

The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code

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INTRODUCTION

Two innovative federal crimes, 18 U.S.C. §2339A¹ and §2339B,² have been frequently charged in prosecutions since September 11, 2001, becoming

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1. §2339A. Providing material support to terrorists

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, 1993, 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), or section 46502 or 60123(b) of title 49, 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. . . .

(b) Definition. – In this section, the term “material support or resources” means 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, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C.A. §2339A (West, 2000 & Supp. 2004). The USA PATRIOT Act of 2001 amended both this section and 18 U.S.C.A. §2339B (West 2000 & Supp. 2004) to increase the maximum term of imprisonment from 10 years to 15 years. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §810(c),(d), 115 Stat. 272, 380. After this article was prepared, legislation was adopted that amends some aspects of §2339A and other statutes that punish material support of terrorism. Some of the issues raised by the recent amendments are discussed in the Epilogue at the end of this article.

2. §2339B. 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 attempts or conspires to do so, shall be fined under this title or 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. . . .

(g) Definitions. – As used in this section . . .

(4) the term “material support or resources” has the same meaning as in section 2339A; . . .

(6) the term “terrorist organization” means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

key elements in the government's anti-terrorism efforts.³ Section 2339A makes it a federal crime knowingly to provide material support or resources⁴ in preparation for or in carrying out specified crimes of terrorism. Section 2339B prohibits knowingly providing material support to a foreign terrorist organization. These statutes bear some resemblance to criminal liability for complicity, but they are being used like a new kind of conspiracy charge, the familiar "prosecutor's darling."⁵ Unlike conspiracy, they are framed with a mens rea of knowledge rather than of purpose, and because they are substantive offenses, they can be combined with traditional conspiracy charges. These provisions can be used to impose punishment for conduct remote from the commission of criminal harms, often conduct involving minimal and outwardly non-criminal acts.

While some judicial decisions have found constitutional infirmities in specific terms of these new crimes, Congress undoubtedly can constitutionally legislate such offenses. The courts should understand how these crimes are innovative, and they should take these insights into account in construing the statutes. They also should pay attention to the long-term implications of the extensive use of these two new substantive offenses both for the federal criminal law and, potentially, for the criminal law of the several states as well.⁶

These two new offenses may be the most significant doctrinal developments in the federal criminal law since the enactment of RICO and the other organizational crime statutes, the money laundering statutes, and the criminal forfeiture laws. They show how each new federal criminal "war" – from Prohibition through the wars on organized crime, on illegal drugs, and now on terror – has spawned new laws or legal doctrines designed to expand

3. In 2003, a Justice Department official testified that the government had brought "support" charges against 61 individuals. *Hearing Before the Subcomm. on Oversight and Investigations, House Comm. on Financial Services*, 108th Cong. 1 (2003) (prepared statement of Alice Fisher, Deputy Ass't Attorney General); see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. ____ (forthcoming 2005).

4. The statutory phrase is "material support or resources." I use the phrase "material support" as a shorthand for the full statutory phrase.

5. The earliest reference to conspiracy as a prosecutor's darling is probably in Judge Learned Hand's concurrence in *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) ("that darling of the modern prosecutor's nursery").

6. Most of the huge output of scholarly treatment of issues arising out of the current war on terrorism has focused on procedural and constitutional issues, such as the long-time incarceration of individuals as enemy combatants and the prospect of prosecution in military tribunals. Several articles deal with the material support offenses, but these focus either on constitutional issues arising out of the scope of application of §2339B, see, e.g., Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1452 n.122 (2003) (review essay), or procedural-constitutional issues arising from the process for designating a foreign terrorist organization. See, e.g., Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125 (2004).

the reach and the effectiveness of the federal government's criminal enforcement arm.

These new offenses constitute unusually potent prosecutorial weapons, because material support may take so many different forms and may be tied to so many different underlying offenses, while the requisite mens rea is merely knowledge. Section 2339B, and to a lesser extent §2339A, thus have a ubiquitous quality. The government is using them as catch-all offenses that can be invoked in widely varying situations where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses. The government is also using these offenses as a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud. Yet we need to ask whether and to what extent the residual and preventive uses of these sections are beginning to trespass upon fundamental values of liberty.

In the following pages, I examine in depth some of the features of §2339A and §2339B that make them problematic offenses under criminal law doctrine.⁷ In Part I, I describe the statutory approach to the material support concept and the kinds of cases being prosecuted. Part II details the special characteristics of the material support offenses under criminal law doctrine and the ways they are both similar to and different from traditional complicity. In Part III, I use the prosecution in *United States v. Sattar* (the Lynne Stewart case) as a vehicle to examine statutory interpretation issues in the definition of "material support."

Part IV presents a theory about the statutory approach to defining material support and the nature of these offenses that views them as heirs to the legacy of a Model Penal Code draft approach on complicity set forth in Tentative Draft No. 1 of the Code in 1953 (a provision that was not approved by the American Law Institute). Tentative Draft No. 1 contained a provision that would have established liability for complicity where the accused knowingly, substantially facilitates criminal conduct. I suggest that this proposal to link a mens rea of knowledge with an actus reus of substantial aid is an early precursor of the statutory approach found in §2339A and §2339B. This insight can be very helpful in understanding how the concept of material support should be interpreted under these modern statutes.

In Part V, I set forth a detailed analysis of the mentes reae of the material support offenses that supplements the Model Penal Code theory developed in Part IV. Finally, I conclude with a comment on the potential implications for the federal criminal system and the criminal law of the several states of an expansive interpretative approach to these offenses, and an Epilogue describing the impact of amendments to the material support offenses contained in the recent intelligence reform legislation.

7. I focus in this article on the implications of these offenses under substantive criminal law doctrine. For other types of issues raised by these sections, see, e.g., the authorities cited in note 6 *supra*. See generally NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT*, ch. 4 (2d ed. 2005).

I. THE STATUTORY DEFINITION OF MATERIAL SUPPORT: KINDS OF CASES
BEING PROSECUTED UNDER §2339A AND §2339B

"Material support or resources" is defined in §2339A by a listing of different types of aid. It means:

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, transportation, and other physical assets, except medicine or religious materials.⁸

Material support⁹ is a key element of the offenses described in both §2339A and §2339B. Section 2339A makes it a federal crime to provide one or more of the types of aid set forth in the definition, knowing or intending that the support will be used in the preparation for, or for the carrying out of, any of the many federal offenses listed in the section.¹⁰ Section 2339B similarly criminalizes knowingly providing any of these categories of aid to a foreign terrorist organization¹¹ designated as such by the Secretary of State.¹²

While §2339A and §2339B are independent substantive offenses, each has certain characteristics of traditional complicity liability. Each punishes aid provided to another that may further criminal activity. Section 2339A more closely resembles traditional complicity liability because it targets aid provided for use in carrying out specific crimes; §2339B criminalizes the

8. 18 U.S.C. §2339A(b) (2000 & Supp. II 2002). The USA PATRIOT Act added the phrase "expert advice or assistance" after the word "training." Pub. L. No. 107-56, §805(a)(2), 115 Stat. 272, 377.

9. See *supra* note 4.

10. See *supra* note 1. These offenses are not all necessarily terrorist offenses, but they are all offenses of a type that terrorists commit. The list includes, for example, killing of government officials, using explosives illegally, wrecking trains, nuclear offenses, and destruction of aircraft.

11. A "foreign terrorist organization" is an organization that engages in terrorist activity as defined in 8 U.S.C. §1182(a)(3)(B) or terrorism as defined in 22 U.S.C. §2656f(d)(2). Section 1182 lists various types of typical terrorist crime categories. Section 2656 defines terrorism to mean: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."

12. The designation process is specified in 8 U.S.C. §1189 (2000). It has been described as giving "unique powers" to the Secretary. *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 386 (9th Cir. 2003), *affirmed in part, vacated in part, and remanded*, 393 F.3d 902 (2004) (en banc). There is little or no opportunity for an organization being considered for designation to be heard in advance, opportunities for judicial review of such a listing are extremely limited, and "a defendant in a criminal action under §2339B is precluded from raising any question concerning the validity of the organization's designation." *Id.*, 352 F.3d at 387-388. See *generally* *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152 (D.C. Cir. 2004); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (D.C. Cir. 2003); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001).

provision of aid to an organization that engages in terrorist crimes.

The material support offenses have been charged in a wide variety of factual contexts. Here are some examples:

- An American religious zealot makes himself available for service in an army that is fighting the United States.¹³
- Six individuals participate in a terrorist group's training camp in Afghanistan.¹⁴
- Another individual tries to set up a terrorist training camp within the United States.¹⁵
- Individuals and a charitable entity are charged with transferring funds to a terrorist organization.¹⁶
- An attorney representing a convicted terrorist serving a life sentence in a federal correctional facility allegedly facilitates the passing of information and instructions to terrorist confederates of her client outside of the prison.¹⁷

Each of these disparate fact situations has led to prosecutions under §2339A or §2339B, or both.

II. SPECIAL CHARACTERISTICS OF THE MATERIAL SUPPORT OFFENSES

Sections 2339A and 2339B have some features that sound in complicity, yet they differ from traditional complicity offenses in a number of important respects.¹⁸ The criminal law typically defines as a substantive offense conduct that involves the direct commission of a harm. Criminal liability for complicity normally is derived from a substantive offense and is not itself defined as a separate crime, although it may, of course, make a person liable for the substantive offense. Thus, a person who aids and abets others who commit a bank robbery is liable for the bank robbery as if he or she had directly committed the robbery. Stating the matter more formally, in addition

13. United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

14. United States v. Goba, 220 F. Supp. 2d 182, 190 (W.D.N.Y. 2002).

15. The reference is to the James Ujaama prosecution, which ended in a plea of guilty. See Dep't of Justice, *Earnest James Ujaama Sentenced for Conspiring to Supply Goods and Services to the Taliban*, Feb. 13, 2004, at http://www.usdoj.gov/opa/pr/2004/February/04_crm_086.htm. The indictment in the case may be found at <http://www.news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf>.

16. There are a number of such cases. See, e.g., United States v. Rahmani, 209 F. Supp. 2d 1045, 1047 (C.D. Cal. 2002); see also Stephen Braun, *Texas Charity, Leaders Are Charged with Aiding Hamas; Federal Officials Say the Holy Land Foundation Funneled More than \$12.4 Million to Support the Palestinian Militant Organization*, L.A. TIMES, July 28, 2004, at A8.

17. United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004), discussed *infra* Part III.

18. Professor Robert M. Chesney has provided a detailed history of the legislative currents that produced §§2339A and 2339B. See Chesney, *supra* note 3.

to the criminal liability of the direct perpetrators of such offenses (primary party liability), individuals may be liable as accomplices to the commission of the substantive offense if they aided or abetted the commission of the offense (secondary party liability). Secondary party liability is normally imposed under a general accomplice provision which makes an accomplice to an offense punishable as a principal.¹⁹

Sections 2339A and 2339B are different from traditional complicity liability in several ways. First, each makes the provision of material support to the commission of offenses (directly in the case of §2339A or more indirectly in the case of §2339B) itself an independent substantive offense with its own penalty, rather than creating secondary party liability for some other offense. Moreover, each is treated as a serious offense, with a maximum penalty of 15 years' confinement, or life imprisonment if the death of a person results. In this respect, these provisions differ from criminal facilitation provisions in some codes that establish independent, complicity-like offenses.²⁰ Typically, these are minor offenses.²¹ In New York, for example, criminal facilitation of a felony is a misdemeanor, although the penalty rises to a 15-year maximum if the crime facilitated is a class A felony, such as murder.²²

Second, unlike traditional complicity statutes, which use a general phrase such as "aid or abet" to describe the kind of conduct that can be a basis for secondary party liability, material support is defined in §2339A(b) by a listing of categories of specific kinds of conduct.²³ In this respect, too, the material support statutes differ from those punishing criminal facilitation, which typically use a general term in defining the offense. As we shall see, this categorical approach to defining the actus reus of the material support offenses is a central feature of these new crimes.

Third, unlike the traditional complicity liability that applies to all offenses, each of these offenses is related to terrorism. Section 2339A sets forth a long list of terrorism offenses as possible objects of the material support that triggers liability. In §2339B the direct object of the forbidden support is not a terrorism offense as such, but a "foreign terrorist organization," that is, an organization that engages in terrorist crimes.

Fourth, recognizing §2339A and §2339B as forms of complicity that have been converted into independent substantive offenses, we can see that, unlike traditional complicity liability, these sections do not require the substantive

19. In the federal system that provision is 18 U.S.C. §2 (2000).

20. *See, e.g.*, NAT'L COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT ON THE PROPOSED NEW FEDERAL CRIMINAL CODE §1002 (1971).

21. *See, e.g.*, N.Y. PENAL LAW §115.00 (McKinney 2004); ARIZ. REV. STAT. ANN. §13-1004 (West 2004); KY. REV. STAT. ANN. §506.080 (Banks-Baldwin 2003). *But cf.* TENN. CODE ANN. §39-11-403 (1989) (facilitation of a felony is an offense one class below that of the felony facilitated).

22. N.Y. PENAL LAW §115.08 (McKinney 2004).

23. *See supra* text accompanying note 8 for a listing of the categories.

offense for which the aid was provided to have been consummated.²⁴

Finally, perhaps the most important feature of these complicity-like crimes is the fact that §2339B requires knowledge and §2339A accepts knowledge as a sufficient mens rea.²⁵ Although the knowledge requirement is more specific for §2339A than for §2339B, because in the former it must relate to a particular offense or offenses, neither section requires the mens rea of purpose usually required for complicity liability.²⁶

The material support offenses thus have some of the characteristics of traditional complicity liability, but they differ in certain key respects: they create an independent substantive offense; they provide for a knowledge mens rea; and they take a different approach to the definition of the actus reus of the offense. Nevertheless, these offenses are first cousins of complicity liability, and one might reasonably anticipate that the interpretative approach taken by the courts in material support cases could have spill-over effects on the law of complicity.

24. Under some modern statements of accomplice liability, attempts to aid can be a basis for liability, but generally the principal's offense must have been committed, though not necessarily have been the subject of a criminal conviction. If it has been attempted but not committed, the aider or attempted aider can be an accomplice in the attempt. See MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §2.06(3) and cmt. thereto (1985).

25. Section 2339A requires knowledge *or* intent. Since the conjunction "or" is used, knowledge alone is sufficient.

26. The dominant view is that a mens rea of purpose is required for complicity liability. However, some cases have adopted a knowledge rule. See, e.g., *Backun v. United States*, 112 F.2d 635, 638 (4th Cir. 1940). There are also some state statutes that provide for a knowledge mens rea in connection with complicity. See, e.g., IND. CODE ANN. § 35-41-2-4 (West 1998) ("A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense. . ."); W. VA. CODE §17C-19-1 (2004) ("knowingly aids or abets"); WYO. STAT. §6-1-201(a) (2004) ("A person who knowingly aids and abets . . ."). Still other statutes provide for a knowledge mens rea in connection with the aiding of specific kinds of crimes, usually relatively minor offenses. See, e.g., N.Y. PENAL LAW §§230.15, 230.20 (McKinney 1999) (prohibiting knowing aiding of prostitution). But see, e.g., *People v. Beeman*, 674 P.2d 1318, 1324-1325 (Cal. 1984) (to be held liable as an accomplice, an accused must act knowing the criminal purpose of the principal and with the intent or purpose of committing or facilitating commission of the offense). There are also other approaches, such as making the mental state vary with the gravity of the offense, or providing for a mens rea of knowledge but requiring substantial aid, as called for in Tentative Draft No. 1 of the Model Penal Code. The most influential opinion requiring purpose is that of Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) ("participate in it as something that he wishes to bring about"). For discussion of the difference between a mens rea of purpose and one of knowledge as applied to complicity, see *infra* Part V. For a review of the different positions taken in the courts, see Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1375 (2002). Where knowledge alone is the requisite mens rea, as under §2339A and §2339B, the question remains knowledge "of what" or knowledge "of which" actus reus elements.

III. UNITED STATES V. SATTAR: INTERPRETING THE MATERIAL SUPPORT CATEGORIES

United States v. Sattar illustrates how the categories approach works in practice in defining the actus reus of the material support offenses.²⁷ The case originally involved charges under §2339B, but after the district court dismissed those counts the government changed its theory of the case by filing a superseding indictment charging under §2339A.

A. A Statement of the Sattar Case

In *Sattar*, four defendants were originally charged in a five-count indictment. Two of the counts were based in §2339B, one of these alleging a substantive as well as an attempted violation of §2339B and the second alleging a conspiracy to violate that section. The indictment alleged that Sheikh Abdel Rahman, convicted in 1995 of terrorist offenses and serving a life sentence, was one of the principal leaders of a designated foreign terrorist organization (FTO). Two of the defendants were said to be active leaders of the same FTO. The other defendants were attorney Lynne Stewart, who represented Rahman at his earlier trial and after his conviction, and the Arabic interpreter aiding communications between Rahman and his attorneys. I focus here mainly on the allegations against Stewart.

Stewart had signed an affirmation acknowledging that she and her staff would abide by Special Administrative Measures (SAMs) imposed by the Bureau of Prisons upon Rahman. These SAMs prohibited him from speaking with the media, and they restricted his access to mail, telephone, and visitors. Stewart had also signed a statement agreeing not to pass messages from Rahman to third parties, including the media.

The original indictment alleged that Stewart had, by pretending to converse with Rahman, and by making noises while the interpreter defendant surreptitiously carried on conversations with Rahman, facilitated and concealed messages between Rahman and leaders of his foreign terrorist organization around the world. It also charged that she had allowed the interpreter to read letters to Rahman from one of the other defendants and to discuss with him whether the organization should continue to comply with a cease-fire.

The indictment further alleged that the defendants had provided “material support and resources” to the FTO in the form of “communications equipment” and “personnel.” The government’s theory regarding communications equipment was that the defendants and others had provided such equipment by their use of telephones in the course of transmitting and

27. 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (*Sattar II*); 272 F. Supp. 2d 348 (S.D.N.Y. 2003) (*Sattar I*). On February 5, 2005, the jury found Stewart guilty of violating §2339A and also making false statements to a U.S. government agency.

disseminating messages and information to and among the FTO's leaders in the United States and around the world. The indictment listed specific uses of the telephone in this connection. The defendants responded that they were being charged with "merely talking" and that the acts alleged in the indictment constituted nothing more than "using" communications equipment, rather than "providing such equipment" to the FTO.²⁸ Finally, the indictment charged that the "personnel" provided by the defendants to the FTO included the defendants themselves, through their assistance to the FTO's leaders and members in communicating with each other.

In response to the defendants' motions to dismiss counts in the original indictment, District Judge John G. Koeltl held certain terms of §2339B unconstitutionally vague.²⁹ The government filed a notice of appeal, but later changed course and filed a superseding indictment based on essentially the same factual allegations, except that the new charges were based on §2339A rather than §2339B. Judge Koeltl then filed a second opinion, this time addressing the government's revised theory of material support.³⁰

In its first opinion (*Sattar I*), the court had held, with regard to the charge of providing communications equipment, that the statute provided neither notice nor standards for its application, and that it was therefore unconstitutionally vague. Changes in the government's interpretative theory in the course of the hearing, the court said, demonstrated that the defendants could not know what was prohibited and were not put on notice that mere use of a telephone to aid an FTO constituted criminal conduct.

The court also held that the statute was unconstitutionally vague as it applied to the facts charged in the indictment relating to the provision of personnel. Here the court took note of two prior decisions. The first, *United States v. Lindh*,³¹ had found that the plain meaning of "personnel" required "an employment or employment-like relationship between the persons in question and the terrorist organization," and that the term thus gave "fair notice" of what conduct is prohibited under the statute.³² Rejecting *Lindh*, the *Sattar I* court stated,

Whatever the merits of *Lindh* as applied to a person who provides himself or herself as a soldier in the army of an FTO, the standards set out there . . . do not provide standards to save the "provision" of

28. *Sattar I*, 272 F. Supp. 2d at 357. In the course of the pre-trial proceeding in *Sattar I*, the government changed its theory from "actively making such [communications] equipment available" to the FTO to stating that "the mere use of one's telephone constitutes criminal behavior under the statute and that, in fact, 'use equals provision.'" *Id.* at 358.

29. *Id.* at 356-361.

30. 314 F. Supp. 2d 279 (S.D.N.Y. 2004) (*Sattar II*).

31. *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2000).

32. *Id.* at 574.

“personnel” from being unconstitutionally vague as applied to the facts alleged in the Indictment.³³

Instead the court relied on the decision in *Humanitarian Law Project v. Reno*,³⁴ which had held the personnel provision unconstitutionally vague as applied:

The Government attempts to distinguish the provision of “personnel” by arguing that it applies only to providing “employees” or “quasi-employees” and those acting under the “direction and control” of the FTO. But . . . [those] are terms that are nowhere found in the statute or reasonably inferable from it.³⁵

The court noted that the government failed

to explain how a lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to criminal prosecution as a “quasi-employee” allegedly covered by the statute. . . . Moreover, these terms and concepts applied to the prohibited provision of personnel provide no notice to persons of ordinary intelligence and leave the standards for enforcement to be developed by the Government.³⁶

Three noteworthy changes were made in the second indictment in *Sattar*. First, rather than an allegation of violations based on §2339B, the violations charged in the new indictment were based on §2339A. They included a charge of conspiracy to provide material support for a terrorist offense, as well as a charge of a substantive violation of §2339A. Second, the allegation of support in the form of communications equipment was omitted from the new indictment. Third, the provision of personnel was again alleged, but the theory underlying this allegation was different. This time, it was alleged that the defendants provided personnel by making Sheikh Abdel Rahman available as a co-conspirator rather than alleging, as in the first indictment, that providing personnel meant that the defendants provided themselves.

B. Why File a Superseding Indictment Based on a New Theory Rather Than Appeal?

Why did the government decide to file a superseding indictment rather than pursue the appeal that it had initially noticed? It is not surprising that the government dropped the allegation concerning “communications equipment.”

33. *Sattar I*, 272 F. Supp. 2d at 359.

34. 205 F.3d 1130 (9th Cir. 2000).

35. *Sattar I*, 272 F. Supp. 2d at 359.

36. *Id.*

The theory that the defendants provided such equipment by *making telephone calls* made an extremely awkward fit with the statutory language. What is less clear is why the government changed its theory about the “personnel” issue, and why it switched from §2339B to §2339A. I will discuss the second issue first.

Both §2339B and §2339A include as an element the provision of “material support,” and the same definition of that term is applicable under both sections. The only change was in the object of the material support – from support of a foreign terrorist organization under §2339B to support of specified terrorist offenses under §2339A.

By alleging the provision of material support to terrorist offenses under §2339A and backing it up with specific factual allegations, the government sought to link the actions of Lynne Stewart and the other defendants directly to specific terrorist crimes, such as kidnaping and murder. This approach eliminated the First Amendment concern raised by the allegations in the first indictment that the defendants had “provided themselves as ‘personnel’ to an organization.”³⁷

The government hardened up its charge of material support by alleging more than the statute required. It asserted that in providing and conspiring to provide personnel, the defendants acted “with the knowledge and intent that such personnel [Rahman] was to be used in preparation for, or in carrying out, the conspiracy to kill and kidnap persons in a foreign country.”³⁸ Section 2339A requires only the disjunctive knowing *or* intending.³⁹

The other change in the government’s case is even more puzzling. Why did the government, while still alleging that the defendants had provided “personnel,” change its theory about which personnel were provided? In the original indictment, the accused were alleged to have provided themselves; in the superseding indictment, it was alleged that the accused had “provided personnel” by providing the prisoner, Rahman, by making him available to his co-conspirators outside of prison. A possible explanation for the change is that the government came to realize that under the former theory, an attorney representing a member of an FTO would seem to be guilty of the crime of providing material support.

How did the defendants provide Rahman? They must have done so by providing the means for Rahman to communicate with his confederates. In other words, this new allegation covered the same general facts that underlay the earlier allegation of providing “communication equipment,” namely,

37. *See Sattar II*, 314 F. Supp. 2d at 300-301. There might have been other reasons for abandoning the appeal. The case could be moved along more quickly by filing a superseding indictment rather than waiting for the disposition of an appeal. The government also might have preferred to avoid the risk of having the court of appeals affirm the district judge’s ruling on the constitutional vagueness issue.

38. *Id.* at 296.

39. As a result of this difference between the indictment and the statute, the district court in its opinion shifted back and forth between the “and” and the “or” locution.

putting Rahman in touch with his confederates through telephone calls. But these facts were now tied to the providing of “personnel.”

This time, Judge Koeltl accepted the government’s claim that the defendants “provided” Rahman by “making him available” as a co-conspirator through the communications that they fostered between him and his confederates around the world. The court supported this conclusion with dictionary definitions of the word “provide” that included “make available” as one of its meanings. In normal parlance, one would not use the phrase “provide personnel” to cover such a situation. One would be inclined to say at most that the defendants provided a channel of communication, but not that they provided personnel. The court’s interpretation involves the following chain of propositions:

1. The defendants passed or facilitated messages from Rahman to his confederates outside of prison.
2. The defendants thereby created a channel of communication between Rahman and his confederates.
3. That channel of communication made Rahman “available” to his confederates.
4. The defendants thereby “provided” Rahman to his confederates.
5. In providing Rahman to his confederates, the defendants provided “personnel” within the meaning of the statute.

The allegations in both the original indictment and its successor provide an awkward fit between the facts alleged and the definition of material support. Each of these applications of the statute involves some straining of its terms to cover the indicated facts – whether: 1) by characterizing the making or facilitating of telephone calls as “providing equipment; or 2) by interpreting “providing personnel” as: a) making oneself available, or b) making a conspirator available to co-conspirators by assisting communications between them. While it is not wholly unreasonable to read the statute as expansively as suggested by these applications, such interpretations of material support are not warranted, as I explain in the next section.

IV. LESSONS FROM THE (EARLY) MODEL PENAL CODE – “SUBSTANTIAL AID” VERSUS “AID”

One may ask why the government has relied upon such strained interpretations of §2339B (in *Sattar I*) and §2339A (in *Sattar II*), and why similarly aggressive claims about the statutes have been advanced in other recent prosecutions. The answer may be that, as suggested in the introduction to this article, §2339A and §2339B are being used by the government as catch-all, preventive crimes that are being invoked in a wide variety of situations. However, because “material support” is defined in §2339A by listing a series of specific categories of aid, and the categories often do not

match up with the conduct alleged to constitute support, the statute is not well suited to perform the catch-all function assigned to it by federal prosecutors.

But why was the statutory definition of material support originally drafted in this categorical form, and why has the government not proposed amending the statute to fix the problems created by the categorical approach? It would seem simple enough to draft a comprehensive statute that would eliminate these troubling problems of interpretation. For example, the difficulties could be eliminated by redrafting the statutes to cover anyone who “knowingly aids in the preparation or carrying out” of specified terrorist offenses or who “knowingly aids a foreign terrorist organization.”

To appreciate why the statutory definition may have been drafted in the form of specific categories of support, we need to return to basic principles of accessorial liability, beginning with the earliest draft of the Model Penal Code. In discussing the mens rea for complicity, the comments to Tentative Draft No. 1 of the Code stated,

The issue is whether knowingly facilitating the commission of a crime ought to be sufficient for complicity, absent a true purpose to advance the criminal end. . . .

The problem has had most attention in the federal courts where there is division of opinion as to the criterion that measures liability. The Second Circuit, speaking through Judge Learned Hand, has taken the position that the traditional definitions of complicity (aiding, abetting, . . .) . . . “carry an implication of purposive attitude towards it.”⁴⁰

In this early draft of the Model Penal Code, Professor Herbert Wechsler, the Reporter for the Code, rejected the idea that purposive aid should be an absolute prerequisite for complicity liability, instead concluding:

[W]hen a true purpose to further the crime is lacking, the draft requires that the accessorial behavior substantially facilitate commission of the crime and that it do so with the knowledge of the actor. This qualification provides a basis for discrimination that should satisfy the common sense of justice.⁴¹

In other words, it was proposed that something less than purpose – knowledge – should suffice for liability where the aid provided is substantial in assisting the commission of the crime. Professor Wechsler’s innovative approach to complicity in Tentative Draft No. 1 was not, however, accepted

40. MODEL PENAL CODE §2.04(3), cmt. 3 at 27-28 (Tentative Draft No. 1, 1953).

41. *Id.* at 30 (footnote omitted); *see id.* at 32 (urging that the proposed knowledge standard be adopted in general terms rather than by attempting to identify each specific type of contributing behavior that should be considered to establish complicity in the absence of a purpose to facilitate commission of the crime).

by the American Law Institute. Instead, the traditional approach was retained, making a purpose to promote or facilitate the commission of the crime a prerequisite for complicity liability.⁴²

This episode of Model Penal Code history helps to put into perspective the approach taken by the drafters of §2339A and §2339B, and it provides us with a possible explanation for that approach. Congress may well have wanted to broaden the reach of the statute, since proving purpose might be difficult in some cases where the imposition of liability might nevertheless be warranted. But a statute that simply made knowing aid a basis for serious criminal liability would be likely to meet opposition on the ground that it went too far, possibly reaching the “minor employee”⁴³ or the “vendor who supplies materials readily available upon the market.”⁴⁴ So it is arguable that what the drafters did – whether or not they had this in mind – was to adopt what was in fact a version of the original Model Penal Code complicity draft, basing liability on knowledge plus “substantial facilitation,” but with a special twist. Rather than adopt a general formula of substantial aid or substantial facilitation, they opted for a categorical approach. On this view, “material support” is the rough functional equivalent of substantial facilitation. But instead of simply relying on that general phrase, the drafters defined and delimited the offense by a series of specific categories (currency, lodging, training, expert advice or assistance, etc.).

Another way of characterizing the approach taken in these two statutes is that a trade-off was made between the mens rea required for the offenses and the actus reus or conduct required to hold the aiding person criminally liable. Thus, the statutes require that the contribution of the actor be material, and they put content into the concept of material support by defining it in terms of substantial forms of aid through the specification of listed categories. By thus “hardening up” the actus reus, the drafters made more acceptable a diluted mens rea of knowledge, which is less demanding than the usual complicity requirement of purpose.

Of course, not all conduct that falls within one of the statutory categories will necessarily amount to substantial aid. For example, when the government prosecutes donors to FTOs for providing support consisting of “currency or monetary instruments,” whether that support is “substantial” will depend on the amount provided, the size and nature of the organization, and similar factors. The statute’s categories of material support represent an approach that does not necessarily ensure that the aid will be substantial in each and every instance, but they provide an objective legal standard that generally establishes

42. Section 2.04 became §2.06 in the final version of the Model Penal Code. The proposal discussed in the text concerning complicity liability without a mens rea of purpose was dropped from the section after it was disapproved by the ALI at its meeting in May 1953. MODEL PENAL CODE §2.06, note on status of section at 21 (Tentative Draft No. 4, 1955).

43. MODEL PENAL CODE §2.04(3), cmt. 3 at 31 (Tentative Draft No. 1, 1953).

44. *Id.* at 30.

a guarantee of substantiality. Thus, the net of criminal liability will not be spread too wide.

The weakness of the Model Penal Code formulation was that it left the determination of an alleged accomplice's contribution to a crime – whether it constitutes “substantial facilitation” of the offense and thus warrants the imposition of criminal liability – to a jury's sense of justice. This approach would have offered little predictability as to when an alleged accomplice's conduct would lead to criminal liability. By putting specific content into the concept of substantiality through a listing of types of prohibited assistance, the §2339A definition of material support furnishes a reasonable modicum of guidance.

The foregoing analysis, if correct, is of more than merely theoretical interest, for it provides grounds for a particular interpretative approach in construing these statutory offenses. The substantiality and specificity of the categories chosen by Congress to define material support can be viewed as providing the justification for scaling down the usual complicity mens rea of purpose to a mens rea of knowledge. It can be argued that these categories therefore should not be given too broad an interpretation, lest they result in liability based on knowing aid alone. It should be recalled that 50 years ago the American Law Institute rejected even a standard of knowledge plus *substantial aid*.

Thus, a natural reading of “communications equipment” would cover short wave radios, walkie talkies, and the like – that is, types of electronic apparatus that could be used in terrorist activities. If the phrase were broadened to include activities such as making phone calls, then every phone call related to the FTO's activities could amount to providing communications equipment, which under the statute would be considered material support. Such an interpretation would give the phrase a meaning at odds with the normal, everyday usage of language, and it would effectively allow everyday minor acts to be covered by one of these statutes. Any limiting notion of substantiality inherent in that specific category of support would thereby be read out of the statute.

Similarly, if one provides “personnel” by providing oneself, then any kind of involvement with an FTO or an accused terrorist could amount to providing “material support” without any consideration of the nature of the involvement or the aid provided. Further, if by making phone calls and communicating instructions from one person to another, one “provides” the first person to the second, then the most mundane forms of communication and cooperation would fall within the statute.

If, however, each of the statutory categories is restricted to its normal, everyday meaning, providing personnel would refer to recruiting one or more individuals to become participants in a terrorist act or members of a terrorist group. This would involve bringing in new members, adding to the number of people involved. This more normal reading of the statutes would provide an objective way to ensure the substantiality of the aid and would furnish a basis for reasonably consistent application of these statutory offenses.

If, on the other hand, all of the specific categories of material support, as defined in §2339A, are given the type of broad interpretation approved by the district judge in *Sattar II* or that have been approved by some other courts, the cumulative effect will be to move the definition of material support strongly in the direction of simply “support,” effectively eliminating the idea that the aid must be substantial or material.

It can be argued, of course, that under the facts alleged in *Sattar* the support allegedly provided was in fact substantial, because facilitating communications between Rahman and his cohorts would put the alleged leader of the criminal group in touch with his underlings. The problem is that the statutory language does not readily support the distinction between a provision of personnel that would amount to substantial support and one that would be insubstantial. Imposing liability on this ground would amount to reading into the statute and its statutory categories a substantiality gloss. If such an interpretation were adopted, trial courts would need to give appropriate instructions to juries to ensure that the gloss was properly applied. Without such a gloss, the interpretation of this language in *Sattar II* means that the knowing facilitation of any communication between persons involved in terrorism, even the lowliest and most peripherally involved, would be subject to prosecution.

The statutes’ categorical approach to defining support makes it hard to have the substantiality of support turn on the particular facts of a case.⁴⁵ If it were desired to implement that kind of approach, it would be better to amend the statutes by deleting the categories and substituting a broad definition – for example, by specifying that material support means “substantial facilitation,” as proposed in Tentative Draft No.1 of the Model Penal Code.

Under such an approach, the question of whether the statute applied to particular conduct of the accused – whether aid was substantial – would be for a jury to decide. Undoubtedly, fostering communication between a terrorist leader and his worldwide group could, and probably would, be seen as substantially aiding the terrorist organization or particular terrorist crimes. Thus, under the facts alleged in *Sattar*, one might expect a jury to convict under such a revised statute. The problem in *Sattar* therefore is not with a criminal conviction on the facts alleged. Rather, it is that the *Sattar* court

45. A possible basis for adding such a gloss to the statute would involve emphasis on the notion of “material” support and applying that term in its usual sense, referring to substantiality or importance. If “material” support were interpreted in that way, “material support” would have to fall within one of the categories, but it would also have to amount to substantial support in the specific factual context. The wording of the statute poses a significant obstacle to this interpretation, since “material support” is itself defined in the statute, and in a manner that incorporates no threshold of quantification or degree, so long as the resource involved is within one of the listed categories of support. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247 (congressional finding that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct”).

reached the result it did by adopting an expansive interpretation of the statute that will have undesirable consequences in other cases.⁴⁶

United States v. Sattar illustrates the kinds of uses to which the government has put §2339A and §2339B. In a number of other prosecutions, the government has similarly advocated an expansive reading of one or the other of these statutory offenses.⁴⁷ However, because many of the cases have been resolved by guilty pleas, relatively few of them have resulted in judicial opinions interpreting the material support provisions. Courts that have addressed the statute and have resisted an expansive application of the statutory categories have done so on constitutional grounds, usually ruling that one or more of the categories is void for vagueness under the Due Process Clause.⁴⁸ A better approach would be to reject the government's expansive application of the statute on the ground that it is not supported by the statutory language.

V. THE MENTES REAE OF THE MATERIAL SUPPORT OFFENSES

A. *Knowledge Compared to Purpose – In General and for Complicity*⁴⁹

In the preceding section, I contended that, as a matter of statutory interpretation, §2339A and §2339B should be read as requiring knowledge plus substantial aid. To fully understand the significance of adopting a knowledge mens rea for complicity-like offenses, we need also to explore the difference between a mens rea of purpose and one of knowledge, both generally and in the special context of complicity. Once again, the Model Penal Code provides useful guidance.

The drafters of the Model Penal Code viewed the mens rea of knowledge as closely aligned with that of purpose, stating that “the Code draws a narrow distinction between acting purposely and [acting] knowingly.”⁵⁰ Under the Code, “purposely” means that the “conscious object” of the actor is to engage in specific conduct or to cause a particular result. “Knowingly,” on the other hand, involves either awareness of the nature of the conduct constituting an

46. Implications for other cases are discussed in the next section.

47. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002).

48. See, e.g., *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003) (“personnel” and “training” unconstitutionally vague), *affirmed in part, vacated in part, and remanded*, 393 F.3d 902 (2004) (en banc); *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) (same); *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (“expert advice or assistance” unconstitutionally vague).

49. This section is generally restricted to an analysis relevant to §2339A, because that section involves material support to listed offenses and thus is more directly similar to traditional complicity. Because §2339B is defined in terms of knowing material support to foreign terrorist organizations, it presents certain issues and problems not discussed here.

50. MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §2.02, cmt. 2 at 233 (1985).

element of the offense or belief that it is “practically certain” that his or her conduct will cause the particular result.⁵¹

For the principal to an offense, though the distinction may be “narrow,” there is a difference between a mens rea of knowledge and one of purpose, as a matter of moral culpability. Suppose, for example, that a soldier is charged with destruction of national defense material with intent to interfere with the national defense of the United States. His testimony is that, having been posted as a guard over a B-52 aircraft, he decided to cut certain wires in the aircraft’s electronics gear in order to call attention to what he considered to be lax security measures.⁵² If his testimony is credited, he could be held to have known that this actions would damage the B-52 and thus interfere with the national defense, but he would lack the requisite specific intent. While he had some moral culpability since he knew he was interfering with the national defense, it is not as great as it would have been if it had been his conscious object to interfere with the national defense.⁵³

As applied to an accomplice to a crime, the mental states of purposely and knowingly draw farther apart. As a general matter, when knowledge is used as the mental state required for the criminal liability of an accomplice, it differs from the mens rea that a principal actor must have insofar as it always includes knowledge of the criminal purpose of the primary actor. As stated in the Comments to the aforementioned Model Penal Code, Tentative Draft No. 1, when discussing a knowing complicity approach:

Conduct which knowingly facilitates the commission of crimes is by hypothesis a proper object of preventive effort by the penal law It is important in that effort to safeguard the innocent, but the requirement of guilty knowledge adequately serves this end – *knowledge both that there is a purpose to commit a crime and that one’s own behavior renders aid.*⁵⁴

51. *Id.* §2.02(b)(ii).

52. *See* United States v. Reyes, 30 C.M.R. 776 (A.F.B.R. 1960).

53. The moral culpability calculus and the willingness of the trier of fact to distinguish between knowledge and purpose in a given situation may be affected by the nature and the strength of the reason why the actor (who admits that he knew but claims that he did not intend) engages in the conduct. In the case discussed in the text, the reason offered by the accused is plausible but not very powerful. Suppose the accused offers no reason for his action, but simply says, “Yes, I cut the wires; I knew what the effect would be . . . but my purpose was not to interfere with the national defense.” In that situation: a) the trier would be less likely to credit the defendant’s factual claim; and b) if the claim that he did not intend to interfere with the national defense is accepted, one might conclude that the moral culpability of the knowing actor comes closer to that of the intending actor. (I am indebted to my colleague, Professor Herbert Morris, for both corrective comments and getting me to sharpen the analysis on this point.)

54. MODEL PENAL CODE §2.04(3), cmt. 3 at 30 (Tentative Draft No. 1, 1953) (emphasis added).

An accomplice's knowledge of the criminal purpose of the primary actor carries with it a degree of built-in uncertainty, because it is knowledge of a fact that involves the state of mind of another person. If the accomplice provides detailed plans of a bank to a person who aims to commit a bank robbery,⁵⁵ can it be said that the accomplice truly knows the criminal purpose of the bank robber? Because it involves the internal mental activity of the primary actor(s), it is difficult to "know," that is, to have that degree of certitude, about the exact nature of the purpose, how firm it is, whether it is subject to contingencies, and whether it is still continuing at the time the accomplice's aid is provided.

The Model Penal Code formulations do allow for meeting the knowledge requirement even in the absence of true knowledge. Section 2.02(7) of the Code also provides: "When knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."⁵⁶

This high probability formulation appeared to be at variance with the knowledge and awareness and practical certainty language that is also utilized in the Model Penal Code culpability provisions. The drafters explained the matter as follows:

[The relevant paragraph] deals with the situation British commentators have denominated "wilful blindness" . . . , the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . . Whether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question.

The draft proposes that the case be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. . . . The inference of "knowledge" of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief.⁵⁷

The accomplice's knowledge of the criminal purpose of the primary actor would seem to fall within the category of knowledge of the existence of a

55. If the accomplice is present on the scene as the robber enters the bank, the knowledge will come close to practical certainty.

56. MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) §2.02(7) (1985). The 1962 Official Draft of the Code changed the phrase "substantial probability" in this provision to "high probability," *see* Model Penal Code §2.02(7) (Tentative Draft No. 4, 1955), but the point remains the same. Something less than practical certainty can suffice in regard to an existing fact.

57. MODEL PENAL CODE §2.02(7), cmt. 9 at 129-130 (Tentative Draft No. 4, 1955).

particular fact. This Model Penal Code provision accordingly would supply an appropriate standard for determining whether the alleged accomplice has the requisite knowledge. If the accused accomplice were aware of a sufficiently high probability of the existence of the criminal purpose of the primary actor, the knowledge standard would be met. It follows that under the Model Penal Code approach, as applied to the accomplice, the “narrow distinction” between purpose and knowledge is somewhat less narrow since the applicable standard as a general matter could be “high probability” rather than true knowledge.

What conclusions can be drawn from this analysis? First, the fact that an accomplice’s knowledge mens rea applied to complicity crimes usually has a degree of built-in uncertainty connected to it, combined with the difference in the degree or moral culpability between knowledge and purpose mental states, may, along with other factors, help to explain the legal system’s reluctance simply to extend a knowledge-plus-aid approach to complicity or complicity-like crimes.⁵⁸ Some additional indication of culpability, such as substantial aid or other limiting factor, has usually been required.⁵⁹ Second, the observations in the previous paragraph are applicable whether one is dealing with complicity with a knowledge mens rea or with an independent complicity-like crime with a knowledge mens rea, such as §2339A. Third, the observations may have greater weight in the §2339A context. In traditional complicity, the accomplice is being prosecuted after the crime has been committed, so there is confirmation of the fact that the primary actor’s purpose existed since that purpose was carried out. The substantive offense alleged as the basis for a violation of the independent and separate material support offense described in §2339A need not have been consummated, so that particular source of confirmation of the existence of the criminal purpose may be missing.

There are also other reasons for requiring, at a minimum, that the aiding conduct of the accomplice be substantial if a shift is made to a knowledge standard. One such reason is suggested in an excerpt from the Model Penal Code quoted earlier: the putative accomplice may have knowledge of the principal’s criminal purpose but have another motive for providing aid, such as when she is a vendor in the business of selling goods or providing services.⁶⁰ Should that knowledge plus the aid provided be sufficient to impose accomplice liability on the seller? Such cases raise policy questions about whether a knowledge-plus-aid standard would impose too great a burden on commerce in comparison with the benefits in crime prevention. Tentative Draft No. 1 tried to strike the middle ground in such cases by proposing a knowledge-plus-substantial-facilitation standard, ensuring that before criminal

58. *See supra* note 26.

59. *Id.*

60. *See supra* text accompanying notes 43-44.

liability can be imposed, the accomplice have a significant degree of responsibility for the criminal result.

If a knowledge-plus-aid standard were applied generally to complicity, there would be reason for concern that the door of criminal liability might open too wide – exposing the general population to the risk of complicity charges and a jury verdict against them whenever they might be viewed as having been aware of the criminal purposes of those to whom they provide some aid.

Parents, for example, who provide financial assistance to their college student offspring and who are aware that he or she may be buying and selling illegal drugs could potentially face criminal charges under such a standard. Parishioners who donate food parcels to their church for forwarding abroad might be at risk of prosecution if their church sends the supplies to a group with terrorist ties. Given the wide discretion left to prosecutors whether to charge, the risk of prosecution could extend far beyond those who have actual knowledge.

One can extend these examples into the many other contexts where a knowledge-plus-aid standard could be applied, and one begins to see the far-reaching implications of such a change in the standard for complicity. Widespread use of a knowledge-plus-aid standard of liability for complicity would increase the actual risk of criminal prosecution; it would correspondingly increase the apprehension of people in society about the risk that they themselves might be prosecuted.

*B. The Knowledge Rule Under §2339B – Humanitarian Law Project v. Department of Justice*⁶¹

1. The Humanitarian Law Project Decision and Its Implications

The analysis in Part IV of the use of statutory categories to define material support is applicable to both §2339A and §2339B. Much of the immediately preceding discussion in this Part has dealt with the mens rea and conduct components of §2339A. This section focuses on mens rea issues special to §2339B, which is aimed at material support of a foreign terrorist organization.

What is criminalized under §2339B is the provision of material support to a designated foreign terrorist organization, one that engages in terrorist activity, that is, perpetrates terrorist crimes. It is not clear how many crimes must be perpetrated, or even whether any must have been perpetrated as of the time that material support is provided. In theory at least, it would seem that a terrorist organization might be one that is planning terrorist crimes but has not yet perpetrated any. In fact, however, those organizations that have been

61. *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382 (9th Cir. 2003), *affirmed in part, vacated in part, and remanded*, 393 F.3d 902 (2004) (en banc).

designated as foreign terrorist organizations are groups that have a strong track record of terrorist activity.

What must a person accused under §2339B have known about an FTO in order to be held criminally liable for knowingly providing material support to it? If the assistance is to provide explosives, say, it seems likely that the accused would know she was aiding terrorist activity. If, however, the aid provided is innocent on its face or neutral, the mens rea question is more difficult. The leading case on this issue was the panel opinion in *Humanitarian Law Project v. Department of Justice*, but that decision was vacated as to the mens rea issue following en banc review in the United States Court of Appeals for the Ninth Circuit. I nevertheless discuss the panel opinion because it helps to elucidate and provides the backdrop for the subsequent enactment of an amendment to the statute contained in the intelligence reform legislation, which is treated in the Epilogue to this article.

Humanitarian Law Project was not a criminal prosecution. Rather, the plaintiffs were organizations and individuals who wished to provide material support to the non-violent and political activities of designated foreign terrorist organizations and who sought to enjoin the enforcement of §2339B against them. The case had already gone to the Ninth Circuit Court of Appeals once before the most recent appeal. On that occasion the court found the terms “personnel” and “training,” as used in the definition of material support, to be unconstitutionally vague.⁶² The plaintiffs’ other constitutional attacks on the statute were rejected. In December 2003, a panel of the court of appeals reaffirmed its earlier vagueness rulings⁶³ and proceeded to address the mens rea required for conviction under the statutory scheme. The court rejected the government’s contention that “it could convict a person under §2339B if he or she donates support to a designated organization *even if he or she does not know the organization is so designated. . . . so long as the organization designates itself by name.*”⁶⁴

Relying in part on *Scales v. United States*,⁶⁵ the court in *Humanitarian Law Project* ruled that in the context of an offense like that described in §2339B, due process requires a culpable mind. To avoid holding the statute unconstitutional, the court construed it to require the government to prove “that the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization’s unlawful activities that caused it to be so designated.”⁶⁶

62. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

63. The government tried to reopen the earlier decisions on vagueness, claiming that any vagueness concerns had been cured by its development of definitions for the statutory terms “personnel” and “training” in the U.S. Attorneys’ Manual. The court rejected this claim. *Humanitarian Law Project v. Dep’t of Justice*, 352 F.3d at 404-405.

64. *Id.* at 397 (emphasis in original).

65. 367 U.S. 203 (1961).

66. *Humanitarian Law Project*, 352 F.3d at 403. Because “currency or monetary instruments” are specifically included in the statutory definition of material support, donations of money are unquestionably within the reach of the statute. Therefore, monetary support does

As the court stated,

Without the knowledge requirement . . . a person who simply sends a check to a school or orphanage in Tamil Eelam run by the LTTE could be convicted under the statute, even if that individual is not aware of the LTTE's designation or of any unlawful activities undertaken by the LTTE. Or, according to the government's interpretation of §2339B, a woman who buys cookies from a bake sale outside of her grocery store to support displaced Kurdish refugees to find new homes could be held liable so long as the bake sale had a sign that said that the sale was sponsored by the PKK, without regard to her knowledge of the PKK's designation or other activities.⁶⁷

The panel in *Humanitarian Law Project* did not follow the *Scales* decision completely, however. *Scales* involved a prosecution for the crime of membership in an organization that advocated the violent overthrow of the government. The Supreme Court in that case required a showing that the accused had the specific intent to accomplish the aims of the organization, even though the statutory language did not support such a reading. If the *Humanitarian Law Project* court had followed *Scales* completely, it would have required the donor to have specific intent to accomplish the aims of the FTO, but it declined to do so. In *United States v. Al-Arian*,⁶⁸ by contrast, a district court recently took the more expansive remedial approach rejected in *Humanitarian Law Project*, holding that under §2339B “the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.”⁶⁹ In a still more recent en banc

not raise issues comparable to those discussed *supra* Part IV with regard to other types of support such as personnel and communications equipment.

67. *Id.* at 402. The court did not expressly deal with a related issue of the actus reus of the material support charge. A donor might claim that the funds he donated are in fact being used only to support lawful activities, not the unlawful activities, of the organization. Even if the proof would support such a claim, of course, donations earmarked for legitimate charitable activities free up other funds for use to support terrorism. In any case, since the statute bars the provision of material support for a designated FTO, without regard to the specific uses that are made of funds donated, this kind of actus reus claim is not likely to be successful. Individuals who wish to donate only to the charitable activities of a designated FTO cannot do so without subjecting themselves to the risk of criminal prosecution. See generally Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004). One implication of the panel's opinion in *Humanitarian Law Project* might be that a designated FTO could try to shift its charitable activities into a separate organization. It then would be necessary to determine whether the separate organization was sufficiently independent to avoid being designated an FTO in its own right, or whether it was simply the alter ego of the original organization. See *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152 (D.C. Cir. 2004).

68. 308 F. Supp. 2d 1322, 1337-1339 (M.D. Fla. 2004). The government's motion for modification of this ruling was denied. 329 F. Supp. 2d 1294 (M.D. Fla. 2004).

69. 308 F. Supp. at 1339.

decision, the United States Court of Appeals for the Fourth Circuit took a different view, ruling that the absence of such a specific intent requirement does not infringe on the constitutionally protected right of free association.⁷⁰

There may be pragmatic reasons why the Ninth Circuit panel in *Humanitarian Law Project* did not entirely follow the *Scales* approach in construing §2339B. Requiring a mens rea of purpose for conviction would make it harder in many cases to prosecute individuals who contribute funds to an organization involved in both terrorism and humanitarian activities. On the other hand, the more moderate, intermediate position reduces the risk of convicting those who contribute to an FTO without scienter. Imposing a specific intent requirement would have also made it more likely that the decision would be overturned.⁷¹

2. *Practical Application of the Humanitarian Law Project Mens Rea Standard*

How would the *Humanitarian Law Project* panel's mens rea standard be likely to work in practice? It seems clear that if the panel had construed §2339B to require a mens rea of specific intent or purpose, the value of the section as an important enforcement tool would have been significantly diminished.⁷² But what will be the effect on enforcement of requiring knowledge that a group being supported has been designated as a foreign terrorist organization or engages in terrorism?

In some instances, the fact that an organization engages in terrorist activities may be of such widespread notoriety that the government can persuade a jury of the defendant's knowledge. If an organization's activities are less notorious, the government can publicize the fact of its designation as an FTO by notices at airports and on post office bulletin boards, and through stories and advertising in newspapers. Alternatively, the government could notify a donor of the designated status of an organization, and if the donor

70. *United States v. Hammond*, 381 F.3d 316 (4th Cir. 2004).

71. There are other possible explanations for the Ninth Circuit panel's failure to adhere completely to *Scales*. While a First Amendment argument can be made in both cases, the argument may be viewed as stronger in a case like *Scales*, where the political nature of the organization (the Communist Party of the United States) was more pronounced than in *Humanitarian Law Project* (Kurdish and Tamil groups). Further, *Scales* involved a status crime, namely membership, while §2339B requires affirmative action on the part of the accused. The Ninth Circuit panel may have concluded that while a requirement of purpose is necessary in a membership context to ensure adequate culpability, where the accused is engaged in active support of the organization a lesser mens rea will suffice. Another possible explanation is that the panel viewed §2339B as requiring knowing substantial aid in the form of material support, concluding that this criterion meets the constitutional standard set by *Scales*. In other words, due process requires either specific intent plus aid or knowledge accompanied by substantial aid.

72. The district court in *Al-Arian* was of a contrary view, stating that it "did not believe this burden is that great in the typical case" and that often "such an intent will be easily inferred." *Al-Arian*, 308 F. Supp. 2d at 1339.

continued to contribute, a prosecution could ensue. Even if a donor is tried and acquitted because the government fails to prove knowledge, the donor will be effectively barred from making new contributions, since he or she would then have the requisite knowledge.

While the mens rea requirement adopted by the *Humanitarian Law Project* panel would impose additional burdens of proof on the government, application of the requirement is not likely to interfere significantly with the effective enforcement of §2339B.

*C. Conspiracy Liability Compared with Prosecution
Under §2339A or §2339B*

If §2339A and §2339B were not on the books, the government might have charged the defendants in cases like *Lindh*,⁷³ the *Lackawanna Six*,⁷⁴ *Ujaama*,⁷⁵ and *Sattar*⁷⁶ with conspiracy.⁷⁷ Would conspiracy lie in such cases? If so, §2339A and §2339B may not be such crucial weaponry for the prosecutor's arsenal.

Criminal liability for conspiracy has at its core the fairly narrow, well-defined concept of agreement. Complicity has no such limiting concept. "Aid," the central concept in complicity or complicity-like liability, can take an infinite variety of forms. Conspiracy also requires specific intent. The involvement of alleged co-conspirators in the criminal agreement is usually shown by their acts, which also can take many different forms. There is no requirement that the acts be substantial or amount to substantial participation in the criminal group. Thus, the same kind of acts which I have argued should be deemed insufficient under a knowledge-plus-substantial-aid categorical approach, as in *Sattar II*, would readily suffice as overt acts to make the actor liable as a member of a conspiracy.⁷⁸

Conspiracy is in fact being charged in many of the material support prosecutions – that is, conspiracy to violate either §2339A or §2339B. Where conspiracy is charged, it means that the government feels it can prove a mens rea of purpose, but of course in this context it is purpose with respect to one or the other of the material support offenses. Whether conspiracy would lie in these cases in the absence of §2339A or §2339B presents a different question.

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

74. *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002).

75. *See supra* note 15.

76. *See supra* text accompanying and following notes 27-40.

77. The government would also be able to charge other specific offenses, depending upon the particular facts in the case.

78. In an early article on the subject of venue in conspiracy cases, I called attention to cases that relied on the use of telephone calls and even the "wondrously commonplace" activity of baby-sitting as overt acts in furtherance of the conspiracy. Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 767 (1962).

In any case where a §2339A charge is plausible, that is, where the government is able to prove that the defendants knew of the purpose of other individuals to commit one or more of the specific terrorist offenses listed in §2339A and that they knowingly provided substantial aid (by way of one or more of the listed categories of “material support”), it seems likely that a conspiracy charge would also lie. The burden of proving the agreement could in most cases be met.⁷⁹ The key issue would be whether the jury would find that the necessary specific intent, that is, purpose with respect to the facilitation of the object crimes, had been proved. Where knowledge can be shown along with the supporting acts, absent a situation where another plausible alternative motivation for the conduct can be offered, the trier of fact would often, but not always, find that the defendants had the requisite purpose.

Section 2339B, however, more clearly extends liability farther than traditional conspiracy. Cases in which a §2339B prosecution is likely to be successful, but a conspiracy charge might not, include those where the defendant’s involvement was quite remote from specific terrorist activity and an inference of purpose with respect to the commission of specific offenses might be difficult to draw. The *Lackawanna Six* prosecution⁸⁰ provides an example. The defendants attended a terrorist training camp in Afghanistan, but at least some of them claimed that they had motives other than preparing for terrorist activity. The availability of §2339B in that case made it possible for the government to base a charge on the defendants’ knowledge that al Qaeda was a designated FTO, plus their provision of material support⁸¹ to that entity. The fact that §2339B combines a mens rea of knowledge with a provision of material support, not to a specific criminal activity, but rather to a terrorist organization, gives it a scope of potential application broader than traditional conspiracy.

A claim that §2339B is needed if the government is to be able to engage in preventive enforcement and sweep more broadly against potential terrorist activity than is possible under traditional criminal law doctrines is thus not without merit. A separate normative question is whether such a broad applicability expands too much the traditional range of application of serious criminal penalties.

CONCLUSION

The material support, categorical approach, combined with a mens rea of knowledge in 18 U.S.C. §§2339A and 2339B, is best understood as having created a complicity-like variant on the early Model Penal Code’s proposed

79. The agreement might be proved inter sese or the existence of other persons who appear to be acting in concert might provide the basis for an inference of agreement which the defendant by her actions joined.

80. *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002). The defendants were also charged with conspiracy to violate §2339B.

81. *Id.* at 196-223.

knowledge-plus-substantial-aid formula for complicity liability. Subsequently, however, expansive interpretations by some federal courts of the material support categories in prosecutions under these sections have been moving these two statutes strongly in the direction of a knowledge-plus-aid approach.

These judicial interpretations are a departure from currently applicable standards for complicity liability. A knowledge-plus-aid approach has not, until these recent cases, gained much of a foothold in this country. The fact that this new knowledge-plus-aid development is occurring in connection with independent substantive, complicity-like offenses rather than in cases involving traditional complicity liability makes no difference. Establishment of knowledge plus aid as a basis for liability in this substantive crime context would provide a widely available federal model that could easily be transferred into other arenas.

The danger is that such an expansive interpretation of the material support offenses could influence legal developments in both the federal system and the criminal law of the several states. There are numerous precedents in which federal enforcement “wars” and innovative statutes in aid of such “war” efforts have had a strong influence on developments in state criminal law.⁸² This would not be the first time that legal institutions responding in a crisis mode have led to fundamental changes in the legal system. While we are probably more familiar with such developments in the procedural arena, changes in the substantive law can have a significant impact on society and on democratic values. Expansive interpretation of the material support offenses could spawn new statutes in the federal system outside of the terrorism/national security area and lead to similar statutory developments in the states. The result could be the creation of new substantive, complicity-like crimes and, potentially, even an expanded approach to complicity.

It might be argued that an expansive approach to statutory interpretation, leading to a knowledge-plus-aid approach, can be justified, given the importance of providing law enforcement with tools adequate to deal with the extremely serious dangers that terrorism poses. It is not clear, however, that a requirement of knowledge-plus-substantial-aid, bolstered by the traditional law of conspiracy and its prosecutorial advantages, would not be adequate for the enforcement task.

If the government finds itself hamstrung in its anti-terrorism enforcement by judges who give the material support categories a more normal reading, as has been advocated here, it could propose amendment of the statutes to abandon the categorical approach and adopt instead a general formula approach of substantial aid. Either way, it seems doubtful that anti-terrorism criminal enforcement would necessarily be weakened by a knowledge-plus-substantial-aid approach. There are thus good reasons for the federal judiciary

82. Strong examples are the federal RICO and money laundering statutes, which have been emulated in a great many states' criminal laws.

to draw a line in the sand and restrict the interpretation of the material support offenses to the equivalent of a knowledge-plus-substantial-aid approach, consistent with a proposal made by the drafters of the Model Penal Code a half-century ago.

EPILOGUE

Amendments to §2339A and §2339B in the intelligence reform bill adopted by Congress in late 2004⁸³ warrant careful examination in light of the analysis in this article. The amendments are of several types, only some of which are of concern here.⁸⁴ Some of the amendments appear to be a legislative response to a one or another particular judicial decision. In some cases, the amendment overrides the decision; in other instances, it simply codifies it or adopts language that makes clear something that was not so clear.

One of the new provisions is contained in §6602 of the intelligence reform legislation, which adds 18 U.S.C. §2339D. This new section makes it a federal crime knowingly⁸⁵ to receive military-type training from or on behalf of a foreign terrorist organization.⁸⁶ This provision, if in force at the time, would undoubtedly have covered the activities of the Lackawanna Six, who traveled to Afghanistan to receive military-type training. It also might have applied to José Padilla, if newspaper accounts were accurate in their reporting that he received instruction in how to make a dirty bomb, to Richard Reid, the

83. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004). Subtitle G of the statute (“Providing Material Support to Terrorism”) was designated the Material Support to Terrorism Prohibition Enhancement Act of 2004.

84. Some of the provisions not reviewed here are designed to extend the coverage of the original sections or to fill in possible gaps in coverage. Many of the new provisions clarify and, arguably, extend the jurisdictional scope of the original sections.

85. The requisite knowledge is essentially the same as that mandated by the decision in *Humanitarian Law Project v. Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003), *affirmed in part, vacated in part, and remanded*, 393 F.3d 902 (2004) (en banc).

86. §2339D. Receiving military-type training from a foreign terrorist organization

(a) Offense. – Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (c)(4)), that the organization has engaged or engages in terrorist activity (as defined in section 212 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). . . .

(c) Definitions. – As used in this section –

(1) the term “military-type training” includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction (as defined in section 2232a(c)(2))

so-called shoe bomber, who reportedly was taught how to plant a bomb in his shoe, and to anyone who trained at the camps that James Ujaama was planning to set up.

The new section describes a specific type of activity that should be seen as substantial in relation to the activities of a terrorist organization. Accordingly, the use of a mens rea of knowledge in connection with this offense is not objectionable.⁸⁷ In the prosecution of the Lackawanna Six, who were charged under §2339B, the accused were alleged to have provided themselves to the terrorist organization by going to Afghanistan to receive training there. The new §2339D more accurately describes what they did and the nature of their crime; it is a more appropriate way to characterize their conduct than the awkward allegation that they “provided personnel” (that is, themselves).

While from one perspective it makes sense to use §2339D to define this new terrorism-related offense, if that approach – describing specific categories of conduct related to terrorism – were repeated for all the varying conduct that might be covered by §2339B (either along with, or in lieu of, the definitional provision contained in §2339A), the result could be a significant proliferation of specific terrorism-related offenses. Having a general category knowledge/mens rea crime like §2339B, even with its §2339A sub-categories, but properly interpreted, may be preferable to such a proliferation of offenses.

Section 2339D, by itself, can be seen as a positive addition to the statutory scheme. Some other provisions of the intelligence reform legislation correct flaws in the material support statutes; still others add new flaws. Thus, §6603(b) of the intelligence legislation defines the term “personnel” in the definitional section of §2339A to mean “1 or more individuals who may be or include oneself,” confirming the trial court’s interpretation in *Lindh* and rejecting that in *Sattar I*. Taken by itself, this language appears to mean that by knowingly participating in any way that serves the goals of a terrorist organization, one provides material support by providing oneself. Unless modified by other language, it would mean that a person who provides legitimate services to a terrorist organization would be providing material support to the organization by providing herself. To try to avoid this result, §6603(f) contains additional language that provides:

(h) Provision of Personnel. – No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise,

87. Note, however, that this provision does not describe the offense as providing support or aid to the terrorist organization but rather as receiving something from the organization, i.e., training.

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

Depending on how it is construed, this language might ensure that the "including oneself" phrase does not become a vehicle for imposing liability on attorneys representing terrorists or on others who provide legitimate services to terrorists. Thus, an attorney who represents a terrorist client and is prosecuted on the theory that she provided herself could argue that the person provided (herself) was not provided "to work under . . . [the] terrorist organization's direction . . . or to . . . manage . . . the operation of that organization." The government might argue in response that the providers of legitimate services work at the direction of their clients and thus could be held liable under this language.⁸⁸

The quoted amending language would not, however, preclude the imposition of criminal liability on Lynne Stewart, insofar as the government's theory was that she provided Rahman by "making him available" to his confederates.⁸⁹ Nor would it ensure that only the provision of personnel that amounted to substantial support would be criminalized by §2339B. This amendment of the personnel provision of the statute would not prevent the most mundane forms of communication and cooperation among participants from being held to violate the statute, based on a mens rea of knowledge.⁹⁰ The amendment of the personnel provision of the statute thus addresses a narrow concern and does little to limit the otherwise broad application of that provision.

On the other hand, another small amendment of §2339A appears to add significantly to its breadth. Section 6603(b) adds to the list of items in the §2339A definitional section the term "any . . . service." Thus, anyone who knowingly provided a service to a terrorist organization would be subject to the serious penalties found in §2339B.⁹¹ This amendment would also seem to undo the amendment to the personnel provision discussed above. An attorney who provides services to the organization by representing one of its members would be providing material support in the form of a "service," and the protective language of new subsection (h) would not protect her, since it is

88. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT, R. 1.2(a) (2003) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued").

89. *See supra* text following note 39. Query: Suppose an attorney represents a terrorist and manages to secure his acquittal or the dismissal of the case, whereupon the terrorist returns to his terrorist organization. Would the attorney then be guilty of having knowingly provided personnel to the organization? Nothing in the new statutory language bars liability in such circumstances. Liability might be precluded, however, by dint of the Sixth Amendment.

90. *See supra* text accompanying and following notes 43-44.

91. Section 2339A previously included "financial services," but not "any service," in the list of covered categories.

restricted to the use of the “personnel” term.⁹² The janitor or the pizza delivery person or a taxi driver, or anyone who provides the most mundane “services,” would seem to be at risk of prosecution if an inference of their having the requisite knowledge could be drawn.

Thus, while a couple of these amendments are positive developments, none of them addresses the core flaw in the statute, and one of them may well serve to magnify the effects of that flaw. The concern remains that the material support offenses will be emulated widely and lay the foundation for a broad retreat from the traditional posture of the criminal law in this country that complicitous liability requires a mens rea of purpose, and that if a mental state of knowledge is deemed sufficient, at the very least the underlying conduct must be substantial in relation to the criminal goals of the primary parties.

92. Again, the Sixth Amendment might be invoked.

* * *