THE MATERIAL SUPPORT STATUTES AND THEIR TENUOUS RELATIONSHIP WITH THE CONSTITUTION

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INTRODUCTION

Terrorism prosecution is a unique and innovative sphere in the American justice paradigm. Terrorism, unlike virtually every other criminal offense, is primarily subject to preventive prosecutions—that is, investigating, indicting, and prosecuting prospective terrorists before they can carry out their violent plans. The Department of Justice ("DOJ") adopted this prophylactic strategy in wake of the September 11, 2001 terrorist attacks in an effort to combat future terrorist endeavors.[1] The DOJ's new modus operandi was seemingly born from a desire to protect the country from future catastrophic attacks by authorizing federal agents to intervene earlier in the criminal timeline and prosecute suspects before they could set their schemes in motion. A study of all terrorism-related convictions from 2001 to 2010 found that 94.2% of those convictions "have been either preventive prosecution cases or cases that involved elements of prevention prosecution."[2] However, this preventative posture has not been reserved only for suspects with large-scale or even discrete plans for terrorism, but rather it has been used against any and all persons suspected of terrorism.

More than any other law, the material support statutes, 18 U.S.C. § 2339A and § 2339B, have embodied this policy, and have been wielded as powerful tools in anticipatory terrorism prosecutions.[3] The Supreme Court has said as much, definitively ruling that "[t]he material-support statute is,

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* J.D. Candidate, 2018, University of Pennsylvania Law School. Special thanks to Professor Adnan Zulfiqar for the guidance and sage advice.

1 Wadie E. Said, Humanitarian Law Project *and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455, 1479 (2011).

2 WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 4–5 (2015) (quoting STEPHEN DOWNS & KATHY MANLEY, PROJECT SALAM & NAT'L COAL. TO PROTECT CIV. FREEDOMS, INVENTING TERRORISTS: THE LAWFARE OF PREEMPTIVE PROSECUTION 2 (Jeanne Finley ed., 2014), http://www.projectsalam.org/inventing-terrorists-study.pdf).

3 18 U.S.C. §§ 2339A–B (2016) (making it a crime to provide material support or resources for a range of activities).

on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur."[4] Although § 2339A was initially passed some seven years prior to 9/11, its increasingly broad reach has made it a regular charge lodged by the United States government against alleged terrorists or alleged aiders and abettors of terrorism. Section 2339A criminalizes inchoate actions; most notably, it criminalizes actions taken in preparation for a conspiracy to be made.[5] Section 2339b, on the other hand, imposes a form of strict liability for support provided to designated foreign terrorist organizations, criminalizing "charity, solidarity, religious practice, and speech."[6] Under both prongs of this statute, many otherwise legal actions have fallen under the scope of the DOJ's criminal jurisdiction. Naturally, serious tension with several sacrosanct constitutional freedoms has grown apparent.

In particular, § 2339A and B prosecutions have created questions under, among others, the First and Fifth Amendments, resulting in litigation over the statutes' infringement on the rights guaranteed by those provisions. The material support statutes ostensibly infringe upon due process, freedom of speech, and equal protection interests, and despite a deluge of lower federal court rulings finding these individual infringements to be reasonable or unavoidable, many § 2339A and B prosecutions seem increasingly untenable under the Constitution. Either the Constitution provides the same protections and safeguards for all criminal suspects, or the protections it espouses are nothing more than hollow words, at the mercy of the government's capriciousness. If the former is true, then a significant portion of the material support prosecutions are, in varying degrees of severity, in conflict with the aforementioned constitutional rights.

Prophylactic prosecution relies on a necessary enlargement of complicity and conspiracy liability, which will likely, in light of American jurisprudence's preference for trans-substantivity, expand beyond the terrorism realm, therefore increasing criminal liability at the expense of longstanding enumerated rights. Moreover, anticipatory prosecution augments the risk of false-positives, or prosecuting individuals who would not have gone on to commit the act, as well as the risk of prosecuting "dissenting thought uncoupled from culpable action."[7] If the Constitution is to retain its supreme protections, these problematic prosecutions, particularly those pursuant to §§ 2339A and B, must be struck down and prohibited by the courts.

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

5 *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 480 (2007) (describing the reach of § 2339A to highly inchoate crimes).

6 *Id.* at 478 (noting that § 2339B imposes a form of strict liability); *see also* SAID, *supra* note 2, at 6 (explaining the broad range of activities the government has criminalized under the material support statute).

7 Chesney, *supra* note 5, at 426, 427.

For the purposes of this analysis, only terrorism prosecutions pursuant to the material support statutes will be considered. By way of clarification, material support prosecutions are not per se unreasonable or irreconcilable with the Constitution; however, certain provisions of §§ 2339A and B, and the manner in which the DOJ has leveraged these provisions in prosecuting alleged terrorists creates serious tension with a variety of constitutional protections. Those provisions, the related prosecutions, and their constitutionality are the primary subjects of the forthcoming paragraphs. This analysis will begin with an overview of the statutes themselves and then turn to an evaluation of certain material support prosecutions under the lens of the constitutional rights to due process and freedom of speech and association. Lastly, it will consider feasible alternatives to combatting and preventing terrorism without, or with a curtailed, material support regime. This analysis will not dedicate time delving into arguments that have been definitively rejected by the courts, and instead will focus on viable or live arguments still feasible in litigation. Moreover, due to both time and space constraints, this will not be an exhaustive constitutional analysis, and it will be limited just to arguments under the First and Fifth Amendments.

I. 18 U.S.C. § 2339A, § 2339B

A. 18 U.S.C. § 2339A

Section 2339A, initially passed in 1994, criminalizes providing material support to anyone with the knowledge or intention that the provisions will be used to commit one or more of a sundry of predicate offenses.[8] It is most prevalently utilized where the suspects are not linked to a foreign terrorist organization ("FTO"), and are therefore not subject to § 2339B, which has a comparatively lower scienter requirement, and is accordingly easier to successfully lodge against terror suspects.[9] Section 2339A enumerates, in pertinent part: "Offense.—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 laws]."[10] The statute lists a multitude of underlying crimes, where the provision of material support to

8 18 U.S.C. § 2339A(a).

9 Chesney, *supra* note 5, at 475–76, 478 (noting that § 2339A charges are "particularly important in cases where there does not appear to be an FTO link" and that "of the twenty-three defendants charged with one or more violations of § 2339A, only six . . . were charged with a § 2339B, FTO-based violation").

10 18 U.S.C. § 2339A(a) (emphasis added).

commit those offenses is criminalized. These predicate offenses include: destruction of aircraft, violence at international airports, damaging nuclear facilities, bombing, murder of a foreign dignitary, conspiracy to commit certain violent crimes overseas, and so on and so forth.[11] One serious concern here is the heightened level of inchoateness, or the distance the accused was from actually executing the nefarious plan, that is being criminalized under this law. It effectively creates criminal liability for whoever knowingly provides or conceals material support in preparation for a conspiracy to be formed to commit a predicate offense, many of which are conspiracies as well.[12]

Conspiracy liability is itself inchoate, criminalizing the intent to commit a crime where that intent is joined with the act of agreeing with others to perpetrate the crime.[13] Importantly, conspiracy liability only requires specificity to the type of crime to be executed; details on carrying out the crime itself are unnecessary.[14] Thus, furnishing material support for the preparation of an agreement to engage in certain criminal offenses is made illegal by § 2339A—in other words, "conspiracies to provide material support to conspiracies" are criminalized.[15] Professor Robert Chesney has aptly described this § 2339A as "prohibiting the provision of support with intent to facilitate either a violation of a predicate statute *or* activity preliminary to such a violation."[16] This issue has already reached the courts and will be subject to further analysis.

In addition, the legislators defined several key terms, including material support:

> [T]he term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials[.][17]

This definition is, in a word, broad, casting a wide net over a myriad of actions, including the provision of oneself as "material support." Nevertheless, the statute is narrowed by the ascribed mens rea requirement of "knowing or

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11 *Id.*

12 *Id.*

13 *See* Chesney, *supra* note 5, at 448 (defining conspiracy liability).

14 *Id.* at 451.

15 DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 571 (Vicki Been et al. eds., 2014).

16 Chesney, *supra* note 5, at 479.

17 18 U.S.C. § 2339A(b)(1).

intending,"[18] effectively destroying strict liability or liability for mere negligent conduct. Courts have found this scienter requirement to be significant in determining that § 2339A is indeed constitutional.[19] Nevertheless, the "conspire to conspire" liability "impose[s] a form of inchoate criminal liability that otherwise might exceed the reach of federal law," making the statute a valuable device in anticipatory prosecutions.[20]

B. 18 U.S.C. § 2339B

Section 2339B, initially passed in 1996,[21] is confined to support provided to FTOs. It has been the government's statute of choice in anticipatory prosecutions, taking up ubiquitous residence in terrorism cases.[22] In pertinent part, the statute reads:

> Unlawful conduct.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both . . . . To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).[23]

A designated terrorist organization is one that is so designated by the Secretary of State.[24] To complete such a designation, the Secretary must find that the group in question is a "foreign organization"; that it engages or intends to engage in "terrorist activity . . . or terrorism"; and that they are a threat to national security.[25] Relatedly, terrorism is defined as: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[26] Section 2339B excludes independent conduct, free of ties to any terrorist organization: "Individuals who act entirely independently of the foreign terrorist organization to advance its

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18 *Id.* § 2339A(a).

19 *E.g.*, United States v. Awan, 459 F. Supp. 2d 167, 179 (E.D.N.Y. 2006) (stating that where a statute's prohibited conduct is made specific and easily understandable to a person of "ordinary intelligence," then that statute is not impermissibly vague); United States v. Sattar, 314 F. Supp. 2d 279, 305 (S.D.N.Y. 2004) (finding that § 2339A, which "prohibits the provision of material support or resources knowing or intending that they are to be used in preparation for, or in carrying out, a violation of certain enumerated federal crimes," is not unconstitutionally overbroad).

20 Chesney, *supra* note 5, at 479.

21 Antiterrorism and Effective Dealth Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (codified as amended at 18 U.S.C. § 2339B (2016)).

22 SAID, *supra* note 2, at 51 (describing the widespread use of § 2339B in terrorism prosecution).

23 18 U.S.C. § 2339B(a)(1) (2016).

24 8 U.S.C. § 1189(a)(1), (d)(4) (2006).

25 *Id.* § 1189(a)(1)(A)–(C).

26 22 U.S.C. § 2656f(d)(2) (2006).

goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."[27] Moreover, material support here shares the definition enumerated in § 2339A.[28]

To establish liability, the statute only requires that a person knowingly furnish, attempt to furnish, or conspire to furnish aid to an FTO—a showing of specific intent to further or support the group's terrorism is markedly absent.[29] This means that one can donate or provide another form of support to an FTO, not with the intent to facilitate terrorism, but for some other purpose that the organization so engages, and that aid, intended to further a nonviolent, potentially even humanitarian endeavor, will still spur criminal liability per § 2339B. Many FTOs do not consider themselves terrorists or malevolent actors; yes, they engage in violence, but it is, in their view, justified, and they typically engage in a variety of other practices that, for example, includes education, tending to the wellbeing of their communities, and advancing the social capital of their historically oppressed subgroup.[30]

This was the cause of action in *Humanitarian Law Project*, a salient, and rare, Supreme Court opinion on the constitutionality of § 2339B. The respondents challenged the statute's criminalization of nonviolent support to the Partiya Karkeran Kurdistan, or PKK, and the Liberation Tigers of Tamil Eelam, or LTTE.[31] Each group is involved in both violent and nonviolent endeavors in advancing the interests of the ethnic groups they represent, the Kurds and Tamils, respectively.[32] Respondents sought to instruct and train these groups to use international law, political advocacy, and the United Nations to further their causes.[33] Respondents argued that prohibiting the petitioners from providing this type of support is a violation of the First Amendment's right to freedom of speech; however, the Court found that Congress had clearly intended such support to attach criminal liability under § 2339B because of the fungibility of support provided to FTOs, who "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[34] That is, any support provided to

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27 § 2339B(h); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 23 (2010) (holding that § 2339B does not prohibit independent advocacy).

28 § 2339B(g)(4)

29 § 2339B(a)(1).

30 *See generally* PARTIYA KARKERÊN KURDISTAN, https://www.pkkonline.com/en/ (last visited Sept. 16, 2017) (the PKK's official website listing its objectives, its engagements, as well as news and articles about the group, thus demonstrating that the PKK is involved in more than just violent endeavors).

31 *Humanitarian Law Project*, 561 U.S. at 8–10.

32 *Id.* at 14–15.

33 *Id.*

34 *Id.* at 37–38 (internal quotations omitted) (quoting Antiterrorism and Effective Death Penalty Act of 1996 § 301(a)(7), Pub. L. No. 104-132, 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)).

such an organization will only free up their remaining resources to be put towards the terrorism they perpetrate.[35] The Court proceeded to approve the statute and its reach to nonviolent support following a strict scrutiny inquiry, validating § 2339B's freedom of speech conscription.[36] The Court's finding here will be subject to further analysis in the below sections.

II. DUE PROCESS TENSIONS

Both §§ 2339A and B present apparent conflicts with the Constitution's expansive due process protection. Many of these conflicts have already been raised at the district and circuit court level, but only one pertinent case has received direct Supreme Court scrutiny—the aforementioned *Humanitarian Law Project* case. Thus, many of these issues have not yet been definitively decided, nor have all issues been rigorously litigated in front of a tribunal. Indeed, some of these issues have only been considered in dicta.

The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law."[37] The Supreme Court has long interpreted due process to contain both procedural and substantive protections from actions taken by the government.[38] Due process has enveloped a variety of protections, including actual process, for example, which essentially requires that in the case of fundamental rights, some sort of procedure and a real opportunity for affected parties to oppose the government's actions be afforded.[39] Moreover, due process is generally the constitutional touchstone for the mens rea stipulation in criminal law.[40] Due process challenges to the material support statutes are standard, though these challenges take different forms.

A. Section 2339A and Due Process

Section 2339A has been primarily challenged under the aforementioned "conspire to conspire" liability that it creates, which is not dependent on the predicate crime ever actually being executed.[41] Although, this has not been

35 *Id.*

36 *Id.* at 36.

37 U.S. CONST. amend. V.

38 *Compare* Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976) (discussing when procedural safeguards are required under due process), *with* Scales v. United States, 367 U.S. 203, 224–25 (1961) (requiring personal culpability for criminal liability).

39 *See generally Eldridge*, 424 U.S. at 332–35 (outlining what due process requires before certain property or liberty interests can be deprived).

40 *See generally Scales*, 367 U.S. at 224–27 (explaining that mens rea for criminal punishment is required to establish the sufficiency of guilt because guilt is personal).

41 *See* Chesney, *supra* note 5, at 491–92 (explaining that § 2339A does not require a substantial step towards the commission of a predicate offense and discussing the utility and risks of this approach).

outright classified by many courts as a due process question, it does raise substantive due process concerns. Due process stipulates mens rea as a limit on criminal liability; similarly, due process ascribes limitations to conspiracy liability—requiring specific conduct, such as an agreement to perpetrate a crime, be present—and to attempt liability—requiring that that a substantial step be taken towards the commission of a crime.[42]

An appeal containing an objection to the "conspiracy to conspiracy" liability created by § 2339A was notably taken up in *United States v. Khan*.[43] Therein, defendants appealed their terrorism convictions, one of which was pursuant to conspiracy under § 2339A, where the predicate offense was also a conspiracy.[44] Defendants challenged this conviction, arguing that it is inappropriate and unjust for criminal liability to attach in a multi-inchoate offense such as this, or, in other words, that conspiring to conspire is not criminal behavior.[45] The court dismantled this argument, holding that the statutory text of § 2339A expressly permitted "one conspiracy to serve as a predicate for another conspiracy. Nothing about this framework is unconstitutional, improper, or even unusual."[46] So long as the two conspiracies are "distinct offenses with entirely different objectives," there is no constitutional issue.[47] To fortify this finding, the court pointed to the Racketeer Influenced and Corrupt Organizations ("RICO") paradigm, where analogous dual conspiracy liability is permitted.[48]

Notwithstanding the decisive *Khan* ruling, there is a substantial difference between the predicate conspiracy liability in the RICO conspiracy paradigm and the material support paradigm. Primarily, the underlying offenses are more heinous, and entail a heightened level of criminal character in the RICO scheme. For example, in *United States v. Ruggiero*, the RICO case cited by the *Khan* court, the predicate conspiracies were conspiracy to murder and conspiracy to distribute Quaaludes.[49] These offenses are not the same as a conspiracy to provide material support to be used in preparation for a conspiracy to commit an enumerated, terrorist-related offense. The underlying offense in the material support realm is the § 2339A conspiracy to provide material support because it attaches one of the secondary offenses, i.e. conspiracy to destroy an

42 *See id.* at 453 (citing United States v. Provenzano, 615 F.2d 37, 44 (2d Cir. 1980) (requiring an agreement to commit a particular offense)); MODEL PENAL CODE AND COMMENTARIES § 5.01(1)(c) (AM. LAW INST., Proposed Official Draft 1962).

43 461 F.3d 477, 493 (4th Cir. 2006).

44 *Id.* at 483, 486–87; 18 U.S.C. § 956 (2016) (criminalizing a conspiracy to kill, kidnap, maim, or injure persons, or damage property in a foreign country).

45 *Khan*, 461 F.3d at 492.

46 *Id.* at 492–93.

47 *Id.* (citing United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990)).

48 *Id.* (citing United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir. 1984)).

49 *Ruggiero*, 726 F.2d 913 at 918.

aircraft, and without it, the secondary offense could not be brought. In the RICO context, like in *Ruggiero,* the underlying offense is not the RICO conspiracy, but the predicate conspiracies, i.e. conspiracy to murder, that attach the RICO conspiracy, which could not have otherwise been brought.[50]

The *Khan* court made an unreasonable comparison by analogizing the conspiracies to murder and distribute lethal drugs in connection with a RICO conspiracy, with a conspiracy to provide material support to prepare for a conspiracy to commit a crime.[51] The latter is more inchoate and involves considerable separation from the suspect and the would-be terrorist attack. The crime in question is not imminent, not specific, nor is it even guaranteed to occur—the personal culpability is lower here relative to such culpability in the RICO context. In regards to due process, the liability under § 2339A attaches so early and at such an inchoate time that it seems unreasonable; this alone is not sufficient to establish unconstitutionality, but no other statute or liability regime attaches in this manner, including the RICO sphere, as suggested by the *Khan* court.

Additionally, consider the premature liability that attaches here and how it contravenes the longstanding abandonment defense in attempt doctrine. It is clear that, without the material support statute, individuals conspiring to provide material support to prepare for a conspiracy to commit an enumerated offense would not be liable under attempt doctrine.[52] Attempt liability distinguishes between mere preparations and actual attempts, and typically requires an intention to commit the crime as well as a substantial, overt step to be taken towards the commission of that crime.[53] The abandonment defense is a full defense that is available up until the point where criminal liability attaches; abandonment occurs when a suspect abandons the effort to commit the crime and "manifest[s] a complete and voluntary renunciation of [the] criminal purpose."[54] This is valuable in allowing would-be miscreants to reconsider their criminal endeavors with an incentive to abandon the crime and avoid all liability. But in the Section 2339A context, liability attaches so early on and at such an inchoate level that the abandonment defense is not viable.

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50 *Id.* (clarifying that to satisfy the RICO conspiracy's statutory requirements, each defendant has been charged with at least two predicate acts, all of which are conspiracies).

51 *See Khan*, 461 F.3d at 493 (comparing *Ruggiero* to the instant case because in both the "[overarching] conspiracy and predicate conspiracy are distinct offenses with entirely different objectives." (alterations in original) (citing *Ruggiero*, 726 F.2d at 918)).

52 MODEL PENAL CODE § 5.01(1)(c) (AM. LAW INST. 1962) (mandating that someone may be held culpable under attempt liability when, having the required mental state, he does or fails to do something that is an act or omission that is considered a substantial step towards the commission of a crime).

53 *Id.*

54 *Id.* § 5.01(4).

Relatedly, without § 2339A, those "conspiring to conspire" would not be liable under conspiracy for the enumerated offense; that is, without the material support provision, the government would not be able to charge the suspect with the predicate conspiracy.[55] Conspiracy liability generally attaches when an agreement is made with the intention to commit a specific crime. [56] Section 2339A is the only option available to prosecutors to criminally charge suspects, who otherwise have yet to violate any laws.[57] This is problematic because no other regime allows for conspiracies to be predicate offenses for conspiracies at such inchoate and personally inculpable levels. Despite Congress' decision to structure the statute in this manner, which the courts have afforded great weight to in analyzing its constitutionality, [58] this is violative of the spirit of due process and the protections it accords to citizens in criminal punishments.

B. Section 2339B and Due Process

The due process issues that arise under § 2339B are distinct from those discussed in the previous section. Here, defendants rely on *Scales v. United States* to argue that due process requires specific intent to further a group's unlawful ends be proven to prosecute membership; mere membership alone, defendants contend, cannot be constitutionally criminalized.[59] It is well established that criminal punishment cannot be sanctioned without some level of personal culpability.[60] Moreover, for criminal liability to lie in association prosecutions, specific intent to further the illegal objectives of that group must be shown to satisfy the personal culpability requirement.[61] Section 2339B does not adopt a specific-intent requirement and instead establishes liability only where material support is provided to an FTO.[62] This discrepancy has been the subject of various litigations. In *Humanitarian Law Project*, the Court

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55 *See* Chesney, *supra* note 5, at 479–80 (arguing that the broad scope of the material support provision in §2339A provides the government with a greater preventative capacity).

56 *Id.* at 448.

57 *Id.* at 479–80 (explaining that § 2339A is an important tool for prosecutors because it applies regardless of if the predicate offense actually occurs).

58 *See* United States v. Khan, 461 F.3d 477, 493 (4th Cir. 2006) (stating that the statutes, and accordingly their authors, "expressly contemplate allowing one conspiracy to serve as the predicate offense for another conspiracy" in defending their legality).

59 367 U.S. 203, 225, 227 (1961) (holding that associational relationships must be accompanied by specific criminal activity to be consistent with the law of conspiracy and complicity).

60 *See* Benjamin Yaster, *Resetting* Scales*: An Examination of Due Process Rights in Material Support Prosecutions*, 83 N.Y.U. L. REV. 1353, 1356 (2008) (citing Morissette v. United States, 342 U.S. 246, 251–52 (1952)) (asserting that the belief that punishment and retribution are only appropriate for those who are culpable is fundamental to American criminal law).

61 *Id.* at 1358 (citing United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995)).

62 18 U.S.C. § 2339B(a)(1) (2016) (imposing liability for anyone who "knowingly provides material support or resources to a foreign terrorist organization").

refuted this argument, and refused to impute the intent requirement to § 2339B.[63] Finding that Congress made it abundantly obvious that it had no desire to augment the mens rea requirement in the way the defendants sought, and that *Scales* was distinguishable from the material support statute, the Court summarily dismissed this argument.[64] Nevertheless, the Court never considered the due process element of this argument; it merely held that even though it will construe legislation so that it comports with the Constitution, it will not revise a statute, against the will of Congress, in a way that will ultimately pervert the purpose of the statute.[65] Yet, if it can be demonstrated that the Constitution does indeed require a specific intent requirement for association prosecutions, then the Court would have no choice but to construe the statute accordingly, or strike down the relevant provisions as unconstitutional.

Professor Benjamin Yaster argues that because Court in *Scales* bifurcated its analysis, it found both First and Fifth Amendment rights in association prosecutions—freedom of association and freedom from criminal sanctions without personal culpability, respectively.[66] Evidently, membership liability was found to be more than just a province of the First Amendment's freedom of association; it also is subject to the due process stipulation that criminal punishment can only be doled out where one is personally culpable, here meaning that she intended to further the illicit ends of the organization or that she had a "sufficiently substantial" relationship to that group.[67] The due process test used in *Scales* "prohibits punishment of a defendant for 'the relationship of [her] status or conduct to [another's] concededly criminal activity' when that relationship is less than substantial."[68] Moreover, Professor Yaster states that "the touchstone is simply the nature of the defendant's conduct and her mental state, and whether these amount to a finding that, indeed, the defendant was personally culpable for the illegal acts an associate committed."[69] In *Humanitarian Law Project*, the Court never expressly discussed the due process arguments against mere membership liability, failing

63 Holder v. Humanitarian Law Project, 561 U.S. 1, 17 (2010) (asserting that § 2339B had no textual basis to require intent in some circumstances).

64 *Id.* at 16–18 (declining to find a requirement for specific intent in § 2339B because such a requirement was not supported by case law or congressional intent).

65 *Id.* at 17 ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute." (quoting Scales v. United States, 367 U.S. 203, 211 (1961))).

66 Yaster, *supra* note 60, at 1360, 1372.

67 *Id.* at 1360 (questioning the relationship between freedom of association and a prohibition on guilt by association); *id.* at 1373 (citing *Scales*, 367 U.S. at 225).

68 *Id.* at 1374 (alterations in original) (quoting *Scales*, 367 U.S. at 224–25).

69 *Id.* (citing *Scales*, 367 U.S. at 224–25).

to even discuss the sufficiently substantial relationship outlined in *Scales*. Accordingly, a defendant who maintains this due process argument, citing the extensive judicial history that applied and expanded *Scales* to prohibit such criminalization, may receive a more narrow analysis from the Court.[70] This tension between § 2339B, *Scales*, and the due process right will continue to be the basis of criminal defenses to material support prosecutions because of the evident inconsistency and disharmony between the protections espoused by the Constitution and § 2339B's essentially strict liability regime.

One argument that was not made in *Humanitarian Law Project* and was thus not subject to the Court's scrutiny, was whether § 2339B "grants too much enforcement discretion to the Government."[71] This is a derivative of the due process vagueness argument, maintaining that the statutes vagueness facilitates its arbitrary and even discriminatory enforcement, violating the Fifth Amendment.[72]

It is unclear whether there is enough evidence for this standard to be satisfied here. Nevertheless, it is no secret that seemingly the vast majority of suspects accused of terrorism are either Muslim or are connected to one of the Middle East or the sub-Asian continent, as evidenced by Guantanamo Bay's detainee demographics: every one of its 780 prisoners were either Muslim or resided in a so called "Muslim majority" country.[73] A defendant may attempt to establish discriminatory enforcement to compel a finding of illicit enforcement discretion. In *Khan*, the defendants made a similar selective prosecution argument, invoking the Constitution's equal protection right.[74] They contended that the material support statutes were not being used to prosecute individuals who provided material support to the Irish Republican Army and the Cambodian Freedom Fighters, two designated FTOs that have no connection to Islam or the so-called Muslim-world.[75] The court brusquely rejected this argument, holding that the defendants failed to show that individuals similarly situated to themselves were selectively not prosecuted under § 2339A or B, and that "[t]he Executive branch has the right to focus its prosecutorial energies on alleged terrorists groups that present the most direct threat to the United States and its interests."[76] Notwithstanding

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70 *See generally id.* (citing a multitude of cases applying or expanding *Scales*).

71 Holder v. Humanitarian Law Project, 561 U.S. 1, 20 (2010).

72 *See* City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (holding that statutes must provide "sufficiently specific limits on the enforcement discretion of the police 'to meet the constitutional standards for definiteness and clarity.'" (quoting City of Chicago v. Morales, 687 N.E.2d 53, 64 (Ill. 1997))).

73 Andre Scheinkman, Alan McLean, Jeremy Ashkenas, Archie Tse & Jacob Harris, *A History of the Detainee Population*, N.Y. TIMES (Oct. 10, 2017, 10:40 PM), https://www.nytimes.com/interactive/projects/guantanamo.

74 U.S. v. Khan, 461 F.3d 477, 497–98 (4th Cir. 2006).

75 *Id.* at 498.

76 *Id.*

the second part of that determination, a showing of discriminatory enforcement, as a result of excessive enforcement discretion, is a viable claim where claimants can point to similarly situated individuals that received favorable prosecutorial treatment, which would presumably defeat the material support charge.[77] However, it is unclear what exactly will establish that the statute failed to meet the Constitution's requirement of "definiteness and clarity."[78] A showing of disparate impact through a statistical analysis of all those prosecuted under § 2339A and B would be insufficient to state an equal protection violation under the Fourteenth Amendment.[79] An additional showing of discriminatory intent would also be required under the aforementioned claim.[80] It is not immediately clear whether the courts would require such a burdensome showing to make a discriminatory enforcement claim under due process, but, ostensibly, a showing of disparate impact in material support prosecutions is reasonably plausible.

III. FREEDOM OF SPEECH TENSIONS

This analysis will be cabined to § 2339B because it has been the primary and regular subject of freedom of speech attacks.[81] Forms of speech can constitute material support and accordingly § 2339B does restrict the freedom of speech. The Court conceded as much in *Humanitarian Law Project*, but following a balancing test, the constraint, and the statute, were upheld.[82] This is part of a broader restriction on speech across the federal criminal landscape, where "endangerment speech crimes," or "prohibitions that target expression that ostensibly increase the likelihood of inflicting future harm."[83] The increase in statutory limitations to expression and speech are closely tied to the government's recent emphasis on prophylactic prosecutions.[84]

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77 *See Morales*, 527 U.S. at 51, 64 (finding the city ordinance such that it would lead to arbitrary enforcement). *But see* Holder v. Humanitarian Law Project, 561 U.S. 1, 20 (2010) (enforcing rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.").

78 *Morales*, 527 U.S. at 64.

79 *See generally* Washington v. Davis, 426 U.S. 229, 238–39 (1976) (requiring a showing of discriminatory intent, not just disparate impact, to establish an equal protection claim).

80 *Id.*

81 *See generally Humanitarian Law Project*, 561 U.S. at 14 (analyzing the scope of § 2339B burdens on free speech); United States v. Mehanna, 735 F.3d 32, 40 (1st Cir. 2013) (exploring the fine line between national security and protection of First Amendment rights).

82 *Humanitarian Law Project*, 561 U.S. at 36–37 (2010).

83 *See* Michael Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1671 (2015) (detailing recent federal statutes and cases that restrict expression and speech to determine when it is appropriate to criminalize speech).

84 *Id.* at 1675.

In *Humanitarian Law Project*, the Court balanced § 2339B's restriction on coordinated speech with an FTO in the form of training for peaceful redress, and the government's compelling interest in preventing terrorism; finding that independent advocacy and speech are protected, and that the statute criminalizes only speech synchronized with an FTO, or speech at the direction of an FTO, which due to the fungibility of support, increases the likelihood of terror attacks, the Court ruled that the restriction was permissible.[85] But the dissent therein argued against fungibility, questioning whether providing a multi-faceted FTO, like the PKK, with training on petitioning the United Nations for peaceful resolution of disputes would indeed lead the PKK to have an increased capacity for carrying out terrorism.[86] The dissent argues that the majority's ruling does not comport with the First Amendment, and that the statute should properly be read as to criminalize "First Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions."[87] The government's fungibility argument is tenuous at best, and as the dissent pointed out, the government failed to provide any empirical data demonstrating that material support in the form of speech is fungible, thereby increasing an organization's ability to conduct terrorism.[88] It is unlikely that the fungibility argument is capacious enough to cover all speech that may fall under the scope of § 2339B. Short of the Department of Justice developing empirical evidence, it is possible that a future case, under the right circumstances, could exploit this weakness in the majority's opinion in *Humanitarian Law Project*, thus successfully challenging the § 2339B's constraint on the First Amendment.

In *Humanitarian Law Project*, the Court repeatedly maintained that § 2339B did not interfere with independent speech or advocacy, and its eventual ruling upholding the statute's restriction on speech was based, in part, on the determination that independent advocacy was not infringed upon in the case.[89] Yet, in *United States v. Mehanna*, the court ruled that the decision in *Humanitarian Law Project*, and the statute itself, did not stipulate that a suspect have a direct connection with the FTO to be liable.[90] In an apparent blow to the independent advocacy protection, the defendant's § 2339B conviction for translating an FTO's propaganda into English and posting it online was upheld despite there being limited, possibly insufficient, evidence connecting the defendant to the FTO.[91] Based on the majority's posture in *Humanitarian Law Project*, it

85 *Humanitarian Law Project*, 561 U.S. at 26, 36–39.
86 *Id.* at 47–48 (Breyer, J., dissenting).
87 *Id.* at 56.
88 *Id.* at 47.
89 *Id.* at 26 (majority opinion).
90 735 F.3d 32, 50 (1st Cir. 2013).
91 *Id.*

is highly likely that the Court would reconsider its ruling in regards to § 2339B's limiting effect on speech and expression. What seems inevitable is that as prosecutors intervene earlier, and more speech, including independent speech, is criminalized, the courts will push back and strike down the more egregious convictions in an effort to preserve the First Amendment.

IV. ALTERNATIVES

Terrorism is a real and viable international threat. The government undeniably has a compelling interest to prevent terror attacks, and the material support statutes are effective tools in the pursuit of that interest. Provided that this is not a call for § 2339A and B to be summarily erased from the United States Code, it is still important to analyze the statutes, their application, and the effects they have on the Constitution. The sheer volume of literature and cases challenging the constitutionality of § 2339A and B is enough to suggest that there may be some conflict, and upon closer consideration, there is absolutely room for the courts to find certain applications of the material support statutes unconstitutional, namely the criminalization of "conspiring to conspire," and nonviolent advocacy. In the alternative, government can still bring material support charges, among other terror-related charges, against more culpable suspects. Yes, that means the government will have to wait longer before intervening, but that is precisely what Department of Justice does in virtually every other criminal offense. In fact, waiting longer to intervene and arrest a suspect provides law enforcement with more time to gather evidence and intelligence, limiting the arrests of false-positives, and focusing the government's, and in turn, the courts', efforts on the most likely and dangerous suspects.[92]

CONCLUSION

The material support statutes created extensive liability to nearly unprecedented levels. With the criminal liability swelling and attaching earlier than ever before, § 2339A and B have engendered numerous constitutional attacks. Not many have been found persuasive by the justice system, although that may be due in part to the fact that alleged terrorists are arguably the least sympathetic defendants in post-9/11 America. Nevertheless, many of these challenges are not wanting for merit. Serious constitutional issues persist with the statutes, and given the right circumstances, those issues may be exploited to strike down certain applications or provisions. For example, the multi-level inchoate, "conspiring to conspire" could be in violation of the Constitution's guarantee to due process; moreover, § 2339B's criminalization

92 *See generally* Chesney, *supra* note 5, at 434–36 (weighing the pros and cons of early intervention).

of speech, including, albeit gradually, independent advocacy, could be violative of the freedom of speech. The Constitution's protections apply to every defendant subject to the American penal system.[93] The Constitution's protections apply irrespective of the crime committed. The material support statutes should not be afforded special status, nor should they be exempt from the rigorous scrutiny the Constitution imposes on all statutes that infringe upon its provisions.

93 *See generally* Boumediene v. Bush, 553 U.S. 723 (2008) (holding that noncitizens arrested abroad still have constitutional rights, subject to a multi-factor balancing test).