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MATERIAL SUPPORT AND THE FIRST AMENDMENT: ELIMINATING TERRORIST SUPPORT BY PUNISHING THOSE WITH NO INTENTION TO SUPPORT TERROR?

*Bradley A. Parker**

The most odious of all oppressions are those which mask as justice.
Justice Robert H. Jackson¹

INTRODUCTION

The September 11, 2001 attacks on the World Trade Center and the Pentagon fundamentally changed the way that law enforcement officials operate and address terrorist threats. Immediately after the attacks, the Department of Justice (“DOJ”) implemented new procedures that were expected to help prevent and obstruct future acts of terror that appeared to be imminent.² In the process, the DOJ vowed to use every available law to combat the threat that this new kind of enemy now posed to individuals within the United States.³ The exigency to obstruct future attacks led to the reevaluation and broad reinterpretation of existing laws that in some situations has been clearly unconstitutional. Broad interpretations of seemingly narrow statutes were thought necessary in order to allow law enforcement officials to effectively obstruct and prevent future attacks.

The coordination of the attacks and the destruction that it caused shocked the world and alerted many to the reality that fundamentalist and extremist groups were organized and could attack

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¹ *Krulwitch v. U.S.*, 336 U.S. 440, 458 (1949) (Jackson, J., concurring).

² See generally U.S. DEP’T OF JUSTICE, COUNTERTERRORISM SECTION, COUNTERTERRORISM WHITE PAPER (June 22, 2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

³ Attorney General John Ashcroft, Testimony Before the National Commission on Terrorist Attacks Upon the United States (Apr. 13, 2004) (“Had I known a terrorist attack on the United States was imminent in 2001, I would have unloaded our full arsenal of weaponry against it—despite the inevitable criticism. The Justice Department’s warriors, our agents, and our prosecutors would have been unleashed. Every tough tactic we have deployed since the attacks would have been deployed before the attacks.”), http://www.9-11commission.gov/hearings/hearing10/ashcroft_statement.pdf.

us in our own communities. There was an urgent demand to hold those responsible for the attacks accountable and even before the second tower had collapsed Osama bin Laden and al-Qaeda were presumed to be responsible. Many people around the world were learning about bin Laden, al-Qaeda and Islamists for the first time while “experts” on Islamic Law were discussing the foundations and history of Qur’anic interpretations supporting the Islamists’ views that led to the September 11 attacks. Al-Qaeda had inflicted a devastating blow to the American psyche that propelled Osama bin Laden to the front pages of newspapers around the world as well as to the top of the Federal Bureau of Investigation’s (“FBI”) most wanted lists.⁴

The Department of Justice, under pressure from the President and state law enforcement agencies to prevent and obstruct future attacks, pledged to protect America using all available law enforcement tools. Then-acting U.S. Attorney General John Ashcroft stated: “We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.”⁵ These statements marked a watershed moment in the methods and procedures that were used to combat terrorism.

The Department of Justice’s shift from the traditional prosecution of suspected terrorists to the prevention of attacks before they occurred⁶ gained traction in the terrorism support statutes⁷ and the federal material witness law.⁸ Both were used as tools to preventively detain and target individuals who were suspected of being members of or supporting terrorist organizations.⁹

⁴ See Federal Bureau of Investigation, The FBI’s Ten Most Wanted Fugitives, <http://www.fbi.gov/wanted/topten/fugitives/fugitives.htm> (last visited Jan. 30, 2010); Federal Bureau of Investigation, FBI’s Most Wanted Terrorists, <http://www.fbi.gov/wanted/terrorists/fugitives.htm> (last visited Jan. 30, 2010); David Johnston & Philip Shenon, *A Nation Challenged: The Investigation; U.S. Lists Most Wanted Terrorists and Offers Reward of Millions*, N.Y. TIMES, Oct. 11, 2001, at A1.

⁵ U.S. Att’y Gen. John Ashcroft, Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), available at http://www.justice.gov/archive/ag/speeches/2001/ag_crisisremarks10_25.htm.

⁶ Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–27 (2005).

⁷ 18 U.S.C. § 2339A; 18 U.S.C. § 2339B (2006).

⁸ 18 U.S.C. § 3144 (2006); see HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005), available at <http://www.hrw.org/reports/2005/us0605/index.htm> (click “Misuse of the Material Witness Law to Hold Suspects as Witnesses”); see also Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22 (2009).

⁹ See Chesney, *supra* note 6, at 26–47.

The federal terrorism support statutes that ban and criminalize the provision of material support to designated foreign terrorist organizations have been broadly reinterpreted and applied outside of their original scope, which has resulted in violations of First Amendment rights. The Department of Justice's expansive and broad characterization of what constitutes material support has led to misguided prosecutions under the guise of the "War on Terror" that do nothing to actually combat the organizations and individuals that pose a clear and present danger to American lives.

In this Note, I argue that the present prohibition on providing material support to designated foreign terrorist organizations in the form of "expert advice and assistance" is misguided in the larger context of the interminable "War on Terror." The prohibition should be viewed as a violation of the First Amendment of the U.S. Constitution because the terrorism support statutes are not in accord with *Scales v. United States*¹⁰ and *Brandenburg v. Ohio*.¹¹ The broad interpretation of material support prohibitions is a throwback to McCarthyism and essentially criminalizes the provision of advice only when offered to a certain disfavored political organization that has been designated by the Secretary of State as a Foreign Terrorist Organization ("FTO"). Finally, I argue that material support statutes should be narrowly drawn, requiring specific intent to further the illegal aims of an FTO in order to prevent misguided prosecutions against individuals who have no intention to support the illegal aims of a designated FTO. Focusing law enforcement resources on individuals who do not intend to support violent or even illegal acts of an organization ultimately makes us more vulnerable to future attacks.

I. A HISTORY OF CRIMINALIZING MATERIAL SUPPORT

A. *Pre-September 11, 2001 Federal Material Support Statutes*

Following the 1993 bombing of the World Trade Center,¹² Congress passed legislation that had been in the works since 1991,¹³ which sought to eliminate economic support to terrorist organizations.¹⁴ The first material witness statute, codified as 18

¹⁰ *Scales v. United States*, 367 U.S. 203 (1961).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹² See Ralph Blumenthal, *Explosion at the Twin Towers: The Investigation; Bomb is Definite Answer, But All Else is Mystery*, N.Y. TIMES, Feb. 28, 1993, § 1, at 34; *The Twin Towers: The Complaint; Starting with Debris*, N.Y. TIMES, Mar. 5, 1993, at B3.

¹³ See Chesney, *supra* note 6, at 11–12.

¹⁴ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 120005, 108 Stat. 1796 (1994).

U.S.C. § 2339A, was part of this legislation. Section 2339A criminalized the provision of “material support” to any individual or organization when the donor “kn[ew] or intend[ed] that [the material support was] to be used in preparation for, or in carrying out” one or more criminal violations enumerated in the statute.¹⁵ This first material support statute only criminalized the provision of material support where the donor specifically intended for the aid to support terrorist activity.¹⁶ This narrow definition did not result in a complete ban on support for criminal activity because individuals

¹⁵ The first material support statute provided:

§ 2339A. Providing material support to terrorists

(a) DEFINITION.—In this section, ‘material support or resources’ means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, but does not include humanitarian assistance to persons not directly involved in such violations.

(b) OFFENSE.—A person who, within the United States, 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 section 32, 36, 351, 844 (f) or (i), 1114, 1116, 1203, 1361, 1363, 1751, 2280, 2281, 2331, or 2339 of this title or section 46502 of title 49, or in preparation for or carrying out the concealment of an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.

Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322, § 120005, 108 Stat. 1796 (1994); the current 18 U.S.C. § 2339A(a) provides:

(a) 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 section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

18 U.S.C. § 2339A (2006).

¹⁶ Recognizing that the term “terrorist activity” is subjective and generally has been used to describe a broad range of acts and conduct that may not even include violence, I have used the term throughout this paper in reference to the enumerated acts included in 18 U.S.C. § 2339A and § 2339B.

could still indirectly support terrorist activity as long as they did not specifically intend for their aid or support to do so.¹⁷ The specific-intent element was so stringent that § 2339A was not very useful or valuable to federal prosecutors in efforts to eliminate economic support for terrorism.¹⁸

While not extremely valuable to federal prosecutors, § 2339A is constitutional and does not violate the First Amendment. The Supreme Court has noted that the act of giving money can be considered an act of expression that deserves First Amendment protection.¹⁹ However, the government may ban speech “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰ An individual prosecuted under § 2339A must know or intend that his or her support will aid in the preparation or carrying out of criminal activity. The speech or material support is directed toward producing violence, which the defendant had the intention to support, and therefore would not be protected by the First Amendment.²¹

Following the bombing in Oklahoma City in 1995,²² Congress again attempted to eliminate the financing of terrorist organizations by enacting a more relaxed material support statute that would reach a broader range of individuals than the existing statute. Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”),²³ which created a second material support statute codified as 18 U.S.C. § 2339B.²⁴ Section 2339B used

¹⁷ Chesney, *supra* note 6, at 13.

¹⁸ *See id.* at 18–19.

¹⁹ *See Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (“Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).

²⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²¹ *See United States v. Lindh*, 212 F. Supp.2d 541, 569 (E.D. Va. 2002).

²² *See* John Kifner, *Terror in Oklahoma City: The Overview – At Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building; 12 Victims Were Children in 2d-Floor Day-Care Center*, N.Y. TIMES, Apr. 20, 1995, at A1; David Johnston, *Terror in Oklahoma: The Overview; Oklahoma Bombing Plotted for Months, Officials Say*, N.Y. TIMES, Apr. 25, 1995, at A1.

²³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, § 303, 110 Stat. 1214 (1996).

²⁴ Section 2339B as enacted in the AEDPA provided:

Providing material support or resources to designated foreign terrorist organizations

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or at-

the same definition of “material support” as § 2339A²⁵ but eliminated the specific-intent requirement where the recipient of the aid or support has been designated by the Secretary of State as a Foreign Terrorist Organization (“FTO”).²⁶ Under § 2339B an individual can be prosecuted for “knowingly provid[ing] material support or resources to a foreign terrorist organization.”²⁷ The omission of a specific intent requirement in § 2339B broadened its applicability and enhanced the utility of the statute but it was rarely used by federal prosecutors prior to September 11.²⁸

Interestingly, § 2339B originally contained a licensing scheme or exception for certain types of aid to groups that had been designated as an FTO.²⁹ Under this licensing scheme individuals or organizations would have been able to seek permission from the Department of the Treasury to provide certain types of aid or support to the designated FTO.³⁰ The Department of the Treasury could grant a “license only after the person establishes . . . that . . . the funds are intended to be used exclusively for religious, charitable, literary, or educational purposes;” and that all recipients have procedures that “ensure that the funds will be used exclusively for religious, charitable, literary, or educational purposes, and will not be used to offset a transfer of funds to be used in terrorist activity.”³¹ The proposed scheme would have required the donor and the recipient to keep a record of all transactions that took place and would have required production of those records on the de-

tempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2339B (2000).

²⁵ *Id.* § 2339 B(g)(4); *Cf. supra* note 15 for definition of “material support” under 18 U.S.C. § 2339A.

²⁶ 18 U.S.C. § 2339B (a)(1) (referencing § 219 of the Immigration and Nationality Act for the definition of a “designated terrorist organization”).

²⁷ *Id.* § 2339B(a)(1).

²⁸ Chesney, *supra* note 6, at 19.

²⁹ The proposed licensing scheme provided:

(e)(3) The Secretary shall grant a license only after the person establishes to the satisfaction of the Secretary that—

(A) the funds are intended to be used exclusively for religious, charitable, literary, or educational purposes; and

(B) all recipient organizations in any fund-raising chain have effective procedures in place to ensure that the funds (i) will be used exclusively for religious, charitable, literary, or educational purposes, and (ii) will not be used to offset a transfer of funds to be used in terrorist activity.

S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(e)(3)(A)–(B)); *see also* Chesney, *supra* note 6, at 15.

³⁰ Chesney, *supra* note 6, at 15.

³¹ S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(e)(3)(A)–(B)).

mand of the Secretary of the Treasury.³² The licensing scheme was dropped following the Oklahoma City bombing and § 2339B acted as a prohibition on all fundraising regardless of the intent of the donor.³³

Prior to September 11, 2001, federal prosecutors rarely prosecuted individuals under either of the then-existing material support statutes. The limited use could be attributed to § 2339A's narrow scope as a result of its specific-intent requirement while § 2339B may have appeared to be too broad for a U.S. Attorney to fervently seek indictments and convictions because of constitutional concerns. The fact that both statutes were Congressional reactions to recent bombings, which had dominated American media because they were large-scale acts of terror, suggests that the statutes were more of a political tool than a tool for federal law enforcement. Regardless of the reason for the limited use of the material support statutes prior to September 11, federal prosecutors after September 11 increasingly began to target a wide range of individuals who had allegedly provided material support to terrorist organizations.

B. *Post-September 11 Federal Terrorism-Support Statutes*

Following the attacks on the World Trade Center and the Pentagon, Congress hastily signed³⁴ the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act³⁵ (“USA PATRIOT Act”) into law. The USA PATRIOT Act broadly sought “to deter and punish terrorist acts in the United States and around the world” and “to enhance law enforcement investigatory tools.”³⁶

The USA PATRIOT Act made a few changes to the existing material support laws. Most importantly, § 805(a)(2)(B) added “expert advice or assistance” to the definition of “material support” in § 2339A,³⁷ which also acts as the definition under § 2339B.³⁸ This addition expanded the original definition, which targeted

³² *Id.* (proposing 18 U.S.C. § 2339B(e)(4)).

³³ See Chesney, *supra* note 6, at 15–16.

³⁴ See Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, but With 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, at B6.

³⁵ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107–56, 115 Stat. 272 (2001).

³⁶ *Id.* at 272.

³⁷ *Id.* § 805(a)(2)(B).

³⁸ 18 U.S.C. § 2339A(b)(1) (2006); 18 U.S.C. § 2339B(g)(4) (2006).

mainly tangible support in the form of money, weapons, and other similar goods and services, to include the vague prohibition on providing “expert advice or assistance.”³⁹ The addition of “expert advice or assistance” by § 805(a)(2)(B) has been the target of several First Amendment challenges.

Section 805(a)(2)(B) of the USA PATRIOT Act was challenged on First Amendment grounds by several humanitarian groups that provided support to the Tamil Tigers and the Kurdistan Worker’s Party. In *Humanitarian Law Project v. Ashcroft*,⁴⁰ the plaintiffs argued that § 805(a)(2)(B) violated First Amendment guarantees of freedom of speech and association and to petition the government for a redress of grievances because there was no requirement of “specific intent to further the organization’s unlawful ends.”⁴¹ Next they argued that § 805(a)(2)(B) invites “viewpoint discriminatory targeting of particular groups and their supporters based on their political views” because the Secretary of State has “effectively unreviewable authority to designate foreign organizations as ‘terrorist’ and [to] prohibit the provision of ‘expert advice and assistance’” to that politically disfavored group.⁴² Finally, the plaintiffs attacked § 805(a)(2)(B) and its prohibition on “expert advice and assistance” as being “impermissibly vague and substantially overbroad” and as a result § 805(a)(2)(B) fails “to afford adequate notice to individuals of what is prohibited, giving government officials unfettered discretion in enforcement” and causes individuals to refrain from taking part in First Amendment protected activity.⁴³ The court found that the term “expert advice or assistance” was impermissibly vague⁴⁴ but rejected the argument that § 805(a)(2)(B) was overbroad.⁴⁵

Following the decision in *Humanitarian Law Project*⁴⁶ that § 805(a)(2)(B) was impermissibly vague, Congress sought to define “expert advice or assistance.” Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”),⁴⁷ which amended the definition section of the first material support stat-

³⁹ See 18 U.S.C. § 2339A(b)(1) (2006).

⁴⁰ *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004).

⁴¹ Complaint for Declaratory and Injunctive Relief at ¶ 49, *Humanitarian Law Project v. Ashcroft*, No. 03-6107 (C.D. Cal. Aug. 27, 2003).

⁴² *Id.* ¶ 51.

⁴³ *Id.* ¶ 53.

⁴⁴ *Humanitarian Law Project*, 309 F. Supp. 2d at 1199–1201.

⁴⁵ *Id.* at 1201–03.

⁴⁶ *Id.*

⁴⁷ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638 (2004).

ute, 18 U.S.C. § 2339A(b)(1).⁴⁸ In IRTPA, Congress defined “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge.”⁴⁹ While this may have added some clarity to exactly what “expert advice or assistance” was to be punished, others argue that “[i]t provide[d] no additional clarity, and in fact exacerbate[d] the statute’s vagueness, because now an individual must guess as to whether the knowledge that makes his advice ‘expert’ is ‘specialized’ or not.”⁵⁰

The federal material support statutes have developed as responses to the terror acts that have occurred within the United States since 1993.⁵¹ The first material support statute, 18 U.S.C. § 2339A, was narrowly drawn and was rarely used. The second material support statute, 18 U.S.C. § 2339B, was enacted to eliminate the “loophole” that arose under the § 2339A requirement of specific intent; nonetheless federal prosecutors rarely used the statute as a tool to combat terrorism support prior to September 11. Following September 11, the Department of Justice broadly reinterpreted the statutes so that they could be used as a tool to prevent and obstruct future terrorist attacks. The material support statutes were broadly applied beyond their originally intended scope and as a result are now being used in violation of the First Amendment.

II. MATERIAL SUPPORT MISSION CREEP

A. *First Amendment Implications*

The First Amendment does not provide absolute protection to all types of speech. Unprotected categories of speech relevant to the material support statutes include fighting words,⁵² incitement to illegal activity or imminent violence,⁵³ and true threats or intimidation.⁵⁴ It follows quite uncontested that violent conduct and speech that threatens violence may be constitutionally prosecuted.⁵⁵ Therefore, individuals who intend to support violent terrorist activity by providing material support as defined in 18 U.S.C. § 2339A(b)(1) can be constitutionally prosecuted and punished under § 2339A because they possess the specific intent required by

⁴⁸ *Id.* § 6603(b).

⁴⁹ *Id.*

⁵⁰ PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT (Stewart A. Baker & John Kavanagh eds., 2005).

⁵¹ See Chesney, *supra* note 6, at 12.

⁵² See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁵³ See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

⁵⁴ See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

⁵⁵ See *United States v. Lindh*, 212 F. Supp.2d 541, 569 (E.D. Va. 2002).

the first material support statute. This comports with the First Amendment.

Possible conflict with the First Amendment arises in cases where there is no obvious or provable specific intent to further the violent goals of a terrorist organization. The second material support statute, 18 U.S.C. § 2339B, was specifically created to address these cases but the broad scope of application by federal prosecutors has resulted in a statute that criminalizes First Amendment protected speech and acts as a tool to punish individuals whose conduct cannot be linked to any specific terrorist attack or violent conduct.

In this section I do not challenge the long-standing constitutional jurisprudence that criminalizes speech that threatens violence or that results in violence. I seek to illustrate that the broad interpretation of the material support statutes following September 11 has criminalized speech in violation of the First Amendment to the U.S. Constitution in two different contexts. First, § 2339B infringes on the protected First Amendment right of association by criminalizing material support only when offered to a politically disfavored group. As applied by the government, punishment hinges not on individual intent to further terrorist activity but on the identity of the organization that has received the material support. Individuals are prosecuted and punished because of their tenuous connection to others who have committed illegal acts even though there is no showing of an individualized specific intent to further terrorist activity. Second, § 2339B criminalizes First Amendment protected speech even where the speech is not directed to incite or produce imminent lawless action and is not likely to incite or produce such lawless action.⁵⁶

B. Guilt by Association: FTOs and the Need For Specific Intent

1. *Scales v. United States* and Specific Intent

An individual's freedom of association is rooted in both the First Amendment and the "liberty" interest guaranteed in the Fourteenth Amendment⁵⁷ to the U.S. Constitution. The First Amendment states, "Congress shall make no law . . . abridging the

⁵⁶ See *Brandenburg*, 395 U.S. at 447 (holding that an Ohio criminal syndicalism law violated an individual's right to free speech because the law criminalized advocacy and teaching of disfavored doctrines without considering whether that conduct would actually incite imminent lawless action).

⁵⁷ U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law").

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵⁸ The Supreme Court has recognized that group association is closely related to the constitutionally protected freedoms of speech and assembly.⁵⁹ The Court has also acknowledged that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”⁶⁰

The right of free association applies when an individual assembles as part of a group to partake in protected First Amendment activities. The right to join with other people to advocate for a particular political, cultural, educational, or economic opinion or view is known as the right of “expressive association.”⁶¹ The Supreme Court has recognized that “‘implicit in the right to engage in activities protected by the First Amendment’ is ‘a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’ This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.”⁶² Based on the foregoing, individuals have a clearly recognized constitutional right of free association.

Since freedom of association is a constitutionally protected right, an individual cannot be punished for their membership or association with a particular group. Generally, for guilt to be shared, an organization and its members must have a common plan evidenced by a specific intent to commit unlawful acts.⁶³ In *Scales v. United States*, the Court stated:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . , that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organiza-

⁵⁸ U.S. CONST. amend. I.

⁵⁹ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”).

⁶⁰ *Id.*

⁶¹ *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000).

⁶² *Id.* (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

⁶³ *Scales v. United States*, 367 U.S. 203, 228 (1961).

tion engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.⁶⁴

Therefore, in order to punish a defendant in accord with the Constitution, *Scales* requires that the government establish personal guilt by proving that “a defendant ‘specifically intend[s] to accomplish [the aims of the organization] by resort to violence.’”⁶⁵

While *Scales* focused on the Due Process Clause of the Fifth Amendment,⁶⁶ the Court also determined that the same showing of specific intent was required to comport with the First Amendment.⁶⁷ *Scales* recognized “there would indeed be a real danger that legitimate political expression or association would be impaired” if a “blanket prohibition of association with a group having both legal and illegal aims” was deemed to be constitutional.⁶⁸ The Court then held that the First Amendment prohibits punishing individuals based solely on their support of a group’s legal aims or conduct.⁶⁹

Where a group or organization is linked to both illegal and legal activity, the First Amendment requires that the government prove the individual intended to support or further the illegal aims of the group. Without a showing of the specific intent to support or further the illegal acts of the group, an individual may not be punished.

2. Forgetting *Scales*: 18 U.S.C. § 2339B

The second material support statute, 18 U.S.C. § 2339B, was meant to eliminate the perceived narrow utility of the first material support statute⁷⁰ and address the criticisms of the “loophole” created by requiring an individual to possess the specific intent to further a group’s illegal aims.⁷¹ Critics argued that the specific intent requirement created a “loophole” because individuals could donate to groups that were engaged in both legal and illegal conduct but claimed that they only intended to support the legal aims of the group, such as educational or social aid.⁷² Thereby, they would not be subject to the statute and their donations and support

⁶⁴ *Id.* at 224–25.

⁶⁵ *Id.* at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

⁶⁶ U.S. CONST. amend. V.

⁶⁷ *Scales*, 367 U.S. at 228–29.

⁶⁸ *Id.* at 229.

⁶⁹ *Id.*

⁷⁰ 18 U.S.C. § 2339A (2006).

⁷¹ See Chesney, *supra* note 6, at 12–18 & 13 n.72–73.

⁷² *Id.*

would not be subject to any sanctions under the material support law.⁷³

This “loophole” was the one provision that clearly made the first material support statute constitutional. Section 2339A specifically requires that the individual knew or intended that their support or aid was “to be used in preparation for, or in carrying out” illegal acts.⁷⁴ This is in accord with *Scales* because the individual is only punished where he has the specific intent to further the illegal acts of the group.⁷⁵ Also, § 2339A does not rely on the identity of the recipient to determine whether an individual has violated the statute.⁷⁶ Section 2339A is constitutional because it simply punishes any material support provided with the intent to further the illegal aims or conduct of any group or organization.⁷⁷

One component of the second material support statute that is problematic concerns the addition of “expert advice or assistance” to the definition of “material support.”⁷⁸ The definition of “material support” previously included only tangible support while the USA PATRIOT Act injected the vague notion of “expert advice or assistance” which has the potential to criminalize speech.⁷⁹ Under § 2339A this is not problematic because the requirement of specific intent serves to punish individuals who intend for their support to further illegal activity.⁸⁰ Under § 2339B, however, the addition of “expert advice or assistance” opened the door to prosecute individuals who did not intend to further the illegal aims of the group. Their provision of “expert advice or assistance” was only criminalized because their “expert advice or assistance” had been offered to a group that had been designated as a FTO. Therefore, the individual was not required to possess the specific intent of furthering the FTO’s illegal aims. This does not comport with *Scales* as the statute has the potential to punish members of a group who intend to support only the legal aims of that group.

Section 2339B ultimately relies on the recipients’ identity to

⁷³ However, financial transactions could be prohibited and assets could be seized pursuant to emergency powers possessed by the Executive under the International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2006).

⁷⁴ 18 U.S.C. § 2339A(a) (2006).

⁷⁵ *Cf. Scales*, 367 U.S. at 228.

⁷⁶ Chesney, *supra* note 6, at 18.

⁷⁷ 18 U.S.C. § 2339A(a) (2006).

⁷⁸ *See* USA PATRIOT Act, Pub. L. No. 107–56, § 805(a)(2)(B), 115 Stat. 272 (2001); *see also* 18 U.S.C. § 2339A(b) (2006).

⁷⁹ *Compare* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103–322, § 120005, 108 Stat. 1796 (1994), *and* 18 U.S.C. § 2339A (2006).

⁸⁰ 18 U.S.C. § 2339A(a) (2006).

determine whether the provision of support is criminalized or not.⁸¹ The Secretary of State has the authority to designate an organization as a “foreign terrorist organization.”⁸² The AEDPA⁸³ created the second material support statute⁸⁴ and also amended § 219 of the Immigration and Nationality Act⁸⁵ to provide the Secretary of State with this authority as a necessary adjunct to 18 U.S.C. § 2339B. To designate an organization as an FTO the Secretary of State must find that “(A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.”⁸⁶ The Secretary of State can decide at any time that an organization meets the enumerated conditions and may add that organization to the FTO list⁸⁷ by informing Congress and publishing notice of the designation in the Federal Register.⁸⁸ The designation becomes effective for purposes of the second material support statute⁸⁹ upon publication in the Federal Register; however, any designation can “cease to have effect upon an Act of Congress disapproving such designation.”⁹⁰

Section 2339B clearly requires a knowledge standard,⁹¹ but this does not necessarily mean that an individual specifically intended to support terrorist activity; nevertheless, an individual’s provision of “expert advice or assistance” can be punished if the organization has been designated as an FTO. Section 2339B states “[t]o violate this paragraph, a person must have knowledge that

⁸¹ See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003).

⁸² 8 U.S.C. § 1189(a)(1) (2006).

⁸³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 303, 110 Stat. 1214 (1996) (codified in 18 U.S.C. § 2339B).

⁸⁴ See 18 U.S.C. § 2339B (2006).

⁸⁵ 8 U.S.C. § 1189 (2006).

⁸⁶ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 302, 110 Stat. 1214 (1996) (codified in 18 U.S.C. § 2339B).

⁸⁷ “FTO list” refers to the list of organizations that have been designated as a “foreign terrorist organization” pursuant to 8 U.S.C. § 1189(a)(1). As of January 9, 2010 there were 45 designated FTOs. See Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, Foreign Terrorist Organizations: Fact Sheet, <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

⁸⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 302(a), 110 Stat. 1214 (1996) (codified in 18 U.S.C. § 2339B).

⁸⁹ 18 U.S.C. § 2339B (2006).

⁹⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 302(a), 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1189(a)(2)(B)).

⁹¹ BLACK’S LAW DICTIONARY 724 (8th ed. 2005) (defining “knowledge” as “[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact”).

the organization is a designated terrorist organization” or that the organization has engaged or engages in terrorist activity or terrorism.⁹²

There is no consideration of what the individual’s actual intent was under § 2339B. It is enough that the individual provided “expert advice or assistance” to an organization that he or she knew had been designated as an FTO. Under this standard the individual who provided the “expert advice or assistance” could be criminally liable regardless of what his or her actual intent was at the time. This clearly does not follow *Scales*’s requirement of possessing a specific intent to further the unlawful aims of the organization.

Section 2339B includes no requirement of specific intent to further the illegal aims of an organization as required by *Scales*. The requirement that “a person must have knowledge that the organization is a designated terrorist organization” does not equate a specific intent requirement because the actual intent of the individual is irrelevant.⁹³ Without requiring specific intent the statute is most likely unconstitutional on its face, at least concerning the provision of “expert advice or assistance,” because the individual could be providing expert advice to an FTO on how to end their violent ways. Under § 2339B, criminal liability would be imposed “without regard to the purpose or effect of the actual support provided” or the actual intent of the person providing the support.⁹⁴

Ultimately, § 2339B criminalizes individuals for being associated with a politically disfavored group that has been designated as an FTO. Professor David Cole, one of the main opponents of the amended material support statute, has characterized § 2339B as:

a classic instance of guilt by association. It imposes liability regardless of an individual’s own intentions or purposes, based solely on the individual’s connection to others who have committed illegal acts. Moreover, it imposes liability highly selectively. . . . [I]t selectively prohibits material support only to those groups that the Secretary of State in his [or her] discretion chooses to designate.⁹⁵

The selectivity and the lack of a specific intent requirement result in a statute that is open to extremely broad interpretations and has

⁹² 18 U.S.C. § 2339B(a)(1) (2006) (using “terrorist activity” as defined in section 212(a)(3)(B) of the Immigration and Nationality Act and “terrorism” as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

⁹³ 18 U.S.C. § 2339B(a)(1) (2006).

⁹⁴ Cole, *supra* note 81, at 9–10.

⁹⁵ *Id.* at 10.

been used as a preventive law enforcement tool because § 2339B “do[es] not require proof that an individual intended to further any terrorist activity.”⁹⁶

3. The Case of Javed Iqbal

The case of Javed Iqbal shows how the lack of a specific intent requirement in § 2339B can lead to the prosecution of individuals who have no intent to further the illegal activity of a group. Iqbal was a Pakistani immigrant who had been in the United States for over 20 years.⁹⁷ He operated a small company out of a Brooklyn storefront and from his garage located at his home in Mariners Harbor, Staten Island.⁹⁸ Iqbal’s business was called HDTV Ltd., and provided satellite television packages and broadcasts to its customers.⁹⁹ Iqbal was indicted for providing services that included satellite broadcasts of the television station, Al-Manar.¹⁰⁰ Al-Manar is controlled by the designated FTO Hezbollah.¹⁰¹ Because Al-Manar was controlled by an FTO, Iqbal was charged under the second material support statute, 18 U.S.C. § 2339B, for providing material support in the form of “expert advice or assistance and facilities” to an FTO.¹⁰² If convicted of the charges contained in the indictment Iqbal would have faced “a maximum sentence of 110 years imprisonment.”¹⁰³ Iqbal pled guilty and recently received a sentence of 69 months.¹⁰⁴

The broad interpretation of § 2339B as applied to the case of Javed Iqbal has serious First Amendment issues. There is no re-

⁹⁶ *Id.* at 9.

⁹⁷ William K. Rashbaum, *Law Put to Unusual Use in Hezbollah TV Case, Some Say*, N.Y. TIMES, Aug. 26, 2006, at B2.

⁹⁸ Timothy Williams and William K. Rashbaum, *Man on Staten Island Is Charged in Sale of Access to Hezbollah TV*, N.Y. TIMES, Aug. 25, 2006, at B1.

⁹⁹ Press Release, U.S. Attorney Southern District of New York, U.S. Arrests Two for Supporting Hizballah (Nov. 20, 2006), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/November06/iqbalandelahwalindictmentpr.pdf>.

¹⁰⁰ See Al-Manar TV, <http://www.almanar.com.lb/newssite/HomePage.aspx?language=en> (last visited Mar. 3, 2010); Jennifer 8. Lee and William K. Rashbaum, *Man Posts Bail in Hezbollah TV Case*, N.Y. TIMES, Aug. 29, 2006.

¹⁰¹ Jennifer 8. Lee and William K. Rashbaum, *Man Is out in Case of Access to Hezbollah TV*, N.Y. TIMES, Aug. 29, 2006, at B4; Indictment at ¶ 3, United States v. Iqbal, No. S1 06 Cr. 1054 (S.D.N.Y. 2006) (stating that Hezbollah was designated as an FTO on or about Oct. 8, 1997).

¹⁰² Indictment at ¶ 9, United States v. Iqbal, No. S1 06 Cr. 1054 (S.D.N.Y. 2006).

¹⁰³ Press Release, U.S. Attorney Southern District of New York, U.S. Arrests Two for Supporting Hizballah (Nov. 20, 2006), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/November06/iqbalandelahwalindictmentpr.pdf>.

¹⁰⁴ Benjamin Weiser, *S.I. Man Gets Prison Term for Aid to Hezbollah TV*, N.Y. TIMES, Apr. 24, 2009, at A22.

quirement that Iqbal intended to further the illegal aims of Hezbollah and under *Scales* Iqbal should not be held criminally liable. Hezbollah is a Lebanese political and military organization that was formed in the 1980s to drive Israeli forces from Lebanon. Hezbollah also has several seats in the Lebanese parliament. Thus, Hezbollah has both legal and illegal aims since they provide a wide variety of social services such as medical care and education services to various communities throughout Lebanon.

To be punished under *Scales*, Iqbal must possess the specific intent to further the unlawful goals of the organization. There is no evidence that Iqbal sought to support the illegal aims of Hezbollah by providing customers with access to Al-Manar. Furthermore, there is no evidence that Iqbal sought to support any goals of Hezbollah. The only evidence that the government cites is the exchange of satellite broadcasts for money.¹⁰⁵ Hezbollah did pay Iqbal, but this only proves that a business connection existed between the two, not that Iqbal intended to further the terrorist activity of Hezbollah by providing “expert advice or assistance.” *Scales* demands much more.

First Amendment challenges were raised to the criminal charges but the judge rejected them. Judge Richard M. Berman ruled “that the prosecution was based not on the content of speech but on conduct—allegations that [Iqbal] provided material support to a foreign terrorist group.”¹⁰⁶ Judge Berman’s focus on the conduct of providing material support when that material support is “expert advice or assistance” is constitutionally troublesome because the speech is being criminalized based on the identity of the recipient. There is no consideration of Iqbal’s intent under Judge Berman’s ruling. This constitutes guilt by association because it does not follow the *Scales* requirement of specific intent to further the unlawful acts of an organization.

The lack of a specific intent requirement allows for the prosecution of individuals that did not intend to further the illegal activities of a group. Under § 2339B, an individual like Iqbal can be punished for being associated with a group such as Hezbollah that has both legal and illegal aims. The only protection against the government’s broad interpretation of § 2339B following September 11 is to require specific intent.

¹⁰⁵ Indictment at ¶ 13, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006).

¹⁰⁶ Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, Dec. 24, 2008, at A21.

C. *Criminalizing Pure Speech: Where's Brandenburg?*

The addition of “expert advice or assistance” to the definition of material support and the prohibition on all “expert advice or assistance” does not satisfy the constitutional requirements set forth in *Brandenburg v. Ohio*.¹⁰⁷ *Brandenburg* states, “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action*.”¹⁰⁸ The Court reasoned that “[t]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action”¹⁰⁹ and therefore “[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”¹¹⁰

Under 18 U.S.C. § 2339B any and all “expert advice or assistance” provided to a designated FTO is criminalized. “Expert advice or assistance” should clearly be considered pure speech because the term encompasses both written and spoken words and conduct that conveys information and ideas.¹¹¹ Under the current construction, an attorney working on human rights issues in the Occupied Palestinian Territories who provides advice or assistance to a leader of Hamas concerning how they can conduct themselves so they do not violate international human rights conventions could potentially be prosecuted for providing non-violent advice. The attorney’s speech would be criminalized regardless of whether it was “directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action.”¹¹² This construction is in violation of *Brandenburg*.

The prohibition on all “expert advice or assistance” without regard to its connection to lawless activity is in violation of *Brandenburg* and creates a chilling effect on protected speech. The case of Javed Iqbal illustrates this because he was providing the satellite broadcasts of Al-Manar, Hezbollah’s satellite television station.¹¹³

¹⁰⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁰⁸ *Id.* at 447 (1969) (emphasis added).

¹⁰⁹ *Id.* at 447–48 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

¹¹⁰ *Id.* at 448.

¹¹¹ See BLACK’S LAW DICTIONARY 1168 (8th ed. 2005).

¹¹² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹¹³ See Indictment at ¶ 9, *United States v. Iqbal*, No. S1 06 Cr. 1054 (S.D.N.Y. 2006).

Al-Manar's programming is "sophisticated and diverse, ranging from soap operas and dramas, produced in Syria and Iran," to music videos and religious programming.¹¹⁴ Some of the programming can be characterized as "racist and anti-Semitic" and has included programming that promotes suicide bombings against American troops in Iraq.¹¹⁵ However, Iqbal was importing and distributing a newsfeed or satellite programming. He wasn't recruiting suicide bombers to attack American troops in Iraq and there was no evidence that he was broadcasting Al-Manar to incite imminent lawless action. Iqbal's conduct was contributing to the free marketplace of ideas. Iqbal's advice or assistance provided by broadcasting Al-Manar's programming cannot be punished unless his advocacy was directed at inciting or producing imminent lawless action and was likely to incite or produce such action. There is no evidence to suggest that the broadcasting resulted in a clear and present danger to the public welfare and therefore the criminalization of Iqbal's conduct constitutes censorship of pure speech.

The broad scope of what the government has decided falls within the definition of material support forces individuals to look at what programming they provide and what information they are associated with. An individual's actual intent is not the main consideration under § 2339B. Rather, criminalization hinges on the organization the support is provided to and the content associated with that group. If the group is an FTO and they support illegal and legal aims, an individual could be prosecuted regardless of whether their advice had anything to do with lawless activity. This can only lead to less and less information and viewpoints being represented in the marketplace of ideas. More speech is the answer and tolerance of that speech is what *Brandenburg* requires as long as the speech is not "directed to inciting or producing imminent lawless action [that] is likely to incite or produce such action."¹¹⁶

The second material support statute, 18 U.S.C. § 2339B, violates the First Amendment of the U.S. Constitution because it does not include the provisions required by *Scales* and *Brandenburg*. Section 2339B has been unconstitutionally applied to the case of Javed Iqbal and this illustrates how the broad interpretation has allowed authorities to "sweep up large numbers of people without having to prove that [they] engaged in specific harmful conduct."¹¹⁷ This

¹¹⁴ Timothy Williams and William K. Rashbaum, *New York Man Charged with Enabling Hezbollah Television Broadcasts*, N.Y. TIMES, Aug. 25, 2006, at B1.

¹¹⁵ *Id.*

¹¹⁶ *Brandenburg*, 395 U.S. at 447.

¹¹⁷ Cole, *supra* note 81, at 4.

reeks of the McCarthy era and should be seriously addressed to prevent the further constriction and censorship of the freedom of expression.¹¹⁸

III. BURYING MCCARTHY: A NEW MATERIAL SUPPORT APPROACH

The second material support statute, § 2339B, does not adequately ensure that individuals will possess the specific intent to further a designated group's illegal conduct as required in *Scales*, nor does it require that the speech be directed at inciting or producing imminent lawless action as required by *Brandenburg*. The statute prohibits support that is directed toward the legal political or social goals of a group the same as it prohibits support for the illegal aims of the group. A few significant changes can help make § 2339B agree with the First Amendment.

First, the statute must include a requirement of specific intent to further the illegal aims of an FTO where the FTO has both illegal and legal goals. This is the only way to construct § 2339B so that it is in accord with the First Amendment right of free association. Punishing individuals for the illegal aims of a group where they had no intention to further those aims constitutes guilt by association and has no place in our justice system no matter what the situation may be. Our system focuses on personal guilt and there must be a connection between a group's illegal goals and the individual's intent that is being prosecuted.¹¹⁹ *Scales* illustrates the degree of the connection and requires that "a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence.'"¹²⁰ This is what justice requires and this needs to be included within § 2339B.

The statute cannot criminalize "expert advice or assistance" that is not directed at inciting or producing imminent lawless activity. To be consistent with *Brandenburg* there must be an exception for the provision of non-violent advice and assistance. This would not be so difficult because Congress has previously considered a licensing scheme that would allow for individuals to donate or provide material support to an FTO as long as they sought permission from the Secretary of State.¹²¹ The previously proposed licensing

¹¹⁸ *See id.*

¹¹⁹ *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

¹²⁰ *Id.* at 229 (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

¹²¹ The proposed licensing scheme provided:

(e) AUTHORIZED TRANSACTIONS—

(1) The Secretary shall publish regulations, consistent with the provisions of this subsection, setting forth the procedures to be fol-

scheme allowed for aid that was “exclusively for religious, charitable, literary, or educational purposes.”¹²² This could be updated and enacted to provide licensing to individuals seeking to provide “expert advice or assistance” for religious, charitable, literary, or educational purposes. This licensing scheme would work to ensure that the only material support that was punished could be characterized as creating or posing a danger to the public welfare.

These two substantive changes would help relieve § 2339B of its problematic First Amendment issues because guilt would be imposed based on the intent of the defendant rather than on the identity of the recipient of the support. The licensing scheme would provide individuals who sought to only support the legitimate legal goals or activities of an FTO to do so. Thereby, the statute would specifically target conduct that intends to support terrorist activity.

lowed by persons seeking to raise or provide funds for an organization designated under subsection (c)(1).

(2) Any person within the United States, or any person subject to the jurisdiction of the United States anywhere, who seeks to solicit funds for or to transfer funds to any organization or person designated under subsection (c) shall, regardless of whether it has an agency relationship with the designated organization or person, first obtain a license from the Secretary and may thereafter solicit funds or transfer funds to a designated organization or person only as permitted under the terms of a license issued by the Secretary.

(3) The Secretary shall grant a license only after the person establishes to the satisfaction of the Secretary that—

(A) the funds are intended to be used exclusively for religious, charitable, literary, or educational purposes; and

(B) all recipient organizations in any fund-raising chain have effective procedures in place to ensure that the funds (i) will be used exclusively for religious, charitable, literary, or educational purposes, and (ii) will not be used to offset a transfer of funds to be used in terrorist activity.

(4) Any person granted a license shall maintain books and records, as required by the Secretary, that establish the source of all funds it receives, expenses it incurs, and disbursements it makes. Such books and records shall be made available for inspection within two business days of a request by the Secretary. Any person granted a license shall also have an agreement with any recipient organization or person that such organization’s or person’s books and records, wherever located, must be made available for inspection of the Secretary upon a request of the Secretary at a place and time agreeable to that organization or person and the Secretary.

(5) The Secretary may also provide by regulation procedures for the licensing of transactions otherwise prohibited by this section in cases found by the Secretary to be consistent with the statement of purpose in subsection (a)(2).

S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(e)(3)(A) & (B)).

¹²² *Id.*

CONCLUSION

The terrorism support statutes have been radically reinterpreted following the September 11 attacks as a result of the Department of Justice's shift toward a preventive law enforcement system that was justified by exigency to stop a terrorist attack. However, the use of the material support statute following the attacks has violated First Amendment rights of association and speech. The use of the statute in this manner is unjustified because its interpretation is so broad that it swept up within it individuals such as Javed Iqbal, who did not have any intention of supporting terrorist acts. The broad interpretation was used as a means to institute a system of preventive law enforcement but has resulted in the misdirection of preventive efforts because time, money, and other resources have been directed at prosecuting individuals who did not intend to support violent acts of terror. The second material support statute should be amended to prevent further violations of the First Amendment and to protect the robust marketplace of ideas that American jurisprudence has embraced since its founding.