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## ESSAY

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### “TERRORISTIC THREATS” AND COVID-19: A GUIDE FOR THE PERPLEXED

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CHAD FLANDERS,<sup>†</sup> COURTNEY FEDERICO, ERIC HARMON AND LUCAS  
KLEIN<sup>††</sup>

*The first few months of the COVID-19 outbreak in the United States saw the rise of a troubling sort of behavior: people would cough or spit on people or otherwise threaten to spread the COVID-19 virus, resulting in panic and sometimes thousands of dollars in damages to businesses. Those who have been caught have been charged under so-called “terroristic threat” statutes. But what is a terroristic threat, and is it an appropriate charge in these cases? Surprisingly little has been written about these statutes despite their long history and frequent use by states. Our Essay is one of the first to look systematically at these statutes, and we do so in light of the rash of these charges during the ongoing pandemic.*

*Our argument begins with the premise that these statutes typically contemplate a “core case” of terroristic threatening, e.g., someone calls in a bomb threat which forces the evacuation of a building. But these statutes have been variously revised and repurposed over the years, most recently to mass shootings. The recent COVID-19 prosecutions, however, involve facts that are so far outside the “core case,” that even if terroristic threatening is a permissible charge in these cases, it is often not the most appropriate one. We conclude by suggesting that in many of the COVID-19 cases, other charges should be made (such as criminal mischief, disorderly conduct, false reporting, etc.) instead of terroristic threatening, and that a lot of the expressive and deterrence benefits of more serious charges can be accomplished just as well by social disapproval.*

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<sup>†</sup> Chad Flanders is a professor at Saint Louis University School of Law.

<sup>††</sup> Courtney Federico, Eric Harmon, and Lucas Klein are second-year students at Saint Louis University School of Law. Thank you to Joe Welling and Dana Mulhauser for comments on an earlier draft.

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## INTRODUCTION

The spread of the COVID-19 virus has seen a rise in charges of so-called “terroristic threats.”<sup>1</sup> The conduct which has led to these charges fits a similar pattern: a person coughs on something, or licks something, or says something, and in doing so they imply (explicitly or implicitly) that they are COVID-19 positive.<sup>2</sup> In some cases, stores have had to be evacuated and sterilized as a result; in others, thousands of dollars of groceries have been thrown out. Charges of terroristic threatening have now been brought in several states—a few states have multiple cases<sup>3</sup>—and some of the early cases have received rather sensationalized national media attention.<sup>4</sup> A Department of Justice memorandum on March 24, 2020 counseled law enforcement officials that as

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<sup>1</sup> For a good survey of these cases, see Carlie Porterfield, *Why Spitters Could Be Charged as Terrorists Because of the Coronavirus*, FORBES (Mar. 31, 2020, 1:21 PM) <https://www.forbes.com/sites/carlieporterfield/2020/03/31/coronavirus-spitters-could-be-charged-as-terrorists---heres-why/#1bc4221a79c2> [<https://perma.cc/NFY3-HKYU>].

<sup>2</sup> See *infra* Part II (discussing four recently charged cases of “terroristic threats”).

<sup>3</sup> New Jersey seems to have taken an especially aggressive tack, with one news story claiming over thirty individuals had been charged with making terroristic threats as of April 29, 2020. José Sepulveda, *Here’s Why Coronavirus Is Being Classified as a Biological Agent*, CNBC (Apr. 29, 2020, 11:12 AM) <https://www.cnbc.com/2020/04/29/law-enforcement-officials-characterize-covid-19-as-biological-agent.html> [<https://perma.cc/R8A7-JTTK>].

<sup>4</sup> See, e.g., Audra D. S. Burch, *Coronavirus Misbehavior: When Was Licking a Toilet Ever a Good Idea?* N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/us/coronavirus-terrorist-threat-felony.html> [<https://perma.cc/ERZ3-Y22W>]; Chelsea Janes, *Coughing ‘Attacks’ May Be Prosecuted as Terrorism in War on Coronavirus*, WASH. POST, (Apr. 8, 2020, 6:13 PM) [https://www.washingtonpost.com/national/health-science/coughing-attacks-may-be-prosecuted-as-terrorism-in-war-on-coronavirus/2020/04/08/b97d7f9a-790d-11ea-9bee-c5bf9d2e3288\\_story.html](https://www.washingtonpost.com/national/health-science/coughing-attacks-may-be-prosecuted-as-terrorism-in-war-on-coronavirus/2020/04/08/b97d7f9a-790d-11ea-9bee-c5bf9d2e3288_story.html) [<https://perma.cc/T83C-HL5N>].

COVID-19 “appears to meet” the statutory definition of a biological agent, threats to spread the virus could fall under federal terrorism-related statutes.<sup>5</sup>

What exactly does it mean to make a “terroristic threat”? While it is beyond dispute that threats to infect others with a deadly virus should be taken seriously, does the behavior rise to the level where we should equate those acts with *terrorism*?<sup>6</sup> This Essay aims to contextualize the recent rise in the use of terroristic threat charges, especially at the state level. Most states have such statutes (they are not new); they have been variously applied—even repurposed—over the years to fit emerging crises, whether they be international terrorism, mass shootings, or even the intentional or reckless spread of HIV. The application of terroristic threat charges to threats of spreading COVID-19 does not, therefore, present an entirely novel development. And one can certainly understand the need to send a strong message that such foolish and dangerous behavior (like videotaping oneself licking deodorant sticks) cannot be tolerated and will be prosecuted. At the same time, we can question whether the statutes represent the most appropriate charges in every case.

This Essay proceeds in three parts. In Part I, we present a broad overview of the statutes criminalizing terroristic threats in many of the states in the U.S. The story we tell goes like this: there is something resembling a core set of cases that terroristic threat statutes were designed to cover. These cases involve credible threats of great harm (usually involving the use of a weapon) directed against a sizeable number of people and result in serious public inconvenience (evacuation of a building is one of the most commonly cited examples). The punishment for violations of these statutes is, accordingly, quite severe. These statutes were passed or refined (if statutes were already in place), in response to perceived threats of terrorism and massive public disruption—whether this be the international terroristic acts of September 11, 2001, or the rise of domestic terrorism, i.e. mass shootings. For the most part, the statutes (especially in the first degree) fit these later crises because they were sufficiently close to the “core set” of cases to which the statutes were a response. That is, threats of mass shootings and (obviously) threats of terrorisms were properly charged as “terroristic.” One major exception to this rule, which may be especially relevant to our current circumstances, was the

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<sup>5</sup> Memorandum from the Deputy Attorney General, U.S. Department of Justice, to All Heads of Law Enforcement Components, Heads of Litigating Divisions, and United States Attorneys (Mar. 24, 2020), <https://www.justice.gov/file/1262771/download> [<https://perma.cc/4SWV-5GSF>]

<sup>6</sup> For an article that also asks this question, see Manal Cheema & Ashley Deeks, *Prosecuting Purposeful Coronavirus Exposure as Terrorism*, LAWFARE (Mar. 31, 2020, 10:49 AM), <https://www.lawfareblog.com/prosecuting-purposeful-coronavirus-exposure-terrorism> [<https://perma.cc/2HTN-K9YX>]. Our debt to Cheema and Deeks’s article will be obvious. They have raised all of the right questions, and in a very rigorous and probing way, especially for such a short piece.

use of terroristic threats charges in the 1990s against threats involving the spread of HIV. But those cases—and others where the idea of “terrorism” seems to get stretched far beyond the core—may give us pause.

In Part II, we examine in detail four early “terroristic threats” cases from New Jersey, Pennsylvania, Texas, and Missouri, some of which have attracted intense media attention. We also consider the terroristic threat statutes and related case law in each of those states. The statutes in each state are close enough to one another to make comparisons worthwhile, but different enough to highlight important differences in how states have variously codified the crime of “terroristic threats.” Some of the cases we describe may seem closer to our “core case” of terroristic threatening. The focus of our analysis however, will, be on the possible difficulties states may encounter in trying to prosecute these cases as terroristic threats. We do not question the fact that such behavior is certainly scary and potentially harmful. Our criticism is not that these cases involved criminal charges; we criticize, rather, the nature of those charges.

In Part III, we try to give greater substance to our worries about the cases in Part II, namely that the charging decisions in these cases may not be correct and may represent overcharging. We raise three brief points. The first point is merely a generalization of some of the worries that arose in our discussion of the cases in Part II: proving the *mens rea* in the recent terroristic threat cases will not always be easy. Some statutes require that there be an intent to commit a crime of violence, which we do not think can be proven by the threat to spread the virus itself. In addition, some of the threats seem to be meant as jokes, which, though tasteless, may not be enough to show “purposeful,” “knowing,” or possibly even “reckless” conduct. In many of these cases, the actors and their actions may be negligent at best.

Our second point goes directly to the concern that these charges may represent overcharging because the behavior in these new cases is almost certainly punishable under other, milder criminal statutes.<sup>7</sup> Not only can the behavior be punished as lesser misdemeanor crimes (for example criminal mischief and disorderly conduct), in many of the cases, these other crimes *have already* been charged, with the terroristic threat charge being layered on top. Finally, we offer that most of the work in enforcing behavior during the pandemic is being done by social norms, and that the heavy hand of the criminal law is not needed, at least not in the more minor “threat” cases. The people in the cases we discuss have already been pilloried repeatedly in the media; that ostracism itself has deterrent and even retributive value. This conclusion suggests that other statutes and social norms may be more germane in deterring and sanctioning this type of conduct than terroristic

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<sup>7</sup> For a superb analysis of this point, see Cheema, *supra* note 6 (noting that there are other criminal laws which would cover the behavior in many of these cases).

threat statutes—especially given that, when compared to the “core cases” of terroristic threats, many of the COVID-19 threat cases fall far from the core and may not even be terroristic threat cases at all.

### I. TERRORISTIC THREATS: HISTORY AND CONTEXT

Reading over the statutes regarding terroristic threats, one gets a strong impression that they have, if only implicitly, an idea of a certain type of case that the statutes aim to cover—what we are going to call the “core case” of terroristic threats. Our reasons for calling this the “core case” will emerge over the course of this article, but we can state our two main reasons up front. First, the statutes defining “terroristic threats” are largely inspired by the Model Penal Code,<sup>8</sup> whose text seems to contemplate this kind of “core” case.<sup>9</sup> Second, and as helpfully reinforced by a series of New York cases from the early 2000s, the term “terrorism” connotes an especially grave threat—not something that can plausibly be seen as a prank or even a sick joke.<sup>10</sup>

A Wyoming case from the 1990s provides a good example of a typical “core” case and will give us a point of reference as we look at the statutes in more detail and examine their application to cases outside of the “core.”<sup>11</sup> In 1992, Henry McCone made repeated calls to the Bethesda Care Center, a nursing home in Laramie, Wyoming, asking to speak to his ex-girlfriend, Teresa Landkamer.<sup>12</sup> When told she could not come to the phone, McCone hung up and called again, threatening that if his ex-girlfriend did not come to the phone he would go there and blow the staff nurse’s head off.<sup>13</sup> The next day, McCone made two more phone calls to the nursing home.<sup>14</sup> In the second

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<sup>8</sup> For a short history of how states have—and have not—adopted the MPC into their own codes, see Chad Flanders, *The One-State Solution to Teaching Criminal Law, or, Leaving the Common Law and the MPC Behind*, 8 OHIO ST. J. CRIM. L. 167, 177-79 (2010) (describing how many states have partially adopted the language of the Model Penal Code into their statutes).

<sup>9</sup> This is confirmed by looking at the drafting notes for the MPC statute. See *infra* notes 37-39 and accompanying text.

<sup>10</sup> This point is well made by Lydia Khalil, who highlights the possibility that extremist groups may in fact be making *real* threats, and that these threats are the ones to be taken seriously, not the threats of “idiotic pranksters” with “no known links to terrorist groups or political motivations behind their actions.” *COVID-19 and America’s Counter-Terrorism Response*, WAR ON THE ROCKS (May 1, 2020) <https://warontherocks.com/2020/05/covid-19-and-americas-counter-terrorism-response/> [<https://perma.cc/R47M-W44Q>].

<sup>11</sup> The “core case” we set out here should be distinguished from another possible “core case,” viz., a specific, targeted threat against an individual or a group of individuals. We do not dispute that this case, too, could be considered “core” under the statutes for many purposes. However, none of the COVID-19 threat cases we are aware of fit the fact pattern of a targeted threat against an *individual*, so we leave this kind of case mostly to one side.

<sup>12</sup> *McCone v. State*, 866 P.2d 740, 744 (Wyo. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

of these calls McCone said, “This is Tonio from Denver, unless Teresa Landkamer pays 2,000 owed for cocaine I will place a bomb in Bethesda Care Center within 24 hours.”<sup>15</sup> In response to the call, a bomb detection unit was dispatched to the nursing home, and an extra officer was stationed at the home for security.<sup>16</sup> The next day, after a threat by McCone that a “bomb would go off in 56 minutes at Bethesda,” the nursing home was evacuated.<sup>17</sup>

McCone was arrested and charged with making terroristic threats for the second, fourth, and fifth calls made prior to his arrest and—amazingly—for *another* bomb threat after he was released on bail.<sup>18</sup> The Wyoming statute, which was based on the Model Penal Code,<sup>19</sup> defined the crime as follows:

A person is guilty of a terroristic threat if he threatens to commit any violent felony with the intent to cause evacuation of a building, place of assembly or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such inconvenience.<sup>20</sup>

McCone made multiple challenges to his conviction, all of which the court rejected.<sup>21</sup> In rejecting his overbreadth challenge, the court cited McCone’s brief, in which he conceded that “bomb threats or threats to physically hurt a person, made in a serious and imminent context, are not protected speech,” to which the court added, “[t]his is exactly what [the Wyoming statute] forbids and precisely what McCone accomplished by threatening to bomb Bethesda and shoot one of Bethesda’s employees.”<sup>22</sup>

We would add, further, that this type of conduct seems to be exactly what most terroristic threatening statutes are intended to forbid, making it a good example of a “core case” of terroristic threatening. In those core cases, we find several major commonalities: (1) a credible, specific threat to commit a serious crime, usually a crime of violence, which is also (2) a threat to use some dangerous device or instrument (bomb, gun, weapon of mass destruction, biological agent, etc.) (3) aimed at a large number of people or a governmental entity and (4) intended to cause panic or force an evacuation or, in the words of the Wyoming statute, to cause a “serious public inconvenience.”<sup>23</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 745.

<sup>19</sup> MODEL PENAL CODE § 211.3 (AM. LAW INST. 1962).

<sup>20</sup> WYO. STAT. ANN. § 6-2-505 (2020).

<sup>21</sup> *McCone*, 866 P.2d at 756.

<sup>22</sup> *Id.* at 746.

<sup>23</sup> WYO. STAT. ANN. § 6-2-505 (2020). For a somewhat related list, see Ken LaMance, *What Does it Mean to “Make a Terrorist Threat?”*, LEGALMATCH, <https://www.legalmatch.com/law->

McCone's case is precisely such a core case because he made *multiple* bomb threats to a nursing home which, ultimately, caused its evacuation. While the threats may have been false, they were nonetheless taken seriously and followed up on by the police.

A look at the statutes in other states shows agreement on these major elements that compose a "core case."<sup>24</sup> The federal statute mirrors the Model Penal Code in outlawing terroristic threats of a crime of violence with the purpose to cause evacuation or serious public inconvenience.<sup>25</sup> Alabama makes it a terroristic threat when someone threatens a crime of violence by use of a "bomb, explosive, weapon of mass destruction, firearm, deadly weapon, or other mechanism," and which *inter alia* causes the disruption of a school, church, or government activity.<sup>26</sup> Arizona adds to these the "dissemination . . . of a toxin."<sup>27</sup> Georgia includes the intent not only to commit a crime of violence but also to release a hazardous substance, or burn or damage property.<sup>28</sup> Illinois says that a terrorist threat must be meant "to intimidate or coerce a significant portion" of the civil population;<sup>29</sup> Missouri says that the threatened act must cause fear in "ten or more" people.<sup>30</sup> Nebraska includes in terroristic threatening the intent to cause the evacuation of a building, place of assembly, or facility of public transportation.<sup>31</sup> Many other state statutes reproduce in whole or in part the Model Penal Code language, such as Wyoming. Some statutes narrow the scope of the threats even further, as with Kentucky, which focuses on the threat of use or actual use of weapons of mass destruction.<sup>32</sup>

To be sure, some statutes go beyond the core case in also criminalizing false reports that have the effect of an evacuation or public inconvenience, even when the threat of committing a serious crime is not present.<sup>33</sup> When states have not only first degree, but second and third degree, many more

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library/article/making-a-terrorist-threat.html [https://perma.cc/6TQW-9693] (last modified Feb. 27, 2019) ("[T]he threat needs to be of a highly dangerous nature.").

<sup>24</sup> For an excellent review of state "terroristic threat" statutes, see Susan W. Brenner & Megan Rehberg, "Kiddie Crime"? *The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 62 n. 255 (2009).

<sup>25</sup> 25 C.F.R. § 11.402 (2019).

<sup>26</sup> ALA. CODE. § 13A-10-15(a) (2018).

<sup>27</sup> ARIZ. REV. STAT. ANN. § 13-2301(C)(12) (2018); ARIZ. REV. STAT. ANN. § 2308.02(A) (2017).

<sup>28</sup> GA. CODE ANN. § 16-11-37 (2016).

<sup>29</sup> 720 ILL. COMP. STAT. 5/29D-20 (2009).

<sup>30</sup> MO. REV. STAT. § 574.115 (2017).

<sup>31</sup> NEB. REV. STAT. § 28-311.01 (2015).

<sup>32</sup> KY. REV. STAT. ANN. §§ 508.075, 508.080 (West 2001).

<sup>33</sup> For a broad statute like this, see, for example, DEL. CODE ANN. 11 § 621(a)(2)(a) (2015), which indicates that making a false statement knowing that it is likely to cause an evacuation is "terroristic threatening." See also KY. REV. STAT. ANN. § 508.078(1)(b)(1) (West 2020) (false statement with purpose of causing evacuation).

cases outside of the “core case” are apt to be captured.<sup>34</sup> So while there are penumbras that can extend far outside of the core, the core seems always to be there in every state terroristic threat statute. In other words, the core remains the core, and it deals with the case of someone who with a weapon threatens to use it and causes a panic. The consequences for a violation when it comes to the core case are nearly always harsh.<sup>35</sup>

The seriousness of the “core case” is underscored in the commentary to the 1962 Model Penal Code’s terroristic threatening provision, where many state statutes find their inspiration.<sup>36</sup> Threats “creating prospect of relatively trivial kinds of public inconvenience are excluded from this section,” the drafters wrote in the commentary to the code, “as are threats of personal attack insufficiently grave to amount to terrorization.”<sup>37</sup> And, in a comment to an earlier draft, the drafters said that it was not their intent to authorize “grave sanctions” against “the kind of verbal threat which expresses transitory anger.”<sup>38</sup> If the threatened acts only created a minor public inconvenience, or the threats were made only in a fit of pique, the drafters advised that they should not be punished as terroristic threat, but under other sections of the MPC, such as false reporting.<sup>39</sup> This is a point we will return to in Part III of our Essay.

Identifying the core case can help us assess the application—or misapplication—of these statutes to other modern crises, before we turn to the more recent cases involving COVID-19. Here, a helpful first example might be that of New York, which passed its terroristic threat statute in response to the international terrorist attacks of 9/11.<sup>40</sup> Made into law only days after the terrorist attacks on New York (September 17, 2007), the statute seems more geared to the then-recent events, as it focuses on cases where the aim is to intimidate a civilian population or “influence the policy” of a

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<sup>34</sup> This is also the case with Kentucky’s third degree terroristic threatening statute. *See* KY. REV. STAT. ANN. § 508.078(1)(b)(1) (West 2020). We criticize this tendency to expand terroristic threat statutes beyond the “core” in Part III.

<sup>35</sup> *See* Janet Portman, *Terrorist Threat Laws and Penalties*, CRIMINAL DEF. LAW., <https://www.criminaldefenselawyer.com/crime-penalties/federal/Terrorist-Threat.htm> [<https://perma.cc/GM95-Q89W>] (“Depending on the state and the nature of the threat, a conviction for making a terrorist threat can result in a prison sentence of 40, and even 100 or more years in prison.”). We also note the felony status of the recent terroristic threat cases in our discussion of them in Part II.

<sup>36</sup> MODEL PENAL CODE § 211.3 (AM. LAW INST. 1962). There is a suggestion that terroristic threat statutes were constructed in response to waves of “campus unrest” and “mob violence,” but we have been unable to find anything to back this up. *See, e.g.*, *State v. Gunzelman*, 502 P.2d 705, 710 (1972) (noting in passing that the Kansas terroristic threatening statute “may have been directed at campus unrest, fire and bomb threats to public buildings and acts of mob violence”).

<sup>37</sup> MODEL PENAL CODE § 211.3, cmt. (AM. LAW INST. 1962).

<sup>38</sup> MODEL PENAL CODE § 211.3, cmt. (AM. LAW INST. Tent. Draft No. 11, 1959).

<sup>39</sup> MODEL PENAL CODE § 211.3, cmt. (AM. LAW INST. 1962).

<sup>40</sup> N.Y. PENAL LAW § 490.00 (McKinney 2001) (“The devastating consequences of the recent barbaric attack on the World Trade Center and the Pentagon underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism.”)

government.<sup>41</sup> The statute does not require any evacuation, but only that the threat cause "fear" of "murder, assassination or kidnapping."<sup>42</sup> The focus, in other words, was on political terrorism. In the preamble to the article in which the terroristic threatening statute appears, the legislature stressed that terrorism was a "serious and deadly problem that disrupts public order," and that, accordingly, "our laws must be strengthened to ensure that terrorists are prosecuted and punished in state courts with appropriate severity."<sup>43</sup>

But in what may provide a cautionary note for the more recent uses of terroristic threat statutes, the New York statute seems to have been applied broadly and far beyond the core of the cases identified above and what was originally contemplated by the New York statute.<sup>44</sup> In a widely reported case, a person was charged with making a terroristic threat against a police officer by using a police officer emoji followed by a gun emoji.<sup>45</sup> Prosecutors have also sought to charge gang violence under the "terroristic threats" statute.<sup>46</sup> In rejecting this latter application, the New York Court of Appeals cautioned that in construing the statute, courts must be cognizant that "the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective

<sup>41</sup> *Id.* at § 490.20.

<sup>42</sup> *Id.*

<sup>43</sup> See *People v. Adams*, 39 N.Y.S.3d 923, 924 (N.Y. Sup. Ct. 2016).

<sup>44</sup> See Louis Jim, "Over-Kill": *The Ramifications of Applying New York's Anti-Terrorism Statute Too Broadly*, 60 SYRACUSE L. REV. 639, 640 (2010) (examining the potential for over-application of New York's anti-terrorism statute and its potential for misuse). The Wikipedia entry on the New York law also provides an excellent overview of the law and how it has been used, with numerous citations to cases, and details the scope of the New York Anti-Terrorism Act of 2001. *Anti-Terrorism Act of 2001*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Anti-Terrorism\\_Act\\_of\\_2001](https://en.wikipedia.org/wiki/Anti-Terrorism_Act_of_2001) [<https://perma.cc/3Y2X-53PG>].

<sup>45</sup> See, e.g., Tim Cushing, *Teen Arrested for Emoji-Laden 'Terroristic Threats'*, TECHDIRT (Jan. 30, 2015, 8:04 AM), <https://www.techdirt.com/articles/20150129/12011529858/teen-arrested-emoji-laden-terroristic-threats.shtml> [<https://perma.cc/FBQ3-J79Z>] ("[W]hat constitutes a 'terroristic threat?' According to the NYPD, it's a line of emoji . . . guns pointing at an emoji cop's heads [sic]."); *How the Law Responds When Emoji Are the Weapon of Choice*, THE CONVERSATION (Dec. 4 2017, 2:20 PM), <https://theconversation.com/how-the-law-responds-when-emoji-are-the-weapon-of-choice-88552> [<https://perma.cc/9WZW-WSZC>] ("[A] 17-year-old in New York was charged with making a terrorist threat on his Facebook page after posting a policeman emoji, and three guns pointing towards it").

<sup>46</sup> See Jim, *supra* note 44, at 640 ("A gang member being convicted of murder and manslaughter would be nothing new in New York City, but this case was different. This time, the jury found all four offenses to be 'crimes of terrorism,' in violation of New York's anti-terrorism statute."); Chantal Tortoroli, *Gangs of New York Are Terrorists? The Misapplication of the New York Antiterrorism Statute Due to the Lack of Comprehensive Gang Legislation*, 84 ST. JOHN'S L. REV. 391, 421 (2010) (arguing that the New York antiterrorism statute was unconstitutionally vague and unjustly applied against a gang member, as "the true purpose of the statute is to fight politically motivated terrorism attacks against American ideals and freedoms").

understanding of what constitutes a terrorist act.”<sup>47</sup> More plausible—and more core—uses of terroristic threat statutes in the wake of 9/11 were those states who prosecuted people for threatening anthrax attacks.<sup>48</sup>

Even more directly at the core are threats of mass shootings, which made up the bulk of terroristic threat cases in the last several years (at least prior to the recent use of terroristic threat statutes in COVID-19 cases). Indeed, a digest of these cases cites no less than five cases in the month of August 2019, in which a person was charged with making a terroristic threat of a “mass shooting.”<sup>49</sup> In one nationally reported case, days after a mass shooting in a Texas Walmart, a man walked into a Missouri Walmart with a handgun and a rifle; he was charged under the state’s terroristic threats statute.<sup>50</sup> New York’s terroristic threat statute has also been used against students who have threatened to “shoot up” high schools.<sup>51</sup> And in another school case, a custodian in New York was charged under the terroristic threat statute when he invoked Columbine in making threats against a teacher.<sup>52</sup> These types of

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<sup>47</sup> *People v. Morales*, 20 N.Y.3d 240, 249, (N.Y. 2012). *But cf.* *People v. Jenner*, 835 N.Y.S.2d 501 (N.Y. App. Div. 2007) (rejecting an argument by the defendant, who had threatened to shoot up the Department of Social Services, that “his conduct was not what the Legislature had in mind when it enacted this statute after the terroristic attacks of September 11, 2001 and he should not be labeled a terrorist”).

<sup>48</sup> As a brief summary of these cases:

[S]everal states have used their terroristic threat or terrorizing statutes to prosecute anthrax hoaxsters. For one example, a man who had told workers in the downtown office of the Pennsylvania Department of Public Welfare that he had a box containing anthrax was charged with making a terroristic threat, even though he claimed to suffer from a mental illness. In another instance, Andrew James Theodorakis, a senior at Dickinson College, faced charges of both terroristic threatening and causing a catastrophe for placing white powder in two envelopes sent through intercampus mail bearing the message, ‘You now have anthrax. Prepare to die.’

Ira P. Robbins, *Anthrax Hoaxes*, 54 AM. U. L. REV. 1, 36-37 (2004) (footnotes omitted).

<sup>49</sup> Steve Almasy, Dave Alsup & Madeline Holcombe, *Dozens of People Have Been Arrested over Threats to Commit Mass Attacks Since the El Paso and Dayton Shootings*, CNN, <https://www.cnn.com/2019/08/21/us/mass-shooting-threats-tuesday/index.html> [<https://perma.cc/P4UD-2FT2>] (last updated Aug. 22, 2019, 10:58 AM).

<sup>50</sup> Bill Chappel & Richard Gonzalez, *Rifle-Carrying Man Faces Terrorism Charge After Causing Panic at Walmart in Missouri*, NPR (Aug. 19, 2019, 11:08 AM), <https://www.npr.org/2019/08/09/749763786/rifle-carrying-man-arrested-after-causing-panic-at-walmart-in-missouri> [<https://perma.cc/QU6D-3WV9>].

<sup>51</sup> See, e.g., Matthew Saari, *Fifth-Grader Charged for ‘Terroristic Threat’*, MANCHESTER MEDIA (June 20, 2018), <https://manchesternewspapers.com/2018/06/20/fifth-grader-charged-for-terroristic-threat/> [<https://perma.cc/F3FA-Y76F>] (explaining that an elementary student was arrested by New York State Police and charged for threatening to “shoot up” the school’s high school with an automatic weapon); see also Annie Johnson, *Sheriff: St. Martin High Student Arrested After Threatening to ‘Shoot up the School’*, WLOX (Sept. 7, 2019, 11:48 AM), <https://www.wlox.com/2019/09/07/st-martin-high-student-arrested-after-threatening-shoot-up-school/> [<https://perma.cc/EL4Y-3MRL>] (explaining that a student was charged under Mississippi terroristic threat statute for a post saying he would shoot up his school). These charges may be controversial because they involve charging juveniles with serious felonies; our point is only that the type of *threat* here is in fact plausibly seen as “terroristic.”

<sup>52</sup> *People v. Hulsen*, 56 N.Y.S.3d 335, 337 (N.Y. App. Div. 2017).

threats seem to fall indisputably under the "core"—the threats are serious and involve the promised use of a weapon, buildings are evacuated, and many people are potentially put at risk. The prosecution of these cases as "terroristic threats" seems unproblematic, especially when those making mass-shooting threats are adults.

A particularly controversial use of terroristic threat statutes that seems to sweep beyond the core is the prosecution of those who threaten to spread HIV.<sup>53</sup> Given the current use of terroristic threat statutes regarding another virus, these cases should be of special interest to us, and the extension of terroristic threats to cover them—like the expansion of the 9/11 terroristic threat statute in New York—may also provide us with a cautionary tale. The connection, if any, of the AIDS crisis cases to the core case seems strained. The threats are usually directed at one person or a small number of people, and it is usually unclear how real the actual danger was. Many of these cases happen in prison, and the threats are directed at guards by incarcerated individuals. In one New Jersey case, a jail inmate threatened to bite or spit on an officer's hand in an attempt to infect him with HIV.<sup>54</sup> In a Pennsylvania case, a person taken into custody scratched an officer's hand with his fingernails.<sup>55</sup> Both convictions were affirmed.<sup>56</sup>

These prosecutions can appear problematic, but not because they are not serious. Indeed, such cases are serious enough that they can be, and sometimes are, prosecuted under homicide statutes. People who threaten to infect someone with a disease may in fact be guilty of attempted murder.<sup>57</sup> But our question is whether they are properly prosecuted under terroristic threat statutes, especially if we take the core case discussed above as paradigmatic of what those statutes are meant to cover. There is, for starters,

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<sup>53</sup> For an article that provides a useful context for these cases, see Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 378-79 (2013).

<sup>54</sup> *State v. Smith*, 621 A.2d 493, 495 (N.J. Super. Ct. App. Div. 1993).

<sup>55</sup> *Commonwealth v. Walker*, 836 A.2d 999, 1001 (Pa. Super. Ct. 2003).

<sup>56</sup> *Id.* at 1002; *Smith*, 621 A.2d at 516.

<sup>57</sup> See, for example, the following summary of cases from a Maryland state appellate decision:

In *State v. Caine*, 652 So.2d 611 (La.App.), *cert. denied*, 661 So.2d 1358 (La.1995), a conviction for attempted second degree murder was upheld where the defendant had jabbed a used syringe into a victim's arm while shouting "I'll give you AIDS." *Id.* at 616. The defendant in *Weeks v. State*, 834 S.W.2d 559 (Tex.App.1992), made similar statements, and was convicted of attempted murder after he spat on a prison guard. In that case, the defendant knew that he was HIV-positive, and the appellate court found that "the record reflects that [Weeks] thought he could kill the guard by spitting his HIV-infected saliva at him." *Id.* at 562. There was also evidence that at the time of the spitting incident, Weeks had stated that he was "going to take someone with him when he went," that he was 'medical now,' and that he was 'HIV-4.'

*Smallwood v. State*, 680 A.2d 512, 517 (Md. 1996) (alternation in the original).

usually nothing “mass” about the HIV cases: they involve only a threat directed at one person. We believe that such terrorism charges may reflect more of a sense of panic—of irrational fear—than of the correct characterization of the bad behavior. Because that fear may also be present in the response to the COVID-19 virus cases, the older AIDS crisis cases may provide a good touchstone.<sup>58</sup>

## II. COVID-19 THREATS AS “TERRORISTIC.”

In this Part we move from the general to the specific, and examine in detail four recent cases involving threats to infect someone with or spread COVID-19 from four different states: Cody Lee Pfister, in Missouri; George Falcone, in New Jersey; Margaret Cirko, in Pennsylvania; and Lorraine Maradiaga, in Texas. Does terroristic threatening work as a proper charge in these cases, based on the state’s statute and case law? Do these cases fall near the core case identified in the preceding Part? Even if the statutes in these charges makes it possible to convict these four individuals, is it *desirable*? While we will suggest answers to some of these questions in what follows, our full answers to them will have to wait until Part III.

### A. Missouri

One of the earliest cases happened in Missouri, where Cody Lee Pfister was charged with making a terroristic threat in the second degree for filming himself licking several deodorant sticks at a local Walmart.<sup>59</sup> In the video—which he posted on social media—Pfister looks at the camera and asks, “[w]ho’s scared of coronavirus?”<sup>60</sup> The statute Pfister was charged under reads:

A person commits the offense of making a terrorist threat in the second degree if he or she recklessly disregards the risk of causing the evacuation, quarantine or closure of any portion of a building, inhabitable structure, place of assembly or facility of transportation and knowingly . . . [c]auses a false belief or fear that an incident has occurred or that a condition exists involving danger to life.<sup>61</sup>

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<sup>58</sup> Khalil, *supra* note 10, also points out the possibility that, at least under the federal statutes, the relevant biological agent must be engineered or synthesized. This fact has not stopped charges involving HIV from being made at the state level, however.

<sup>59</sup> Rachel Rice, *Man Charged After Police Say He Licked Items at Warrenton Walmart to Mock Virus Fears*, ST. LOUIS POST-DISPATCH (Mar. 25, 2020), [https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/man-charged-after-police-say-he-licked-items-at-warrenton-walmart-to-mock-virus-fears/article\\_2e9d0fc7-b21a-5ebc-a8e9-cc181f3f3934.html](https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/man-charged-after-police-say-he-licked-items-at-warrenton-walmart-to-mock-virus-fears/article_2e9d0fc7-b21a-5ebc-a8e9-cc181f3f3934.html) [<https://perma.cc/QH3X-EVN6>].

<sup>60</sup> *Id.*

<sup>61</sup> MO. REV. STAT. § 574.120 (2017).

The statute obviously departs from the core case discussed above in that it does not require the threat of committing a serious crime either with or without a weapon. It does, however, fit with the core in that it ties the making of the terroristic threat to a risk of causing an “evacuation, quarantine, or closure” of a building. The second-degree threat statute, unlike the first, does not require that the person have directed the threat to “ten or more people.”<sup>62</sup>

Both Pfister and his lawyer have aggressively courted the press. Pfister has already appeared on an Instagram live podcast with Michael Rappaport.<sup>63</sup> Pfister’s defense—as put forward by his attorney—seems to be that at the time he recorded the video, March 10, 2020, the World Health Organization had not yet declared that the spread of COVID-19 was officially a “pandemic,” and President Trump was still advising people to “stay calm.”<sup>64</sup> Pfister commented to Rappaport that he was only trying to prank a worried friend and that he (Pfister) wasn’t “scared” because he didn’t think the virus was “a big deal.”<sup>65</sup> Pfister’s attorney is hoping for a plea deal for “peace disturbance or something.”<sup>66</sup> Missouri sets a second-degree terroristic threat as a Class E felony, which carries a maximum sentence of four years.<sup>67</sup>

Several Missouri appeals court cases have reversed charges of making a terroristic threat in the first degree when it was clear that the defendant did not in fact have the purpose of causing an evacuation, or that the statements representing the threat were mere ramblings.<sup>68</sup> If Pfister were charged for making a terroristic threat in the first degree, this would probably represent a winning argument if it is true, as Pfister said on the Rappaport podcast that he was only making an “inside joke” by licking the deodorant.<sup>69</sup> But Pfister was charged under the second-degree version of the statute, which does not require a showing of purpose. All it requires is a showing that Pfister knew he was making a false claim, that the false claim involved a condition that

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<sup>62</sup> *Id.*; *Id.* § 574.115(1) (2017).

<sup>63</sup> Doyle Murphy, *The Walmart Coronavirus Licker’s Defense*, RIVERFRONT TIMES (Apr. 3, 2020, 11:04 AM), <https://www.riverfronttimes.com/newsblog/2020/04/03/the-walmart-coronavirus-lickers-defense> [<https://perma.cc/SZ8H-MUQX>].

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> MO. REV. STAT. §§ 574.115(1), (2), 558.011 (2017).

<sup>68</sup> See *State v. Metzinger*, 456 S.W.3d 84, 97 (Mo. Ct. App. 2015) (explaining that the context of the defendant’s tweets containing “references to pressure cookers and allusions to the Boston Marathon bombing,” showed that “a reasonable recipient would not interpret them as serious expressions of an intent to commit violence” in affirming the trial court’s opinion to dismiss the case); *ex rel. C.G.M. v. Juvenile Officer*, 258 S.W.3d 879, 883 (Mo. Ct. App. 2008) (holding that the defendant’s question to his friend of whether his friend “wanted to help blow up the school” if he received dynamite for his birthday did not qualify as a true threat because it was unclear “whether the speaker [was] making a serious expression to cause an incident involving danger to life”).

<sup>69</sup> Doyle Murphy, *supra* note 63.

presented a danger to human life, and that in making that claim Pfister recklessly disregarded the risk of causing the evacuation, closure, or quarantine of a building.

In one case from 2018, a Missouri court of appeals held that the defendant was in fact aware of the risk that his knowingly false statements would lead to an evacuation.<sup>70</sup> But this case seems distinguishable from Pfister's: it involved clear, and clearly articulated, threats to shoot up a school.<sup>71</sup> That is, the threat seemed serious, and it seemed that the student knew what he was saying and was aware of what reaction it would (and did) cause—panic. Pfister, on the other hand, might claim that he did not know how COVID-19 could spread, or even that he could spread it; he could also claim that he did not know how fatal the virus was (hence the idea that he was not afraid of the virus, and maybe no one should be). In other words, Pfister's claim might be that at the time, he thought everything about COVID-19 was being overblown, and that he was simply unaware of the seriousness of what he was doing. He may have not known the risks he was taking, which is different than saying he was aware of the risks but disregarded them—but it is the latter claim that has to be true to prove he was reckless.

#### B. *New Jersey*

George Falcone was charged under New Jersey's terroristic threat statute for coughing on a worker who said he was too close to the food display at a Wegmans.<sup>72</sup> After he coughed, Falcone allegedly laughed and told the worker that "he was infected with the virus."<sup>73</sup> Referring to Falcone's actions later that day, the Governor of New Jersey said, "[t]here are knuckleheads out there. We see them and we are enforcing behavior."<sup>74</sup> The Attorney General of New Jersey, Gurbir S. Grewal, has generally indicated that he will take a hard line on threats involving the COVID-19 virus: "[W]e vow to respond swiftly and strongly whenever someone commits a criminal offense that uses

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<sup>70</sup> *ex rel. D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 787 (Mo. 2019).

<sup>71</sup> *Id.*

<sup>72</sup> Neil Vigdor, *A Man Coughed on a Wegmans Employee. Now He's Charged With a Felony*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/us/coronavirus-terrorism-nj.html> [<https://perma.cc/R2HT-VH66>].

<sup>73</sup> *Id.*

<sup>74</sup> *Man Who Maliciously Coughed on Wegmans Employee Charged with Creating the Terrorist Threat*, USA REALLY, (Mar. 25, 2020, 11:46 AM), <https://usareally.com/6055-man-who-maliciously-coughed-on-wegmans-employee-charged-with-creating-the-terrorist-threat> [<https://perma.cc/9CQB-A8E2>].

the coronavirus to generate panic or discord."<sup>75</sup> The New Jersey third degree terroristic threat statute reads:

A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.<sup>76</sup>

If convicted, Falcone could be sentenced up to ten years imprisonment because his threat came during a national emergency.<sup>77</sup>

One initial question we might have about the Falcone case—and it will reappear with the Texas case considered below—is whether Falcone indeed threatened to commit a “crime of violence” when he coughed on the Wegmans grocery worker. There does not seem to be a separate statutory definition of a crime of violence under the New Jersey code.<sup>78</sup> But intuitively, it does not seem plausible that the act of coughing on another—without more—falls under the class of a crime of *violence*.<sup>79</sup> Certainly, Falcone’s behavior—while objectionable—is not like the core case of calling in a bomb threat that forces the evacuation of a nursing home. Nor is it obvious that Falcone’s purpose in coughing on the worker was to “terrorize her,” rather than show his annoyance.<sup>80</sup> It seems even harder to prove that his purpose was to cause the evacuation of the store. As with Pfister, however, a claim of recklessness (which is also

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<sup>75</sup> Tamar Lapin, *New Jersey Man Charged After Coughing on Wegmans Worker, Saying He Has Coronavirus*, N.Y. POST, (Mar. 24, 2020, 10:01 PM), <https://nypost.com/2020/03/24/new-jersey-man-arrested-after-coughing-on-wegmans-worker-saying-he-has-coronavirus/> [<https://perma.cc/XJK7-MZBD>].

<sup>76</sup> N.J. STAT. ANN. § 2C:12-3(a) (West 2002).

<sup>77</sup> *Id.*; N.J. STAT. ANN. § 2C:43-6a(2) (West 2013).

<sup>78</sup> The New Jersey Superior Court, Appellate Division has explained that

In order for a jury to be properly guided it must be instructed on the qualities of ‘any crime of violence’ the proofs suggest the defendant may have threatened. That is, the elements and definition of any such crimes must be adequately explained to the jury, so that the jury is not left to speculate as to the crimes that might be supported by the evidence.

*State v. MacIlwraith*, 782 A.2d 964, 966 (N.J. Super. Ct. App. Div. 2001).

<sup>79</sup> Although not from New Jersey, an Arizona case is illuminating on this point:

Although the 2002 conviction was classified as assault, Pesqueira concedes that it merely involved spitting on a corrections officer while incarcerated. And although spitting is insulting, it is not a crime of violence. *See State v. Arnett*, 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978) (defining violence as “the exertion of any physical force so as to injure or abuse”), quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d unab. ed. 1976).

*State v. Pesqueira*, No. 2-2008-0390, 2009 WL 3790443, at \*5 (Ariz. Ct. App. Nov. 13, 2009).

<sup>80</sup> The statutory definition of “terrorize” is “to convey the menace or fear of death or serious bodily injury by words or actions.” N.J. STAT. ANN. § 2C: 38-2(d) (West 2020). “Terror” means “the menace or fear of death or serious bodily injury.” *Id.*

contemplated by the statute) may be easier to prove, but again, it still must be recklessness as to terrorizing or of causing a “serious public inconvenience.”

The New Jersey pattern jury instructions also appear favorable to Falcone. As part of the charge, the jury is to be instructed that it is “not a violation of this statute if the threat expresses fleeting anger or was made merely to alarm.”<sup>81</sup> Although Falcone went on to suggest (sarcastically) that the employees at Wegmans were lucky to have jobs, he might press the point that his anger was merely “fleeting,” as he was upset at being told to step back from the food display. Again, as with Pfister, we have a situation where we are forced to distinguish between foolish behavior and behavior meant to terrorize or cause an evacuation.

### C. Pennsylvania

In late March 2020, Margaret Cirko walked into a local Pennsylvania supermarket and allegedly began deliberately coughing and spitting on rows of produce, baked goods, and meat.<sup>82</sup> Cirko apparently made statements that she was sick as she was doing this. As a result, the store had to throw out over \$35,000 of produce. The store owner, Joe Fasula later said that Cirko’s actions made it a “challenging day,”<sup>83</sup> and that while there was “little doubt this woman was doing it as a very twisted prank, we will not take any chances with the health and well-being of our customers.”<sup>84</sup> Cirko was served with multiple charges, including two felony counts of making a terroristic threat. The Pennsylvania terroristic threat statute reads in relevant part, “[a] person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to . . . cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.”<sup>85</sup> According to news reports, Cirko has a history of “past problems in the community” and was initially sent to a mental hospital for an evaluation.<sup>86</sup> If convicted, Cirko could be imprisoned for up to seven years for a third-degree felony.<sup>87</sup>

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<sup>81</sup> State v. Tindell, 10 A.3d 1203, 1216 (N.J. Super. Ct. App. Div. 2011).

<sup>82</sup> Elisha Fieldstadt, *Woman Who Coughed on \$35k Worth of Grocery Store Food Charged with Four Felonies*, NBC NEWS (Mar. 26, 2020, 10:16 AM) <https://www.nbcnews.com/news/us-news/grocery-store-throws-out-35k-worth-food-woman-coughed-twisted-n1169401> [<https://perma.cc/52YA-N82B>].

<sup>83</sup> *Id.*

<sup>84</sup> *PA Supermarket Tossed \$35K Worth of Food After Woman Coughed on it as Prank, Owner Says*, 24NEWS (Mar. 26, 2020), <https://nbc24.com/news/coronavirus/pa-supermarket-tossed-35k-worth-of-food-after-woman-coughed-on-it-as-prank-owner-says> [<https://perma.cc/Z6ZB-8NCN>].

<sup>85</sup> 18 PA. CONS. STAT. § 2706(a) (2002).

<sup>86</sup> *Pennsylvania Coughing ‘Prank’ Suspect Arrested, Charged After \$35K in Groceries Tossed*, FOX6NOW.COM, (Mar. 29, 2020, 2:27 PM), <https://fox6now.com/2020/03/29/pennsylvania-coughing-prank-suspect-arrested-charged-after-35g-in-groceries-tossed/> [<https://perma.cc/MR86-EEHF>].

<sup>87</sup> 18 PA. CONS. STAT. § 1103(3) (1995).

The nature of Cirko’s threat, as indirectly revealed by her behavior, is not clear. Charging her with making a terroristic threat in this context means she intended her behavior to cause a “serious public inconvenience.” While it seems true that the *result* of Cirko’s actions was a serious public inconvenience, this is not the same as finding that the cause of the public inconvenience was intended as—or even reasonably understood as—the communication of a “threat.” Again, a comparison to our core case will prove helpful. In the *McCone* case, the defendant actually called in a threat to bomb the nursing home. Is coughing on food and saying you are sick the same as phoning in a bomb threat?

Pennsylvania, like New Jersey, also has a constraint that the threat cannot be merely “transitory.”<sup>88</sup> According to the commentary on the Pennsylvania code, the statute was not meant to penalize “spur-of-the-moment threats which result from anger.”<sup>89</sup> Pennsylvania courts have characterized this limitation on the statute as going to whether the defendant had “the requisite intent to terrorize.”<sup>90</sup> Rather than a mere transitory sentiment, the facts must show a “settled purpose to carry out the threat or to terrorize the other person.”<sup>91</sup> If what Cirko did was meant as a prank or a sick joke—or was a product of mental illness—it may be hard to show that she had the *intent* to put others “in a state of fear that agitates body and mind.”<sup>92</sup>

#### D. Texas

Like Cody Lee Pfister, Lorraine Maradiaga’s alleged threats came over social media. In what seems to have been a thematically connected series of Snapchat videos, Maradiaga first filmed herself going through a COVID-19 testing site, apparently to get tested.<sup>93</sup> She then made a video of herself in a Walmart saying that she was going to “infest” the store and that “if I’m going down, all y’all [expletive] going down.”<sup>94</sup> In the last video, Maradiaga told those who wanted to get the coronavirus and die that they should call her.<sup>95</sup> Texas police arrested Maradiaga for her videos and charged her with making

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<sup>88</sup> Commonwealth v. Walker, 836 A.2d 999, 1001 (Pa. Super. Ct. 2003).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Commonwealth v. Kidd, 442 A.2d 826, 827 (Pa. Super. Ct. 1982).

<sup>92</sup> *Id.*

<sup>93</sup> Morgan Gstalter, *Texas Teen Who Threatened to Spread Coronavirus Charged with Making Terroristic Threat*, THE HILL, (Apr. 8, 2020, 1:14 PM), <https://thehill.com/blogs/blog-briefing-room/news/491798-texas-teen-who-threatened-to-spread-coronavirus-faces-terrorism> [https://perma.cc/27TA-M2K2].

<sup>94</sup> LaVendrick Smith, *Carrollton Police Arrest Teen Who Said She Would Spread Coronavirus at Walmart*, DALLAS MORNING NEWS (Apr. 7, 2020, 3:32 PM) <https://www.dallasnews.com/news/crime/2020/04/07/carrollton-police-arrest-teen-who-said-she-would-spread-coronavirus-at-walmart/> [https://perma.cc/5QGY-MV9S].

<sup>95</sup> Gstalter, *supra* note 93.

a felony terroristic threat in the third degree.<sup>96</sup> The Texas statute under which Maradiaga was charged reads “A person commits an offense if he [sic] threatens to commit any offense involving violence to any person or property with intent to . . . place the public or a substantial group of the public in fear of serious bodily injury.”<sup>97</sup> After the initial public backlash against her videos, but apparently before she was arrested, Maradiaga posted a video that claimed “it was all an April Fool’s joke.”<sup>98</sup> If convicted, Maradiaga could face between two and ten years imprisonment.<sup>99</sup>

Maradiaga’s case may seem the hardest to defend, at least until we test it against the statute. Maradiaga did seem to explicitly threaten to cause people injury when she said that she was going to infest the Wal-Mart in order to have everyone go down with her. Although Maradiaga may not have been COVID-19 positive, this fact is not relevant to whether her behavior falls under the statute, since Texas courts have held that it is not necessary “for the accused to have the capability or the intention to actually carry out the threat.”<sup>100</sup> All that is necessary, a Texas court said in 2006, is that “the accused, by her threat, sought as a desired reaction to place a person in fear of imminent serious bodily injury.”<sup>101</sup> There is a strong case that this is precisely what Maradiaga did with her video.

However, like New Jersey’s statute, there must also be a threat to commit an offense “involving violence,” and it does not appear as if Texas has a statutory definition of what constitutes a crime of violence. Texas courts have held that crimes such as arson are *per se* crimes of violence but that other crimes, like burglary, depend more on a case-by-case determination.<sup>102</sup> As one court put it, the meaning of an “act of violence” seems only to have the “meaning that would be ascribed to it by persons of ordinary intelligence.”<sup>103</sup> While Maradiaga’s threat—like Cirko’s—almost certainly resulted in substantial costs incurred by Wal-Mart, it is not obvious that the damage was caused by a “crime of violence.” Bombing a building involves violence; it is less clear that coughing, even when accompanied by a threat to infect people, is a “violent” act, either inherently or as a matter of the facts of Maradiaga’s case.

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<sup>96</sup> *Id.*

<sup>97</sup> TEX. PENAL CODE ANN. § 22.07(a) (West 2017).

<sup>98</sup> Alex Boyer, *Police Searching for Carrollton 18-Year-Old Who Claims to Be ‘Willingly Spreading’ COVID-19*, FOX 5 NEW YORK (Apr. 5, 2020), <https://www.fox5ny.com/news/police-searching-for-carrollton-18-year-old-who-claims-to-be-willingly-spreading-covid-19> [<https://perma.cc/Z64C-8C2Y>].

<sup>99</sup> TEX. PENAL CODE ANN. § 12.34(a) (West 2009).

<sup>100</sup> *Williams v. State*, 194 S.W.3d 568, 575 (Tex. App. 2006), *aff’d*, 252 S.W.3d 353 (Tex. Crim. App. 2008).

<sup>101</sup> *Id.*

<sup>102</sup> *Burks v. State*, 876 S.W.2d 877, 894 (Tex. Crim. App. 1994).

<sup>103</sup> *Gardner v. State*, 699 S.W.2d 831, 836 (Tex. Crim. App. 1985).

### III. COVID-19 AND TERRORISTIC THREATS: AN ASSESSMENT

Our discussion of the recent COVID-19 threat cases was marked by some skepticism, as it seemed to us that there were plausible questions that could be raised about the appropriateness of those charges. The behavior in these cases certainly seems scary, but does it rise to the level of what we have called the core case of terroristic threatening—or even come close? The participants themselves seemed to recognize that what they did was foolish, stupid, and even dangerous, while at the same time asserting that it was not meant seriously, or was a prank or an inside joke. When viewed in this light, their behavior does not rise to the level of calling in a bomb threat that results in the evacuation of a nursing home.

This rather lenient conclusion may be rash. Even if these cases do not reach the core, they may still be covered by the periphery of those statutes, especially as we move away from the first-degree statutes in these states and into the lower degrees. In this Part, we broaden our analysis to raise substantive questions about charging terroristic threatening in these cases, even when those charges are not first degree. While our argument stems partly from the fact that these cases are far from the “core case,” there is more to it than that.<sup>104</sup> We raise three points. First, generalizing from what we have said about the individual cases above, there may be a problem with proving the requisite mental state in COVID-19 threat cases. Second, there may be other more appropriate charges to bring in these cases. Third, it may be that what does most of the work in deterring conduct like that in the charged cases is not the criminal law, but social norms more generally and the societal condemnation that violations of those norms can incur.

#### A. *Mens Rea*

There seem to be several difficulties with proving the mental state in the recent run of threats of COVID-19 transmission. If there is a requirement of purpose in the statute, this may be hard to show if the object of the threat was not to frighten or terrorize, but to play a prank. If someone meant it only as a joke, then it is not obvious that the requisite intent was there, especially the more specific that intent needs to be.<sup>105</sup> Does a person who plays a joke have the *intent* to cause an evacuation or to cause a serious public inconvenience? It may be hard

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<sup>104</sup> Relevant here is a larger concern with overcriminalization. This is true with regards to both what acts get charged as crimes at all, as well as with prosecutors deciding to go with the harshest possible charge when those acts are charged as crimes. See generally Chad Flanders & Desiree Austin-Holliday, *Dangerous Instruments: A Case Study in Overcriminalization*, 83 MO. L. REV. 259 (2018).

<sup>105</sup> See, e.g., *Thomas v. Commonwealth*, 574 S.W.2d 903, 910 (Ky. Ct. App. 1978) (stating that the Kentucky version of the terroristic threat statute does not apply “in the case of idle talk or jesting”).

to prove this beyond a reasonable doubt. And, as referenced in regard to the Maradiaga case, there may be an additional problem of proving that there was even an intention to engage in a crime of violence, whatever that turns out to be. Merely threatening to cough on someone does not seem to show an intent to commit a crime of physically hurting someone or physically damaging property. If the intention to commit the crime has to be joined with an intent to cause an evacuation, the problems of proof will multiply.<sup>106</sup>

Intentional actions are usually only required in the first-degree versions of the terroristic threat statutes. But many of the recent cases are instead charged under a theory of recklessness, where the persons are charged with consciously disregarding a substantial risk that their actions will have certain consequences—an evacuation or putting people in fear of serious injury. But there may be problems of proof here as well. As the attorney in the Pfister case emphasized, to consciously disregard a risk, one must be subjectively aware that there was a risk in the first place. So, a lot will turn on what the defendant was, in fact, aware of. Did they know that COVID-19 was a serious disease capable of causing death? Did they know how it would spread and, more particularly, that their actions could spread the disease? Did they know that they had, or could have, the virus?<sup>107</sup> In the early days of the pandemic, some could claim—perhaps plausibly—that they simply did not know the gravity of the risk they were taking because they were uninformed or simply of a different opinion. All of these facts may speak to whether they even *knew* they were making the sort of threat alleged, e.g., that they knew that they were making a “false report” of an incident that was a “danger to human

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<sup>106</sup> These statutes thus need to be distinguished from other statutes, which may only require that a “reasonable person” believe that a threat was being made, regardless of the purported threatener’s intent. The standard in these statutes, in other words, is subjective, rather than objective. *See, e.g.*, *United States v. Segui*, No. 19-188, 2019 WL 8587291, at \*5 (E.D.N.Y. Dec. 2, 2019) (discussing the distinction between objective and subjective standards as it applies to federal threat statutes).

<sup>107</sup> The analogy to the spread of HIV seems apt here. People are coughing or spitting with the alleged intention of spreading COVID-19. However, it is not clear that any of the people charged with terroristic threats in these recent cases were infected with COVID-19 or believed they were, or were aware that they could transmit the virus. Note that this point goes not to whether other people might have been put in fear by the threat, but whether the person making the threat was *aware* that he or she was communicating a threat. *But cf.* *State v. Smith*, 621 A.2d 493, 517-18 (N.J. Super. Ct. App. Div. 1993) (rejecting the defense that it was medically impossible to transmit HIV through a bite so corrections officer could not have reasonably feared infection).

life.”<sup>108</sup> Finally, in specific cases, we might also ask: were they aware of the risk that the building would have to be evacuated?<sup>109</sup>

Note that it is important in this regard not to confuse being negligent and being reckless. Most of these defendants were negligent beyond a reasonable doubt—meaning that even though they may not have known the risk they were taking, they *should* have known, and a reasonable person would have been aware of those risks. All of the cases discussed in the previous Part meet this standard. This makes us believe that terroristic threatening charges—if they are to be made at all—might be appropriate in these cases on a theory of negligence, and some statutes in their lesser degrees allow for that. But if the mental state required is reckless, the necessary factual proof is different. Under a theory of recklessness, the state needs to prove not just that this person should have known that what they were doing was irresponsible, but that they were aware that their behavior was risky and proceeded to do it anyway. If the mental state is knowledge or purpose, the state’s burden is even higher.<sup>110</sup>

### B. *Alternative Charges*

There is no requirement on prosecutors that they bring the *least* serious charge compatible with criminal behavior; indeed, the practice of many prosecutors is quite the opposite. To get maximum leverage in plea negotiations, prosecutors tend to *overcharge*, both in terms of charging as many

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<sup>108</sup> MO. REV. STAT. §§ 574.115(1), (2) (2017). We do not even consider here the question of whether some of the defendants in these cases were mentally ill, although this seems a distinct possibility. In a case where the mental illness of the defendant was a relevant factor in an acquittal on a terroristic threat charge, a Georgia court explained that:

Considering together the identity of the party to whom the message was directed, the conditional nature of the message, and the evidence as to the defendant’s history of mental illness, including paranoia, we conclude that a rational trier of fact could not reasonably determine under the evidence presented in this case that the State has proven beyond a reasonable doubt an intent on the part of the defendant to terrorize Captain Johnson.

*Wiggins v. State*, 319 S.E.2d 528, 530 (Ga. Ct. App. 1984).

<sup>109</sup> *Cf. State v. Tanis*, 247 S.W.3d 610, 615 (Mo. Ct. App. 2008) (“Such understanding of the possible legal consequences of his actions further evidences Mr. Tanis’s conscious disregard of the risk that a portion of Park University would be evacuated.”).

<sup>110</sup> In the past, constitutional challenges have been made to terroristic threat statutes, and we might see similar challenges raised in these cases. The main claim has been that such statutes are vague and overbroad. Words like “terrorize” seem especially vague, where someone might be left to guess what it means to cause terror in another person. A similar vagueness challenge has been made against “to evacuate,” but that seems much less persuasive. “Serious public inconvenience” seems to fall somewhere in between “terrorize” and “evacuate” in terms of vagueness. First Amendment challenges (whether vagueness or overbreadth), however, have been almost uniformly rejected by the courts, so we do not consider them here. *But see State v. Hamilton*, 340 N.W.2d 397 (Neb. 1983) (finding an early version of the Nebraska terroristic threat statute unconstitutionally vague).

crimes as possible, and the highest degree of a charge as possible.<sup>111</sup> The cases in the previous sections can be seen as examples of overcharging; even though other charges might be adequate, the charge of terroristic threatening is at least permissible, if not plausible, and can helpfully be used to drive a hard bargain.

But if the problem is technically permissible but overzealous charging, then our issue may not be in the first instance with prosecutors (who after all are still charging within the limits of the law), but with the legislature that wrote the laws in such a capacious way. The laws should have been written more carefully, so that *only* core cases could be charged as terroristic threats. And in fact, we believe that the strongest case for such laws is usually only when those laws are limited to covering the core cases, which would mean getting rid of most second and third degree terroristic threatening statutes.

But we try to make a more modest point here: even though it may be correct to charge *some* COVID-19 threat cases as terroristic, it may be that other charges are the most appropriate in the end. The laws can still be on the books, but prosecutors should exercise their discretion and limit terroristic threat charges mostly to the core cases. We leave for another day the further suggestion that terroristic threat laws that cover cases *outside* the core cases should not be on the books at all.<sup>112</sup>

Why, then, should prosecutors largely refrain from using terroristic threat laws when faced with cases that might fit the statutes, but that fall beyond the “core”? Partly, the name *terroristic* conveys something much larger and much more ominous than what has happened in these cases. Such a worry about stretching “terrorism” to cover simple assault cases is present in some of the post-9/11 New York cases we saw earlier, and we find those cautionary notes persuasive, even compelling.<sup>113</sup> We risk lessening the force of the “terrorist” label when we move to cases that involve threats against one person or cases that would otherwise be charged as more common crimes—even when that more common crime might be homicide. Not all homicides are terrorism. Something similar might be said about the move to categorize threats to spread HIV as involving “terrorism.”

Another part of our concern with charging terrorist threats in the COVID-19 cases is that many of these cases were meant to be understood as jokes or

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<sup>111</sup> Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1304 (2018) (“As plea bargaining scholars have long recounted, prosecutors’ ability to threaten inflated sentences, combined with their power to trade those sentences away for pleas of guilt, allows them to control who goes to prison and for how long.” (internal quotation omitted)).

<sup>112</sup> One could of course imagine an even more limited core that limited terroristic threatening to crimes that involved political terrorism, as the New York law attempts to do. *See supra* Part I.

<sup>113</sup> *See Sepulveda, supra* note 3 (quoting Wendy Parmet, director of the Center for Health Policy and Law at Northeastern University, as saying “it’s really also important to understand the differences between a naturally occurring disease and, you know, an act of war”).

pranks, were early in the spread of the pandemic, and the people who are being charged have faced and will face much in the way of societal condemnation for what they have done. If these factors do not incline necessarily towards *mercy*—and we are not suggesting that they should—our attitudes toward these cases may be leavened by the fact that there are *other*, alternative charges that can be made so that the bad actors will not avoid criminal punishment.

In half of the cases we have discussed, the persons *were* charged with other crimes. Cirko was charged with criminal mischief and disorderly conduct.<sup>114</sup> She will almost certainly, as part of a plea deal or because of a guilty conviction, be made to pay for the damage she caused to the store. Falcone was charged with harassment and, because he would not give his identification to a detective, obstruction of justice.<sup>115</sup> It does not seem as if Pfister or Maradiaga have been charged with anything other than terroristic threatening, although whether that charge remains after plea negotiations is an open question. Pfister is back in jail, however, for violating the terms of his probation.<sup>116</sup>

The Cirko and Falcone cases show how in these cases, there *will* be other charges available to prosecutors besides terroristic threatening, including criminal mischief, where destruction of property is at issue, and disorderly conduct, which usually includes the causing of a public inconvenience. Missouri and Texas have similar laws.<sup>117</sup> Further, while many terroristic threat statutes include false reporting provisions, these also exist as separate laws in many states as well.<sup>118</sup> Even a simple trespassing charge seems warranted in several of the cases. The threat to spread COVID-19, especially if directed at a particular individual, could be charged as assault. Many of these crimes are misdemeanors and do not rise to the felony level of most first and second degree terroristic threatening laws. They may, however, represent the most appropriate charges in those cases where the risk does not appear all that great and the intentions of those who created the risk is, at best, murky. These lesser charges may point to the proper resolution of these cases, whatever the original charges.<sup>119</sup>

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<sup>114</sup> Fieldstadt, *supra* note 82.

<sup>115</sup> Lapin, *supra* note 75.

<sup>116</sup> Rice, *supra* note 59.

<sup>117</sup> See, e.g., MO. REV. STAT. §§ 569.100, 569.120 (2017) (property damage); *Id.* § 574.010 (peace disturbance); TEX. PENAL CODE ANN. § 42.01 (West 2013) (disorderly conduct); TEX. PENAL CODE ANN. § 28.04 (West 1994) (reckless damage or destruction).

<sup>118</sup> Recall that this was the recommendation of the Model Penal Code drafters for threats that caused only a minor inconvenience or were the result of transitory anger. See *supra* note 39 and accompanying text.

<sup>119</sup> A recent Missouri terroristic threats case might provide an example of how these cases could be resolved. A Missouri man was charged with making a terroristic threat in the second degree for allegedly walking around a Walmart store in a bulletproof vest, displaying a loaded rifle, causing panic among the shoppers. He eventually pled guilty to the lesser charge of making

### C. Social Norms

It is also hard not to underestimate the power of social norms in regulating behavior during the pandemic.<sup>120</sup> Most people behave according to the “rules,” after all, not because of the threat of criminal sanctions, but mostly because they believe in the social utility of the rules. They may also behave according to the rules *because they are the rules* and believe that they are legitimate, even if they may disagree with some of them. The response to the pandemic has been, by most people and for the most part, one of rule-following. We shelter in place, we keep our distance, we go out only when necessary. When we break from those norms, we expect condemnation not only because we know that we are putting people at risk, but, on a deeper level, because we do not want to break the rules or see ourselves as exceptions to those rules. Therefore, when Pfister and Maradiaga posted their actions on social media they gained notoriety, not fame. Pfister’s video was almost immediately brought to the attention of the police by “locals, nearby residents, as well as people from the Netherlands, Ireland, and the United Kingdom,” according to the Warrenton chief of police.<sup>121</sup>

There are already plenty of news stories collecting Twitter responses of outrage and disgust against those who took the so-called “coronavirus challenge.”<sup>122</sup> While the very existence of such a hashtag—#coronaviruschallenge—suggests a widespread problem, the number of people taking the challenge seems small compared to those eager and ready to loudly denounce and criticize such behavior.<sup>123</sup> Indeed, most references to the hashtag

a false report. Jennifer Moore, *Here’s How Missouri Law Defines Making a Terrorist Threat, Second Degree*, KSMU (Aug. 9, 2019), <https://www.ksmu.org/post/heres-how-missouri-law-defines-making-terrorist-threat-second-degree#stream/o> [<https://perma.cc/Z8WL-VX2A>]; *Armed Man at Missouri Walmart Pleads Guilty to Lesser Charge*, AP NEWS (Nov. 1, 2019), <https://apnews.com/55c268a3b56e4daaa1e77607fa352d6d> [<https://perma.cc/FG3U-B433>].

<sup>120</sup> See generally Natalia Mishigina et al., *The Importance of New Social Norms in a COVID-19 Outbreak*, POL’Y OPTIONS POLITIQUES (Mar. 31, 2020), <https://policyoptions.irpp.org/magazines/march-2020/the-importance-of-new-social-norms-in-a-covid-19-outbreak/> [<https://perma.cc/2VKE-CNKU>] (describing how preventative measures can become social norms in a way that could further public health goals).

<sup>121</sup> City of Warrenton Police Department, FACEBOOK (Mar. 23, 2020), <https://www.facebook.com/mowarrentonpolice/posts/225199115529733?> [<https://perma.cc/LFZ3-DQVK>].

<sup>122</sup> The “challenge” involves licking a toilet seat. Alexandra Deabler, *Woman Who Licked Toilet in ‘Coronavirus Challenge’ Talks to Dr. Phil About Bizarre Stunt, Admits She ‘Lied’*, FOX NEWS (Mar. 28, 2020), <https://www.foxnews.com/lifestyle/woman-licked-toilet-coronavirus-challenge-dr-phil> [<https://perma.cc/UH3B-CEAZ>] (“Initially, her ‘coronavirus challenge’ clip went viral on Twitter, where people demanded the woman be thrown in jail.”).

<sup>123</sup> Alia Slisco, *Wisconsin Woman Licks Grocery Store Freezer Handle as ‘Protest to the Coronavirus’*, NEWSWEEK (March 19, 2020), <https://www.newsweek.com/wisconsin-woman-licks-grocery-store-freezer-handle-protest-coronavirus-1493354> [<https://perma.cc/JQD3-UUHU>] (“Although the #CoronavirusChallenge hashtag did trend for a time, few followed the example of the would-be influencer and most activity was instead centered on either jokes or strategies to avoid spreading infection.”).

seem to be made in order to point out how foolish and disgusting the challenge is.<sup>124</sup> One so-called influencer even embraced the title of "clout-chasing idiot" when her prank of licking a toilet seat won no admirers and many detractors.<sup>125</sup> Pfister and Maradiaga, who posted their pranks online, quickly recognized the error of their ways and posted apologies, also online—which was probably a function of social condemnation coming down so hard and so swiftly on them.

The fact of near-universal (if not universal) social condemnation of those making COVID-19 threats should weigh in our consideration of what crimes are appropriate for those making the threats.<sup>126</sup> If the goal is to deter future threats, then a large measure of that deterrence happens even before there is any formal criminal sanction. The backlash begins when the story is publicized and with that, much of the deterrence work is done.<sup>127</sup> The criminal sanction, if it comes at all, comes much later when the point of maximum societal attention has long passed. While there is a case that Pfister and the others should face *some* punishment, it may be that to serve the social purposes of condemnation and deterrence, they do not need a maximum, felony-level punishment. The fitting punishment for those making threats may simply be some time in jail on a misdemeanor charge, along with the society-wide ridicule they face, and probably deserve, for doing such foolish things.

To be sure, things on the ground may change. As the stay-in-place orders become longer, and people become restless, there may be a greater need to signal the seriousness of the situation and the need to follow the rules. But a rise in objections to stay-at-home orders are not the same as increases in threats to spread the COVID-19 virus. The consensus against *that* sort of behavior seems strong, even if people may be tired of staying at home and

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<sup>124</sup> See, e.g., Claire Toureille, 'Stupidity at its Best': TikTok Star, 22, is Slammed for LICKING an Airplane Toilet Seat for a 'Coronavirus Challenge', DAILY MAIL.COM (Mar. 16, 2020, 2:21 PM), <https://www.dailymail.co.uk/femail/article-8116799/Tik-Tok-star-22-slammed-licking-toilet-seat-claiming-complete-coronavirus-challenge.html> [<https://perma.cc/93QP-CNKC>] (describing the online backlash received by a woman who filmed herself licking a toilet seat as part of the coronavirus challenge).

<sup>125</sup> Trace William Cowen, *Coronavirus Mocker Charged with Making Terroristic Threat After Defiant Licking Spree at Walmart*, COMPLEX (March 25, 2020), <https://www.complex.com/life/2020/03/coronavirus-mocker-charged-with-terrorist-threat-licking-spree-at-walmart> [<https://perma.cc/WYM9-9XR3>]; see also Trace William Cowen, *TikTok User Desperate for Clout Licks Airline Toilet Despite COVID-19*, COMPLEX (Mar. 18, 2020), <https://www.complex.com/life/2020/03/tiktok-user-licks-airline-toilet-despite-covid-19> [<https://perma.cc/9V9X-EEU7>].

<sup>126</sup> For a general consideration of the relationship of social norms and criminal punishment, see generally Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609 (2006).

<sup>127</sup> *But cf.* Sepulveda, *supra* note 3 (quoting a director of a Consortium on Terrorism that terroristic threat charges may have a "deterrent effect" on "those individuals who might be doing it as sort of a counterculture response, some kind of joke taken too far" but not on extremist groups who might try to weaponize COVID-19).

not being able to go out to eat, or to shop, or to go back to work.<sup>128</sup> It thus seems to us a kind of *non-sequitur* when the attorney general of New Jersey maintains that terroristic threatening charges are necessary to “make sure people abide by those orders from your governors” and “don’t . . . take advantage of their fellow citizens by engaging in criminal conduct.”<sup>129</sup>

### CONCLUSION

The direction of our argument has been toward leniency in prosecuting many of the COVID-19 cases as “terroristic threats.” Our discussion of a “core case” was descriptive, but it also had a normative element as well: the sense that the core case of terroristic threatening is in fact the *proper* case for a terroristic threatening charge, even when, in other cases, “terroristic threat” is a *possible* charge. The cases we discuss in the second part of our paper seem to pale in comparison to the clearer case of someone phoning in a bomb threat. The intention to terrorize or to evacuate seems more muddled in the recent COVID-19 cases and the potential harm that could be caused much more speculative. Even the seemingly more certain fact that these people were *reckless* in how they behaved is also not entirely obvious.

We want to be clear that we do not mean to rule out the possibility of a case where there *was* a terroristic threat in the sense of our core case. Some of our cases may even come close to the line where there is a core terroristic threat, and others that have been reported in the media may even cross the line.<sup>130</sup> Moreover, it seems important to emphasize that our analysis dealt with cases that happened early in the response to COVID-19, when there was less knowledge about the virus. It will be harder for people to argue *now* that they had no idea that certain behaviors would create a risk that people would panic, or cause a building to be evacuated, as Pfister and his attorney are trying to do. It seems probable, in other words, that later cases may show a greater awareness of the possibility of causing terror, and an intent to cause that terror.

Our point, therefore, should not be taken in too absolutist a way. We are not saying that there have not been, nor will be, cases where there is a core

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<sup>128</sup> *But cf.* Ashton K. Dietrich, *Polarization as a Predictor of Crisis Response and Juror Behavior During COVID-19* (unpublished manuscript) (on file with authors) (suggesting that the response to COVID-19 threats might divide along partisan lines).

<sup>129</sup> Jose Sepulveda, *supra* note 3.

<sup>130</sup> A more recent case from Missouri seems especially disturbing in this regard. *See* Morgan Gstalter, *Police: Missouri Man Charged with Terrorist Threat for Coughing on Customers, Writing ‘COVID’ on Cooler Door*, THE HILL (Apr. 2, 2020, 1:04 PM), <https://thehill.com/blogs/blog-briefing-room/news/490823-missouri-man-charged-with-terrorist-threat-for-coughing-on> [<https://perma.cc/MC68-SMK4>] (explaining that a man in Missouri was charged with making a terroristic threat in the second degree after coughing on customers, breathing on and then writing “COVID” on the inside of a cooler door, and “placing his hand down his pants and then rubbing a cooler door handle”).

case of a threat to spread COVID-19. Nor do we argue that we should ignore foolish behavior when it is combined with assaultive behavior. In those cases, the obvious assault charges should be filed and pursued—especially if they involve a threat of imminent harm to police officers or to health care workers.<sup>131</sup> And there also seems to be evidence that some extremist groups are, in fact, trying to weaponize the use of COVID-19. Obviously, threats from these groups would seem to lie close to the core of "terroristic threatening."<sup>132</sup>

We mean only to bring a note of caution to our present situation. There may be other, lesser charges that are adequate for many of these cases, and even if they can be charged as terroristic threats, this may not be the most appropriate charge, especially when there is a need to lessen overcrowding in prisons and jails.<sup>133</sup> It may be best for states and localities to focus on the core cases, and not get distracted by acts that are more foolish than they are intentionally malicious.<sup>134</sup>

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<sup>131</sup> See, e.g., Chris Ryan, *N.J. Woman Allegedly Hit, Scratched and Spit on Nurse While Claiming to Have Coronavirus*, NJ.COM (May 1, 2020), <https://www.nj.com/coronavirus/2020/05/nj-woman-allegedly-hit-scratched-and-spit-on-nurse-while-claiming-to-have-coronavirus.html> [<https://perma.cc/J4LX-VH5S>] ("A New Jersey woman was charged with making terroristic threats and other charges after she allegedly intentionally coughed on healthcare workers and attacked a nurse while claiming to be positive for the coronavirus.").

<sup>132</sup> See Khalil, *supra* note 10.

<sup>133</sup> See, e.g., Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, J. CRIM. LAW & CRIMINOLOGY (forthcoming).

<sup>134</sup> See also Khalil, *supra* note 10 ("[T]he new . . . guidance addressing those threats has the potential to expand the definition of terrorism beyond what should be acceptable—while also not addressing what needs addressing in the United States, which is the need for carefully constructed domestic terrorism laws . . .").