¹³ and in the words of a high school senior in Connecticut, “You open up your phone and know that there’s been another mass shooting, and nothing happens.”²¹⁴ Have we reached the same point of crisis with mass shootings, where school children are afraid to go to school and do regular mass shooting drills, and where we start investigating and prosecuting potential mass shooters before they act rather than reform our gun laws directly? I caution it is a dangerous road to go down.

²¹³ Maria Danilova, *School Safety Panel Will Not Look at Guns, DeVos Says*, AP NEWS (June 6, 2018), <https://apnews.com/c8f50f582d774699822985a2af44b612>.

²¹⁴ Adra D.S. Burch et al., *New Reality for High School Students: Calculating the Risk of Getting Shot*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/2018/05/20/us/school-shootings-drills-risks.html>.