

2018

Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?

Diane Webber
Georgetown University

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#), [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Webber, Diane (2018) "Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?," *American University International Law Review*. Vol. 34 : Iss. 1 , Article 4. Available at: <https://digitalcommons.wcl.american.edu/auilr/vol34/iss1/4>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

PREPARING TO COMMIT DOMESTIC TERRORIST ACTIVITY: DOES THE UNITED STATES HAVE ADEQUATE TOOLS TO STOP THIS?*

DIANE WEBBER**

I. THE U.K. LEGISLATION	206
A. EXAMPLES OF CONDUCT AMOUNTING TO “PREPARATION” IN U.K. TERRORIST CONVICTIONS	208
B. REQUIREMENTS FOR ARREST	214
II. PREPARATION TO COMMIT TERRORIST ACTS UNDER U.S. LAW	215
A. MATERIAL SUPPORT STATUTES	215
1. Examples of Conduct Amounting to Preparation in Material Support Convictions	219
B. RIGHT-WING TERRORISM	225
1. Examples of Conduct Amounting to Preparation in Right-wing Terror Cases Since 2014	226
C. REQUIREMENTS FOR ARREST	229
III. CONCLUSION	230

Imagine this scenario: someone tells the FBI about a conversation overheard in a café in which two people were laughing and praising a recent terrorist attack where a man drove a truck into a group of people in furtherance of a terrorist cause. They both boasted of their postings on social media about the attack. One of the two said he had been raising money for the cause, had recently acquired a commercial

* This article is based on an earlier version written at the request of Max Hill Q.C., the Independent Reviewer of the United Kingdom Terrorism Legislation.

** Diane Webber S.J.D., Visiting Fellow, Georgetown University, Center on National Security and the Law.

license to drive a heavy-duty truck, and wanted to replicate the incident in Washington, D.C. in furtherance of the same terrorist cause. The other said that he had a cache of automatic weapons that he was itching to use. Does this conversation signify an imminent terror attack? What can the FBI do, and at what stage?

Preparation to commit terrorism is not a federal crime under United States (U.S.) law. This article compares the United Kingdom (U.K.) law of preparation to commit terrorist acts with the U.S. material support statute. This analysis demonstrates that, apart from one U.S. case, arrests for domestic terrorist activity in the U.K. appear to take place at an earlier stage of plotting than in the U.S.

This article also reveals that the scope of U.S. law to investigate and prosecute suspected terror suspects with a connection to international terrorism (connected to ISIS or Al-Qaeda), is broader than in cases of suspected domestic terrorist activity (right-wing, left-wing, animal rights, anti-abortion, etc.). Arrests generally occur at a later stage in cases of non-Islamist terrorism because law enforcement does not have the same legal tools or resources to thwart this type of terrorist activity. This article concludes with recommendations to add preparation to the current roster of counter-terrorism legislative tools and to ensure that law enforcement agencies are equipped to thwart all varieties of terror activity with one set of tools that fits all crimes.

I. THE U.K. LEGISLATION

The U.K. has had anti-terrorism legislation for many years. The legislation was initially enacted to deal with Irish terrorist activity that caused 3,500 fatalities in the U.K. between 1969 and 1998¹ and Islamist terrorism since the 1990s.² The U.K. has proscribed the preparation of acts of terrorism for over four decades. The relevant statutes simply list preparation as one of the elements of the crime.³

1. HM GOV'T, PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM §1, at 22 (TSO 2009) (U.K.).

2. *Id.* ¶ 0.8.

3. *See, e.g.*, PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT 1974, c. 56, § 7(1)(b) (U.K.) (stating “[A] constable may arrest without warrant a person whom he reasonably suspects to be— (b) a person concerned in the commission, preparation or instigation of acts of terrorism”).

The crime of preparation of terrorism has been repeated in all subsequent legislation without attracting public or political criticism. Two examples of this are found in sections 57 and 58 of the Terrorism Act 2000.⁴

After the London terror attacks of July 7, 2005, the government decided that counter-terrorism legislation needed to be made more robust and further measures were enacted. The Terrorism Act 2006 added crimes of encouraging terrorism⁵ and specified more detail about the crime of preparation.⁶ Since these developments took place, section 58 of the Terrorism Act 2000 and section 5 of the Terrorism Act 2006 have been used very frequently, although section 57 of the Terrorism Act 2000 is rarely used. For example, in 2016, out of twenty-four terror prosecutions, ten involved section 5 of the Terrorism Act 2006 and two involved section 58 of the Terrorism Act 2000.⁷ None of the prosecutions involved section 57 of the Terrorism Act 2000.

4. TERRORISM ACT 2000, c. 11, §§ 57(1)(2), 58(1)(2) (U.K.) (stating under § 57 that “[P]ossession for terrorist purposes. (1) A person commits an offense if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. (2) It is a defense for a person charged with an offense under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism . . .” and stating under § 58 that “Collection of information. (1) A person commits an offense if—(a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind. (2) In this section “record” includes a photographic or electronic record . . .”).

5. TERRORISM ACT 2006, c. 11, §§ 1-4 (U.K.).

6. *See id.* § 5 (stating on its relevant part that “(1) A person commits an offence if, with the intention of—(a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention. (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally . . .”).

7. *See* Max Hill, *The Terrorism Acts in 2016: Report of the Independent Reviewer on the Operation of the Terrorism Acts 2000 and 2006*, INDEP. REVIEWER OF TERRORISM LEGIS. 59-63 (2018) (U.K.), <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/01/Terrorism-Acts-in-2016.pdf> (noting that other prosecutions were related to funding of terrorism, disseminating terrorist information, inviting support for a proscribed organization, breaching a notification order, and violating port or border controls).

It should be emphasized that U.K. anti-terror legislation is used to deal with terrorist activity from all sources. This includes, but would not be limited to, Islamist, Irish Republican Army (IRA), and right-wing terrorism.

A. EXAMPLES OF CONDUCT AMOUNTING TO “PREPARATION” IN
U.K. TERRORIST CONVICTIONS

Preparation to commit terrorist activity covers a wide range of activity. The examples that follow are cases where the defendants have appealed against either a conviction or sentence. In *Roddis*, the defendant visited former employers, showed them replica bullets and railway fog signal detonators, and told them that the bullets were live and the detonators were landmines.⁸ He returned to the offices a week later and his employers, who were sure that Roddis was planning a terror attack, called the police.⁹ Roddis was arrested and in a search of his home, police found nineteen video clips of beheadings and evidence on his computer that he had researched how to make bombs, together with ingredients and recipes for making explosives.¹⁰ Roddis appealed his conviction under section 5 of the Terrorism Act 2006.¹¹ One of the grounds for appeal was that the trial judge had insufficiently directed the jury that the intent to commit the act of terrorism had to coincide with the conduct.¹² The appellate judge agreed with the trial judge’s conclusion that “collecting information needed to manufacture explosives and acquiring the necessary materials for bomb making would on the face of this case suffice.”¹³ The appellate judge commented:

The [trial judge’s directions] made it clear that the coincidence of conduct and intention was essential. They also made it clear that the conduct in which the defendant was alleged to have engaged was that he had researched how to make home-made explosives from the internet and purchased two of the ingredients so that he could manufacture his explosives and use it in an improvised explosive device (that is to say a

8. *Regina v. Roddis* [2009] EWCA (Crim) 585 [5] (Eng.).

9. *Id.*

10. *Id.* at [6].

11. *Id.* at [1].

12. *Id.*

13. *Id.* at [10].

bomb) along with the nails he had also purchased for that purpose and the fuse that he had obtained from fireworks. It follows that the conduct left to the jury was not simply the acquisition of the ingredients, but extended to what the judge described as research and what the indictment described as acquisition of knowledge, which was on the facts of this case a continuing process.¹⁴

Thus, the actual charges related not to the fake ammunition Roddis took to his former employers' office, but to the bomb making ingredients and evidence of research that were found at his home. There was nothing to indicate what the target might be or how imminent an attack might be. One might therefore conclude that Roddis was arrested at a very early stage of preparing to commit terrorist activity.

In *Dart*, three defendants pleaded guilty under section 5 of the Terrorism Act 2006, but appealed their sentences.¹⁵ The three defendants (Dart, Alom, and Mahmood) had travelled to Pakistan in 2011.¹⁶ Once back in the U.K., they began to plan their return to Pakistan, where they hoped to obtain training so that they could join the fight in Afghanistan and kill coalition soldiers.¹⁷ The defendants made preparations to obtain visas, they conversed with each other via a "silent conversation" on the computer concerning who they might contact in Pakistan, how to manufacture explosives, what might be legitimate targets, and how they would communicate once they arrived in Pakistan.¹⁸ The trial judge concluded from the evidence that although Dart and Mahmood had not identified a target, whether at home or abroad, he was sure that neither had ruled out an attack of some sort in the U.K.¹⁹ The trial judge emphasized that he was not sentencing Dart "on the basis that he had intended to carry out terrorist activities in this country, but rather upon the basis that his immediate objective had been to go to Pakistan for training, with a view to carrying out subsequent (albeit not yet crystallized) terrorist

14. *Id.* at [10]-[11].

15. *Dart v. The Queen* [2014] EWCA (Crim) 2158 [1]-[6] (Eng.).

16. *Id.* at [27].

17. *Id.* at [29]-[30].

18. *Id.* at [31].

19. *Id.* at [62].

operations there.”²⁰ Although the appeal concerned the severity of the sentence, the appellate judge reiterated that section 5 “requires proof that an individual had a specific intent (albeit that it may have been general in nature) to commit an act or acts of terrorism (as defined) in this country or abroad, or to assist another to do so, and that he or she engaged in conduct in preparation for giving effect to that intention.”²¹ Thus, although the offense calls for *specific* intent, there is no requirement that the defendants must have settled on the exact act or time or place of the act. This indicates that a crime is committed at a very early stage in the continuum from planning to carrying out a terrorist act.

In *Iqbal*, two defendants were arrested at Manchester Airport, on their way to Finland.²² In *Iqbal*’s baggage authorities found blank cartridges, booklets and images, files of speeches, videos of the defendant holding weapons, graphics of explosive devices, and videos of how to slit throats and how to conceal weapons on aircraft.²³ A search of his home yielded, among other terrorism related paraphernalia, a cabinet filled with weapons and a book entitled “Jihad.”²⁴ *Iqbal* was charged with a number of offenses, including section 5 of the Terrorism Act 2006.²⁵ The prosecution alleged that the defendants were readying themselves to use violence in the future, in pursuit of their ideology.²⁶ *Iqbal* appealed against his conviction.²⁷ On appeal, the judge explained the rationale of section 5:

Section 5 casts the net wide. It is an offense which was intended to add to existing common law offences of conspiracy to carry out terrorist acts and attempting to carry out such acts. Conspiracy demands that there be an

20. *Id.* at [60].

21. *Id.* at [12].

22. *Regina v. Iqbal* [2010] EWCA (Crim) 3215 [4] (Eng.).

23. *Id.* at [4].

24. *Id.* at [8] (detailing that the items that the police found in the search included knives, machettes, crossbows, BB guns, air rifles, a poster of Osama Bin Laden, a live rifle cartridge, a shotgun cartridge, balaclavas, berets, a book entitled “Jihad,” a handwritten document entitled “Urban Combat,” a binder containing documents on guerilla warfare printed from the internet, and a green exercise book which had “Islam, Jihad, Resistance, Justice” written on the cover).

25. *Id.* at [2].

26. *Id.* at [9].

27. *Id.* at [1], [9].

agreement, and the law of attempts requires something more than acts which are merely preparatory. The offense created by this section goes further and catches acts of preparation, when coupled with the relevant intention. In our view, there was no reason for the behavior of the applicant in this regard not to be charged under section 5.²⁸

This was despite the fact that no concrete target, time, or place had been identified for the attack. *Iqbal* is therefore another example of how section 5 of the Terrorism Act is designed to catch activity at the earliest stage of the continuum between planning and committing a terrorist act.

In *Sarwar*, two defendants were charged under section 5 of the Terrorism Act 2006, for preparing to attack President Assad's forces in Syria.²⁹ The defendants took a number of preparatory steps while in the U.K. to launch this attack, which could have resulted in substantial military and civilian losses.³⁰ Although they pleaded guilty, the defendants appealed the length of their sentences, on the grounds that the trial judge had made an incorrect assessment of their dangerousness.³¹ *Sarwar* had been arrested on return from Syria.³² His luggage contained a lot of jihadist literature, and photos that showed him with weaponry.³³ Extreme material was found on his computer and traces of explosives were found on his clothes and in his luggage.³⁴ *Sarwar* and his co-defendant contended that:

[Offenses] contrary to section 5 can vary from a case involving preparing to commit a terrorist act of mass murder in his country to an intended use or threat of force abroad in the belief that it would assist the people in that foreign country against a tyrannical regime that was condemned as such by Her Majesty's Government.³⁵

28. *Id.* at [11].

29. *Sarwar v. Regina* [2015] EWCA (Crim) 1886 [1], [3] (Eng.).

30. *Id.* at [12].

31. *Id.* at [1]-[3].

32. *Id.* at [3].

33. *Id.* at [5]-[8].

34. *Id.* at [8]-[9].

35. *Id.* at [16].

Sarwar's counsel submitted that the instant case fell into the latter category and that it was, thus, less blameworthy.³⁶ Furthermore, his counsel argued that the facts favored the defendants because "when the relevant preparatory acts were carried out, there was no prospect that [the defendants] would end up fighting against Western forces."³⁷ Ultimately, the Court of Appeal held:

It [is] perfectly clear to us that [the defendants] had become heavily radicalized in a dangerous way and that their commitment to such a cause could not simply be disregarded by reason of untested and asserted good intentions for the future. [. . .] [t]he fact that the target of their intentions was, on the occasion in question, not within the U.K. was not something which meant that the criteria for a consideration of dangerousness did not apply. The combination of extensive planning and premeditation, coupled with repeated expressions of alignment with radical Muslim fundamentalism, followed by [the defendants] acting on such views, satisfies us that the judge was correct in making a finding of dangerousness and passing [this] sentence. . . .³⁸

Thus, the fact that the preparations in the U.K. were being made for terrorist activity abroad did not mitigate the offense.

In *Abdalraouf*, the defendants, Junead Khan and Shazid Khan were charged and convicted under section 5 of the Terrorism Act 2006 for planning to go to Syria and join ISIS.³⁹ The preparatory steps in this case included discussing plans in messages with each other and members of ISIS in Syria, preparing lists of kit, researching online, and ordering military clothing.⁴⁰ Junead Khan was also charged and convicted of preparing to kill a U.S. serviceman in East Anglia, a region of eastern England.⁴¹ His preparatory steps for this offense included opening a file on his phone with bomb-making instructions, researching online about buying knives and putting a combat knife into his Amazon shopping basket, and driving near U.S. military bases in East Anglia during his rounds as a deliveryman.⁴² The defendants

36. *Id.*

37. *Id.* at [17].

38. *Id.* at [29]-[30].

39. *Regina v. Abdalraouf* [2016] EWCA (Crim) 1868 (Eng.).

40. *Id.* at [65].

41. *Id.*

42. *Id.* at [87].

appealed their sentence.⁴³ This case is referenced because it highlights the level of conduct that will prompt the preferment of charges that can yield a guilty verdict. In the first case concerning both defendants, they made lists, researched online and ordered clothing. In the case of the plan to kill the serviceman, Junead Khan did not take any steps to make a bomb, did not buy the knife, and nothing happened during his journey in East Anglia. The appellate court reduced the sentence, but still issued relatively long sentences (by U.K. standards) designed to protect the public.

In *Kahar*, the defendant was found guilty of a number of terrorism offenses, including conduct that violated section 5 of the Terrorism Act 2006.⁴⁴ The conduct that formed the subject of the charge of preparing to travel to fight in Syria included seeking and downloading information about travelling to Syria on his computer, including ‘44 ways to support jihad’, asking a travel agent about obtaining visas for Turkey and seeking guidance about the appropriateness of travelling while he was in debt and whether to take his pregnant wife and children with him.⁴⁵ He had not purchased tickets, nor had he set out for Syria. This was conduct at the bottom of the scale for sentencing, but he was also sentenced with regard to other counts for which he was convicted. These included offering to fund terrorism, urging others to fight for ISIS, and disseminating terrorist materials.⁴⁶ The Court of Appeal acknowledged the wide range of conduct that can fall under section 5 activity and explained the sentencing principles that had emerged over recent years:

As the range of conduct, both in terms of culpability and harm caused, is so broad, the levels in to which we have divided the criminality that may be encompassed within the offence must be regarded as points on a scale of offending which can merit a life sentence with a very long minimum term to offending which may properly be marked with a relatively short determinate sentence. In accordance with the principles that we have identified, the [six] levels which we set out are differentiated by two principal factors:

43. *Id.* at [65].

44. *Regina v. Kahar* [2016] EWCA (Crim) 568 (Eng.).

45. *Id.* at [37].

46. *Id.* at [35], [37]-[38], [58].

i) the culpability of the offender principally by reference to proximity to carrying out the intended act(s) measured by reference to a wide range of circumstances including commitment to carry out the intended act(s); and

ii) the harm which might have been caused measured in terms of the impact of the intended act (or series of acts) or the intended number of acts, including not only the direct impact intended on the immediate victims, but also the wider intended impact on the public in general if the act had been successful.⁴⁷

Thus, U.K. legislation criminalizes a very wide range of terrorist activity from the earliest stage and will impose periods of custody ranging from twenty-one months in appropriate circumstances for the lowest level of activity in level six. At the other end of the scale in the level one most serious cases, offenders can expect sentences of life imprisonment for up to thirty or forty years.

B. REQUIREMENTS FOR ARREST

Persons reasonably suspected to be terrorists, (i.e. persons who are or have been concerned in the commission, preparation, or instigation of acts of terrorism),⁴⁸ may be arrested without a warrant.⁴⁹ As a previous Independent Reviewer of Terrorism Legislation commented, “(i)t is a notably wide power of arrest, in particular because the arresting officer need have no specific offense in mind. It is enough, under section 40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The acts need not have been identified at the time of arrest.”⁵⁰ An example of this is the *Roddis* case, discussed above.⁵¹ The police were called on Roddis’ second visit to his former employer’s offices. No one knew exactly what he was

47. *Id.* at [26].

48. See Terrorism Act 2000, c.11, § 40(1)(b).

49. See *id.* § 41.

50. David Anderson, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, INDEP. REVIEWER OF TERRORISM LEGIS. 67 (2012) (U.K.), <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf>.

51. See *Regina v. Roddis* [2009] EWCA (Crim) 585 (Eng.).

planning to do, but the police had a reasonable suspicion from his conduct that he was preparing to commit some terrorist act.

The requirement of reasonable suspicion plays a significant part in facilitating arrests at an early stage. Part II of this article will demonstrate that the probable cause needed in order to obtain a warrant to arrest under U.S. law mandates a higher evidentiary standard to be met and may be one reason why in some cases U.S. arrests take place further along the continuum between planning and action.

II. PREPARATION TO COMMIT TERRORIST ACTS UNDER U.S. LAW

A. MATERIAL SUPPORT STATUTES

The U.S. has federal legislation that deals with international terrorism, but domestic terrorism is not an independent federal crime.⁵² The closest comparison to the U.K. section 5 of the Terrorism Act 2006 can be found in the two U.S. federal offenses of providing

52. Daniel Byman, *Should We Treat Domestic Terrorists the Way We Treat ISIS?: What Works – and What Doesn't*, FOREIGN AFF. (Oct. 3, 2017), <https://www.foreignaffairs.com/articles/united-states/2017-10-03/should-we-treat-domestic-terrorists-way-we-treat-isis> (explaining the legal difficulties when dealing with domestic terrorism).

material support found in 18 U.S.C § 2339A⁵³ and § 2339B.⁵⁴

Although the word “preparation” appears in §§ 2339A and 2339B, some U.S. prosecutors do not believe they have a crime of “preparation to commit terrorist activity” as such.⁵⁵ The “preparation” that the statute refers to seems to be encompassed in the concept of “attempt.” However, attempt cannot comprise “mere preparation” – a

53. 18 U.S.C. § 2339A (2002) (stating “(a)Offense.—Whoever provides 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, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law. (b) Definitions.—As used in this section—(1) the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious material(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and (3) the term “*expert advice or assistance*” means advice or assistance derived from scientific, technical or other specialized knowledge.”).

54. 18 U.S.C. § 2339B(a)(1) (1996) (stating “(1) Unlawful conduct.—Whoever knowingly provides material support or resources to a foreign terrorist *organization*, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any *person* results, shall be imprisoned for any term of years or for life. To violate this paragraph, a *person* must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989”).

55. Interview with two Washington, D.C. Federal Prosecutors of Terrorist Crime (Feb. 20, 2018), in confidential file held by author.

substantial step is required.⁵⁶ The prosecutors with whom the author spoke indicated that they believed an offense of preparation to commit terrorist activity would be a useful and desirable tool in the U.S., as it would give investigators more latitude.

Since 2014, the majority of ISIS-related cases have included material support charges.⁵⁷ Three states, Alabama, Arizona, and New York, have some anti-terrorism legislation,⁵⁸ much of which is based on the federal material support statutes. However, most of the documented prosecutions in these states are for violations of the federal statutes.

Section 2339A criminalizes material support “only where the defendant acts with actual knowledge or intent that the support will be used to prepare for, or carry out, certain terrorism-related crimes.”⁵⁹ The intent requirement in § 2339A is that the defendant must have provided support or resources with the knowledge or intent that such resources will be used to commit the specific listed violent crimes.⁶⁰

56. See 2 SUBSTANTIVE CRIM. L. § 11.4 (LaFave, Westlaw through 2017) (explaining that arrests can be made for attempting to commit a terrorist act, provided there has been sufficient activity. Attempt generally involves the intent to do a bad act coupled with an act. The precise definition of what that act must be has been the subject of much debate, and includes “an act sufficiently proximate to the intended crime” or “an act which in the ordinary course of events would result in the commission of the target crime except for the intervention of some extraneous factor,” or “an act of such a nature that it is itself evidence of the criminal intent with which it is done,” or “an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor’s] commission of the crime.”).

57. KAREN GREENBERG, *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES - THE ISIS CASES MARCH 2014 – AUGUST 2017*, CTR. NAT’L SEC. FORDHAM L. 28 (2017), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/59cf980ae45a7c855f673bca/1506777101200/The+American+Exception+9-17.pdf>.

58. See, e.g., ALA. CODE § 13A-10-152 (1975); ARIZ. REV. STAT. ANN. § 13-2308.01 (2017); N.Y. PENAL LAW § 490.10 (McKinney 2001).

59. *In re Chiquita Brands Int’l Inc.*, 284 F. Supp. 3d 1291, 1309 (S.D. Fla. 2018) (citing *United States v. Ghayth*, 709 F. App’x 718, 722-23 (2d Cir. 2017) (holding that the “underlying crime defined by § 2339A involves (1) knowingly (2) providing material support or resources (3) knowing or intending that such resources are to be used in the preparation for or in carrying out (4) an offense identified as a federal crime of terrorism . . .”).

60. See 18 U.S.C. § 2339A(a) (2002) (noting that these crimes include killing or harming U.S. government personnel, foreign officials, damaging government property, public utilities, pipelines, communication and transport systems, using

These are offenses that are connected to international terrorism. “[T]he mental state in § 2339A extends to both the support itself and to the underlying purpose for which the support is given.”⁶¹ Furthermore, it is possible to violate § 2339A “by providing one’s self as personnel to others with the goal of assisting in the commission of, or simply preparation for the commission of, a predicate offense (including an offense in the nature of a conspiracy).”⁶²

Prosecution under § 2339B has a narrower scope. It is predicated on providing support to a designated international terrorist organization. Not only must the defendant have the intent to provide support, he or she must also have knowledge that the support is to be given to a named terrorist organization, but need not have a particular named crime in mind. In other words, knowledge is required about the organization’s connection to terrorism, but a specific intent to further its terrorist activities is not mandated.⁶³

The Center on National Security at Fordham Law has noted that “[o]ne of the unique attributes of terrorism investigations and prosecutions is the establishment of ideological motivation as an element of criminal conduct.”⁶⁴ This was observed in all the material support cases reviewed for this article.

firearms or explosives in public places, banning violence at airports, banning biological and chemical weapons, and conspiring in the U.S. to kill, kidnap, or injure persons abroad).

61. *United States v. Mehanna*, 735 F.3d 32, 43 (1st Cir. 2013) (citing *United States v. Stewart*, 590 F.3d 93, 113 n.18 (2d Cir. 2009)).

62. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 480 (2007) (discussing the broad definition of “material support”).

63. *See In re Chiquita Brands Int’l Inc.*, 284 F. Supp. 3d at 1309.

64. Greenberg, *supra* note 57, at 24 (stating that “Communications and conduct indicating an alignment with ISIS often involve religious and political speech, coupled with conduct that is prohibited if undertaken in order to provide support to ISIS. The FBI affidavits filed with the criminal complaints often draw upon contextual evidence to support claims of ideological alignment and engagement with ISIS, including expressions of admiration for Abu Bakr al-Baghdadi, Anwar al-Awlaki, or Osama bin Laden, as well as expressions of approval regarding past acts of terrorism. The affidavits also highlight signature activities that are often interpreted by law enforcement to signal one’s status as an ISIS supporter, including the habitual consumption of ISIS-generated media, online contact with foreign ISIS members, and the recording of religious oaths of allegiance to Abu Bakr al-Baghdadi.”).

1. *Examples of Conduct Amounting to Preparation in Material Support Convictions*

Publicly available U.S. Government information does not provide a clear sense of the scope of domestic terrorist threats.⁶⁵ A search of four databases related to terrorist convictions since 9/11, which were compiled by universities and non-profit NGOs, showed that only two of the databases have analyzed Islamist cases, mainly related to ISIS.⁶⁶ One hundred and fifty-seven ISIS related cases have been reviewed from 2014 to date. Two of the databases focus on domestic, right wing, and hate crimes.⁶⁷ The cases involving preparation to commit terrorist activity have been analyzed to establish the type of activity that has been prosecuted and the stage of the plot at which arrests were made. Additional information has been supplied from an off the record conversation that the author had with two federal prosecutors of terror crimes.⁶⁸

In many cases the inchoate crime of conspiracy is also charged either alone, or together with the crime of providing material support. Conspiracy is easier to prove because the crime is committed as soon as an agreement between parties can be established and this may occur sooner than waiting for the attempted material support to crystallize. Out of forty persons convicted under § 2339A, twenty-nine were charged with conspiracy as well. Of course, conspiracy charges cannot be brought in cases involving a “lone wolf.”

In *Brown*, the defendants, Avin Marsalis Brown and Akba Jihad Jordan, were convicted of conspiracy to provide material support and

65. See JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW 1 (2017), <https://fas.org/sgp/crs/terror/R44921.pdf>.

66. Greenberg, *supra* note 57, at 1-2; LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA, GEO. WASH. UNIV. PROGRAM ON EXTREMISM 4 (2015), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf>.

67. TERROR FROM THE RIGHT: PLOTS, CONSPIRACIES AND RACIST RAMPAGES SINCE OKLAHOMA CITY, S. POVERTY L. CTR. INTELLIGENCE PROJECT (2015), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/terror_from_the_right_2012_web_0.pdf [hereinafter TERROR FROM THE RIGHT]; A DARK AND CONSTANT RAGE: 25 YEARS OF RIGHT-WING TERRORISM IN THE UNITED STATES, ANTI-DEFAMATION LEAGUE 1-2 (2017), https://www.adl.org/sites/default/files/documents/CR_5154_25YRS%20RightWing%20Terrorism_V5.pdf.

68. See Interview with Federal Prosecutors, *supra* note 55.

resources, knowing and intending that they would be used in preparation for, and in carrying out, a violation of 18 U.S.C. § 956 (conspiracy to kill or maim persons outside the U.S.).⁶⁹ Over a period of six months, Brown communicated with the FBI's "Confidential Human Sources" (CHS) and indicated his desire to go to Syria or Yemen to fight.⁷⁰ Brown and Jordan discussed wanting to go to fight in Syria, and using weapons both in and outside the U.S. with the CHS.⁷¹ They discussed the need for, and applied for, passports to travel overseas to Syria and Yemen for the purposes of violent jihad.⁷² Brown and Jordan handled weapons, got themselves fit for fighting, and discussed the difficulties of getting to Syria.⁷³ The deponent in the affidavit supporting the complaint noted that Brown was always further along with his travel plans than Jordan.⁷⁴ Brown was arrested at Raleigh Durham Airport on his way to Turkey.⁷⁵ Jordan was arrested later at his home and both were charged with conspiracy to provide material support, on the evidence of the CHS.⁷⁶ The factual situation in this case is quite similar to the U.K. *Iqbal*⁷⁷ case, as these plots were disrupted the moment when the defendants were at the point of leaving their home countries.

Keonna Thomas was charged with attempting to provide material support under § 2339A.⁷⁸ Her preparations included communicating with a cleric to find a jihadist to marry in Syria, researching travel routes, and obtaining an electronic visa to visit Turkey.⁷⁹ She was arrested shortly after purchasing a ticket to fly to Barcelona.⁸⁰ The

69. See *United States v. Brown*, No. 5:14-CR-58-FL., 2014 WL 1572553, at *1 (E.D.N.C. Apr. 18, 2014).

70. Criminal Complaint & Supporting Affidavit, *United States v. Brown*, ¶¶ 4-10 (E.D.N.C. Mar. 20, 2014) (No. 5:14-MJ-1181-WW).

71. *Id.* ¶ 7.

72. *Id.* ¶¶ 9, 17-18, 24.

73. *Id.* ¶¶ 8, 23.

74. *Id.* ¶ 15.

75. *Id.* ¶ 27.

76. *Id.* ¶ 28.

77. See *Regina v. Iqbal* [2010] EWCA (Crim) 3215 (Eng.).

78. See *United States v. Thomas*, No. 15-171, 2015 WL 9450870, at *1 (E.D. Pa. Dec. 23, 2015).

79. See *id.* at *1-2.

80. See *id.* at *1; Jeremy Roebuck, *North Philly Mom Admits to Planning to Abandon Kids for ISIS*, THE PHILA. INQUIRER (Sept. 21, 2016),

facts of this case might look similar to the U.K. *Dart*⁸¹ case, but in fact Thomas had taken one more significant step, Thomas had purchased a ticket, whereas Dart had merely made preparations to obtain a visa.

Mufid Elfgeeh expressed support for various terrorist groups, sent funds overseas to persons associated with ISIS, attempted to recruit persons to travel to Syria, and plotted to kill U.S. armed forces.⁸² He was arrested after taking possession of handguns and ammunition.⁸³ According to the FBI:

Elfgeeh approached an individual he believed was a fellow jihadist—who was cooperating with the FBI—and wanted to buy weapons. ‘He had debts and little money, but he came up with \$1,000 to buy two handguns and two silencers, money that should have gone to paying his next month’s restaurant bills. At that point, the investigation changed—from a guy who was providing financial support and attempting to recruit people, to someone who was planning an attack. In our minds he was in the final stages of an operation. Nobody gets two guns with silencers for personal protection.’⁸⁴

Compare this to the U.K. *Abdalraouf* case.⁸⁵ In that case, the police did not wait for Junead Khan to be in possession of any weapons, but arrested him before he had made the purchase of a combat knife.⁸⁶

Akram Musleh posted three videos of Anwar Al-Awlaki on YouTube and was interviewed by the FBI.⁸⁷ Nine months later he bought an ISIS flag online and was photographed in front of it.⁸⁸ He asked people if they wanted to join ISIS and he tried to buy tickets to

http://www.philly.com/philly/news/20160921_North_Philly_mom_admits_to_planning_to_abandon_kids_for_ISIS_fighter_she_married_over_Skype.html.

81. See *Dart v. The Queen* [2014] EWCA (Crim) 2158 (Eng.).

82. Arrest Warrant, *United States v. Elfgeeh*, ¶¶ 10-11(d)-(f) (W.D.N.Y. May 31, 2014) (No. 14-MJ-590).

83. *Id.*

84. F.B.I., *Countering Terrorism: Inside the Mufid Elgeeh Investigation*, F.B.I. NEWS (May 16, 2016), <https://www.fbi.gov/news/stories/inside-the-mufid-elfgeeh-investigation>.

85. See *Regina v. Abdalraouf* [2016] EWCA (Crim) 1868 (Eng.).

86. See *id.* at [89].

87. Arrest Warrant, *United States v. Musleh*, ¶¶ 2-3, 13 (S.D. Ind. June 21, 2016) (No. 1:16-MJ-00444).

88. *Id.* ¶¶ 11, 15.

get to Iraq via Turkey.⁸⁹ Musleh was stopped trying to board a flight to Rome and a journal with ISIS materials was found in his luggage.⁹⁰ This arrest was comparable to the U.K. *Iqbal* case.⁹¹

Haris Qamar drew the attention of the FBI with his tweets supporting ISIS and terrorism.⁹² A confidential informant befriended Qamar in September 2015. Qamar told the confidential informant that he wanted to go to Syria to join ISIS.⁹³ In 2015, he drove by local landmarks and discussed possible targets in Washington, D.C. taken from an ISIS-published “kill list” with the informant.⁹⁴ On June 3 and 10, 2016, at Qamar’s suggestion they drove around various locations in Washington and to Arlington so that Qamar could make an ISIS video containing potential targets for attack.⁹⁵ The arrest warrant was issued for Qamar’s arrest on July 7, 2016.⁹⁶ Compare this with the U.K. *Abdalraouf* case,⁹⁷ where Junead Khan was arrested after driving around various U.S. military bases in East Anglia in the course of his work as a deliveryman. Qamar’s arrest warrant was issued a month after making the potential target video for ISIS.

Everitt Aaron Jameson was an ex-marine who told an undercover agent that he supported the New York attack on October 2017, where a truck driver drove into and killed eight people.⁹⁸ He said he wanted to plan and carry out something similar in San Francisco in furtherance of the same ISIS cause.⁹⁹ Jameson applied for a license to drive a tow truck and was seen driving one around Modesto California in

89. *Id.* ¶17(c).

90. *Id.* ¶ 21.

91. *See* Regina v. Iqbal [2010] EWCA (Crim) 3215 (Eng.).

92. *See* Arrest Warrant, United States v. Qamar, ¶¶ 21-23 (E.D. Va. Jul. 7, 2016) (No. 1:16-MJ-300).

93. *See id.* ¶¶ 35-36.

94. *Id.* ¶ 32.

95. *Id.* ¶¶ 57-60, 65.

96. *Id.*; *see also* Virginia Man Sentenced to 102 Months in Prison for Attempting to Provide Material Support To ISIL, U.S. DEP'T JUST., OFF. PUB. AFF. (Feb. 17, 2017), <https://www.justice.gov/opa/pr/virginia-man-sentenced-102-months-prison-attempting-provide-material-support-isil>.

97. Regina v. Abdalraouf [2016] EWCA (Crim) 1868 (Eng.).

98. Criminal Complaint & Supporting Affidavit, United States v. Jameson, ¶ 7 (E.D. Cal. Dec. 22, 2017) (No. 1:17-MJ-00225-BAM).

99. *Id.*

December 2017.¹⁰⁰ He also indicated that he knew how to make explosives, was trained to use weapons, had money to give to support ISIS, and wanted to travel to Syria.¹⁰¹ Jameson told an undercover agent that he wanted to build devices in a remote location and later said he had found a storage unit.¹⁰² Although two days later he told the agent that he did not think he could do these acts after all, a search warrant was issued for Jameson's home.¹⁰³ The police found firearms and ammunition, a will, and a farewell letter confessing to having done "these acts" in the name of ISIS.¹⁰⁴ The criminal complaint was issued on December 22, 2017.¹⁰⁵ In this example, the planning quickly escalated into a situation of potentially very serious danger and resulted in a prompt arrest.

Hamid Hayat's case is particularly interesting because it could be characterized as a 'thought crime' prosecution, as the available evidence seems to suggest that the highest level of criminal activity identified in Hayat's case merely involved thinking about committing a crime. He was convicted for material support pursuant to § 2339A and for making false statements.¹⁰⁶ Hayat was a U.S. citizen of Pakistani descent and had returned to the U.S. from Pakistan where there was some dispute as to whether he had attended a training camp.¹⁰⁷

Hayat's interviews with the FBI were scrutinized by a leading scholar, Robert Chesney, who questioned how Hayat's conduct could have been prosecutable.¹⁰⁸ Hayat admitted that he attended a training camp in an interview but it was not clear what he had been doing while

100. *Id.* ¶¶ 16-18.

101. *See id.* ¶ 28 (finding that Jameson was actively pursuing to join and support the ISIS organization).

102. *Id.* ¶¶ 32, 36.

103. *Id.* ¶¶ 37-38.

104. *Id.* ¶¶ 39-41.

105. *Id.*

106. *United States v. Hayat*, 710 F.3d 875, 880 (9th Cir. 2013).

107. *Id.* at 880-81.

108. *See Chesney, supra* note 62, at 487-492 (suggesting that the United States government demonstrated that it has a preference of prosecuting at the earliest plausible moment in the terrorism context; however, under the facts of this case, there was uncertainty as to what constituted Hayat's criminal conduct).

at the training camp.¹⁰⁹ Hayat had expressed “sympathy with the global jihad movement’s anti-American perspective and willingness to use violence”; however, it was unclear whether Hayat was likely to act on those views.¹¹⁰ Hayat’s answers to interview questions about his plans to carry out an attack were extremely vague. Despite this, he was charged under § 2339A with providing and concealing material support (the predicate crime was § 2332b – acts of terrorism transcending national boundaries) and two counts of making false statements relating to his denial of attending the training camp.¹¹¹

Hayat was found guilty of everything except concealing the provision of material support, although he had not committed or attempted any crime in the U.S. As Chesney puts it, his crime was:

[P]roviding himself as ‘personnel’ in furtherance of his *own potential* violation of § 2332b in the future. Because § 2339A does not require proof of a substantial step toward the commission of the predicate offense, as would be the case with an attempt charge, it sufficed to show that Hamid knew or intended that his actions would facilitate a future offense even though those actions were of a generalized nature (in this instance, receiving training) and even though the details of that anticipated offense were entirely unspecified. In this way, the § 2339A charge against Hamid functioned as a sweeping form of individual inchoate crime liability.¹¹²

Eight years later, in Hayat’s appeal, Circuit Judge Berzon remarked: “No party has questioned the applicability of the statute to such conduct.”¹¹³

Out of all the material support cases reviewed in this article, *Hayat* is the only case that demonstrates a very early stage of arrest and prosecution that is comparable to a number of the U.K. cases. Indeed, the situation in *Hayat* is not all that different from the fact pattern in the U.K. *Kahar* case.¹¹⁴

109. *Id.* at 488-90.

110. *Id.*

111. *See id.* at 491 (concluding that although Hayat did not commit or attempt an act of violence, he knew that his actions would facilitate a future offense).

112. *Id.*

113. *United States v. Hayat*, 710 F.3d 875, 880 (9th Cir. 2013).

114. *See Regina v. Kahar* [2016] EWCA (Crim) 568 (Eng.) (noting that *Kahar*’s case also involves thinking about committing a crime).

B. RIGHT-WING TERRORISM

Domestic terrorism, for the purpose of this article, means acts of terrorism committed in the U.S. that have no international connection. The FBI defines this as criminal acts “[p]erpetrated by individuals and/or groups inspired by or associated with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature.”¹¹⁵ Therefore, the definition can cover acts by right-wing white supremacists, black separatist extremists, environmental extremists, anti-abortion extremists, anti-government extremists, and anarchists.¹¹⁶ The majority of domestic terrorism between 2000 and 2016 has been committed by right-wing white supremacists,¹¹⁷ so this article will focus on that variety of domestic terrorism.

By definition, domestic terrorism is not within the scope of § 2339B, and very rarely falls within the scope of § 2339A because the predicate crimes in that statute relate to international terrorism. It should be noted that homegrown violent extremists should not be confused with domestic terrorists, because the former have connections with international terrorism, but the latter do not.¹¹⁸ Furthermore, no federal crime of domestic terrorism exists that could be applied to right-wing terrorist activity.¹¹⁹ Therefore, with one exception that is discussed below, right-wing terrorist acts are prosecuted under the general criminal law, usually state laws, sometimes under federal law if there is an interstate connection, or

115. FBI, *Terrorism*, FBI: WHAT WE INVESTIGATE, <https://www.fbi.gov/investigate/terrorism> (last visited Aug. 4, 2018).

116. See BJELOPERA, *supra* note 65, at 10 (asserting that the United States government does not officially designate domestic terrorist “organizations”, but rather characterizes these groups as “threats”).

117. *Id.* at 16 (citing Jana Winter, *FBI and DHS Warned of Growing Threat from White Supremacists Months Ago*, FOREIGN POLICY.COM, August 14, 2017).

118. See *id.* at 9 (arguing that homegrown violent extremists are not domestic terrorists because they act independently and do not take direction from foreign terrorist organizations).

119. Mary McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE BLOG (Aug. 21, 2017, 1:59 PM), <https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism> (arguing that although the government does not recognize federal terrorism charges for domestic occurrences, such offenses are the moral equivalent of international terrorism).

under federal hate crime laws. Preparation is only criminalized if it falls within the scope of attempt, and if the particular definition of a crime includes attempt.

1. *Examples of Conduct Amounting to Preparation in Right-wing Terror Cases Since 2014*

The case of Eric J. Feight is the only example discovered relating to domestic terrorism where one of two Ku Klux Klan (KKK) members who tried to modify a radiation device with the intention of using it to kill Muslims, pleaded guilty to a charge of material support pursuant to 18 U.S.C. § 2339A, knowing or intending that those resources and support were to be used in preparation for violating 18 U.S.C. § 2332a (using or threatening the use of weapons of mass destruction).¹²⁰ The usual connection to international terrorism is seen in that statute, but it can apply within the U.S., subject to some very specific conditions.¹²¹ Feight planned how to build a remote radio-

120. *Upstate New York Man Sentenced for Providing Material Support to Terrorists*, U.S. DEP'T JUST., THE U.S. ATT'Y OFF. N. DIST. N.Y. (Dec. 17, 2015), <https://www.justice.gov/usao-ndny/pr/upstate-new-york-man-sentenced-providing-material-support-terrorists> (explaining that in this case the government recognized and charged a terrorism federal crime for an offense that occurred domestically).

121. 18 U.S.C. § 2332a (2004):

(a) Offense Against a National of the United States or Within the United States.—A *person* who, without lawful authority, uses, threatens, or attempts or conspires to use, a *weapon of mass destruction*—

(1) against a *national of the United States* while such national is outside of the United States;

(2) against any *person* or property within the United States, and

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) such *property* is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce;

(C) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or

(D) the *offense*, or the results of the *offense*, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or *foreign commerce*;

(3) against any *property* that is owned, leased or used by the United States or by any department or agency of the United States, whether the *property* is within or outside of the United States; or

(4) against any *property* within the United States that is owned, leased, or used by a foreign government,

controlled initiation device.¹²² He asked his co-defendant Glendon Scott Crawford to purchase items to build the device.¹²³ Feight duly built and tested the device and was arrested shortly after and charged with providing material support.¹²⁴ One can only speculate as to why he was not charged with conspiring with the co-defendant. Furthermore, it is not clear from the available documents why §2332a applied as opposed to the general criminal law, unless sending a drawing of the device by email to an undercover FBI agent¹²⁵ fell within (2)(A), or if the fact that Crawford travelled to North Carolina to solicit funding from the KKK¹²⁶ fell within (2)(C). Crawford was charged and found guilty only of charges relating to using a weapon of mass destruction.¹²⁷

Curtis Allen, Gavin Wright, and Patrick Stein conspired to use a weapon of mass destruction to kill members of the Somali community in Kansas.¹²⁸ The FBI commenced their investigation in February 2016 based on a report from a confidential human source (CHS). During August and September 2016, the men conducted surveillance to identify potential targets, researched methods of attack, stockpiled firearms, ammunition and explosive components, and planned to issue a manifesto in conjunction with the planned bombing. The attack, the defendants said, would be intended to “wake people up.” After considering possible targets, the defendants decided in August 2016 to conduct the attack on a Garden City, Kansas apartment complex that houses a mosque and a large number of members of the Somali

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

122. Plea Agreement, *United States v. Feight*, ¶ 5 (N.D.N.Y. Jan. 22, 2014) (No. 14-CR-12 (GLS)).

123. *Id.*

124. *Id.* ¶ 1.

125. *Id.* ¶ 5.

126. *New York Man Sentenced to 30 Years for Plot to Kill Muslims*, U.S. DEP’T JUST., OFF. PUB. AFF.: JUST. NEWS (Dec. 19, 2016), <https://www.justice.gov/opa/pr/new-york-man-sentenced-30-years-plot-kill-muslims>.

127. *See id.* (asserting that Crawford is the first person in the United States guilty of violating the “dirty bomb” statute passed by Congress in 2004).

128. *Three Kansas Men Charged with Plotting a Bombing Attack Targeting the Local Somali Immigrant Community*, U.S. DEP’T JUST., OFF. PUB. AFF.: JUST. NEWS (Oct. 14, 2016), <https://www.justice.gov/opa/pr/three-kansas-men-charged-plotting-bombing-attack-targeting-local-somali-immigrant-community>.

community. They discussed making explosives, obtaining four vehicles, filling them with explosives, and parking them at the four corners of the apartment complex to create a large explosion. On October 12, they met undercover agents posing as sellers of automatic weapons. Stein tried out the weapons and showed the undercover agent the target. After Allen's girlfriend informed the FBI on October 11 that Allen was making explosives in his home, a warrant to search Allen's home was issued on October 12 and the criminal complaint was issued on October 14.¹²⁹ This arrest took place three months after the defendants decided on their target, and only after they were in possession of the weapons. Contrast this with the timing of arrest in the U.K. *Khan* case.¹³⁰

Robert Doggart recruited people online to carry out an armed attack on a Muslim community. Doggart discussed details of his plan to burn down a mosque, a school, and a cafeteria in Islamberg, with a confidential informant.¹³¹ Doggart showed the confidential source maps of Islamberg, laid out the number of guns and types of ammunition they would need to destroy the community, and discussed different ways to burn down a mosque and other buildings. On April 10, Doggart told a confidential source that he would travel to Islamberg the next day to undertake reconnaissance and would take his M-4 rifle with him. The criminal complaint was issued later that day.¹³² This arrest was also made when the attack seemed imminent.

After investigating Jerry Drake Varnell for months, during which time Varnell indicated his support for a right wing group, discussed targets with an FBI informant, and declared he was out for blood, Varnell was arrested for attempting to remotely detonate what he thought was a car bomb outside a bank in Oklahoma.¹³³ In the affidavit

129. *Id.*; see Criminal Complaint & Supporting Affidavit, United States v. Allen, (D. Kan. Oct. 13, 2016) (No. 16-M-6151-GEB).

130. See *Regina v. Abdalraouf* [2016] EWCA (Crim) 1868 (Eng.) (highlighting that Khan's arrest was a five-year period).

131. *Chattanooga Man Sentenced for Solicitation to Burn Down a Mosque in Islamberg, New York*, U.S. DEP'T JUST., OFF. PUB. AFF.: JUST. NEWS (June 15, 2017), <https://www.justice.gov/opa/pr/chattanooga-man-sentenced-solicitation-burn-down-mosque-islamberg-new-york>.

132. *Id.*; see Criminal Complaint & Supporting Affidavit, United States v. Doggart, (E.D. Tenn. Apr. 10, 2015) (No. 1:15-mj-83).

133. TERROR FROM THE RIGHT, *supra* note 67; Criminal Complaint, United States

supporting the criminal complaint of malicious attempted destruction of a building used in and affecting interstate commerce by means of an explosive contrary to 18 U.S.C § 844(i), the deponent described activity that took place between January and August 2017.¹³⁴ In the early months, Varnell indicated his desire to make explosives and discussed targets, but the arrest was not made until Varnell had made what he thought was a bomb, and tried to detonate it.¹³⁵

C. REQUIREMENTS FOR ARREST

Generally, a warrant is required to arrest an individual in material support cases. In urgent cases an arrest can be made without a warrant, provided it is applied for immediately after arrest.¹³⁶ Law enforcement officers must show that there is probable cause to arrest. This is a higher standard than the reasonable suspicion required pursuant to U.K. law. In the U.S., reasonable suspicion is required for a stop and search. This means that the police must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.¹³⁷

The concept of probable cause has been notoriously difficult to define. It has been discussed in many Supreme Court decisions¹³⁸ and is the subject of extensive scholarly debate.¹³⁹ Probable cause is present when the facts and circumstances are sufficient to warrant a prudent man in believing that the suspect had committed, or was committing, an offence.¹⁴⁰

v. Varnell, (W.D. Okla. Aug. 13, 2017) (No. M-17-368-STE).

134. *See generally* Criminal Complaint, *supra* note 133.

135. *Id.* ¶ 5.

136. Interview with Federal Prosecutors, *supra* note 55.

137. *See Terry v. Ohio*, 392 U.S. 1 (1968) (providing that the police do not have to be certain that the individual is armed in order to search him, but may conduct the search if a reasonable, prudent man in such circumstances would think that he is in danger).

138. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003); *Illinois v. Gates*, 462 U.S. 213 (1983); *Brinegar v. United States*, 338 U.S. 160 (1949).

139. *See, e.g., Bruce A. Antkowiak, Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569 (2007); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 935-36 (2010); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003).

140. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (reasoning that the constitutionality of

The U.S. standard appears predicated on belief rather than suspicion: “the crucial determination for determining probable cause is whether the investigative or law enforcement officer had an honest and reasonable belief in the guilt of the accused at the time they pressed charges.”¹⁴¹

III. CONCLUSION

Preparation to commit terrorism is not a federal crime under U.S. law. Some U.S. federal prosecutors do not believe that the term “preparation” in the material support statutes means more than conduct envisaged by “attempt,” which requires “a substantial step” to be taken. This contrasts with the wording in the British section 5 of the Terrorism Act 2006, relating to “any conduct.” The small sample of cases discussed dealing with persons attempting to fight overseas indicate that the arrests in the U.S. were made at the same stage of the activity as in the U.K. cases – at the airport or as they were about to leave. It seems that in the other U.S. cases, arrests were made when suspected attacks were imminent, and that the British arrests took place earlier. This is shown by comparing the U.K. *Roddis*, where “collecting information needed to manufacture explosives and acquiring the necessary materials” sufficed,¹⁴² with the U.S. cases where a substantial step had to be taken to amount to attempting the crimes.

Why does U.K. legislation permit arrest at an earlier stage? There are two possible reasons. First, perhaps because the U.K. standard of reasonable suspicion sets a lower evidentiary bar than the U.S. standard of probable cause. If the U.S. is considering finding ways to arrest earlier, it is most unlikely it would consider lowering the evidentiary bar for arrest. Second, perhaps this discrepancy relates to the U.K.’s long history of dealing with terror attacks for well over a century. Several of these attacks have inflicted mass casualties on the British population,¹⁴³ and successive governments have believed there

an arrest depends on the probable cause to execute the arrest and requiring more would hamper law enforcement).

141. *Jones v. Soileau*, 448 So. 2d 1268, 1271 (La. 1984) (citing *Sandoz v. Veazie*, 106 So. 2d 202, 213-14 (La. 1901)).

142. *Regina v. Roddis* [2009] EWCA (Crim) 585 (Eng.).

143. See HM GOV’T, *supra* note 1, at 1.02 (highlighting that there are terrorist

to be a need to respond to various terror attacks by adding to the bank of anti-terror legislation to keep the people safe. The U.K. legislation that attracted the most complaints was that relating to ill-treatment of Irish detainees,¹⁴⁴ the duration of detention without charge,¹⁴⁵ and control orders, which restricted the movements of terror suspects who were not actually detained.¹⁴⁶ In all cases the ‘offending’ legislation was either repealed or amended.¹⁴⁷ Legislation to criminalize the early stages of terror activity has not been met with any opposition. The terror threat to the U.K. is now posed by Islamists, the IRA and right-wing groups.¹⁴⁸ It is important to note that the U.K. treats all terrorism in the same way, pursuant to domestic criminal law,¹⁴⁹ irrespective of whether or not there is an international connection. That is something that the U.S. might want to consider.

Other than *Hayat*,¹⁵⁰ no other examples of “thought-crimes” have been found in the § 2339A material support cases. This may be because, in the case of Islamist terrorism, a shift in the prosecutorial approach has been discernable since ISIS came into being. Prior to 2014, there were a large number of cases unaffiliated with any listed international terror group, so § 2339A prosecutions were often the only option. Since 2014, most of the material support cases have been brought under § 2339B. Between March 2014 and August 2017, there were nineteen prosecutions under § 2339A but more than ninety under

attacks in other countries in which British citizens have been killed or injured).

144. See *Ireland v. United Kingdom*, App. No. 5310/71, 6 Eur. Ct. H.R., (1978) (explaining that the Court declared certain types of treatment unlawful and this resulted in the treatment being banned).

145. See Diane Webber, *PREVENTIVE DETENTION OF TERROR SUSPECTS: A NEW LEGAL FRAMEWORK* 99 (Routledge 2016) (mentioning that the duration of detention without charge was twenty-eight days between 2006 and 2011, whereas it had been fourteen days since 2012).

146. *Id.* at 102-05.

147. *Id.* at 109.

148. Hill, *supra* note 7, at 16-17 (highlighting that the U.K. faces a continuing threat of violence and terrorism from extremist groups such as National Action).

149. See Diane Webber, *Extreme Measures: Does the United States Need Preventive Detention to Combat Domestic Terrorism?*, 14 *TOURO INT’L L. REV.* 128, 149 (2010) (asserting that the United Kingdom treats terrorism as a crime to be prosecuted in the regular criminal courts).

150. *United States v. Hayat*, 710 F.3d 875, 880 (9th Cir. 2013).

§ 2339B.¹⁵¹ Even though § 2339A does not require a connection with a listed terror group, some prosecutors apparently consider that § 2339A is much harder to use than § 2339B, as a connection to one of the listed predicate offences must be made.¹⁵² As ISIS has openly called for people to commit terror acts in their home countries, if admissions of suspects, reported comments, or contents of computers show sympathy for ISIS, that connection is easily made.¹⁵³

Since 9/11 and the formation of ISIS, perpetrators of sixty-six right-wing terrorist plots have been prosecuted. Just over half of these prosecutions related to attempted plots. Since March 2014 twenty-two plots have resulted in prosecutions, but only seven prosecutions were in relation to attempted criminal activity—the rest were prosecutions after completed criminal activity.¹⁵⁴ One reason for this may be that the political will, and consequently most federal resources, have been directed at thwarting international, or ISIS-related terror activity.

If the law were changed to make predicate statutes listed in § 2339A that relate to international terrorism applicable to domestic terrorism, would this assist prosecutors if they wanted to charge suspects with preparation? The answer is no, because the majority of these statutes do not include preparation in their definition. For example, “preparation” is found only in the definition of the crime of causing a terror attack on mass transportation.¹⁵⁵ However, three federal statutes include “making threats” as well as “attempt”¹⁵⁶ and at least twenty-seven include “attempt.”¹⁵⁷ At least four serious offences do not

151. Greenberg, *supra* note 57, at 28 (explaining that 18 U.S.C. § 2339A is the most commonly used statute to target those who conspire or attempt to provide material supports to foreign terrorist organizations).

152. Interview with Federal Prosecutors, *supra* note 55.

153. *Id.*

154. TERROR FROM THE RIGHT, *supra* note 67.

155. 18 U.S.C.A. § 1992 (West 2007).

156. 18 U.S.C.A. § 2281 (West 2015) (violence against maritime platforms); 18 U.S.C.A. § 2332a (West 2004) (using a weapon of mass destruction); 18 U.S.C.A. § 2332b (West 2015) (acts transcending national boundaries).

157. 18 U.S.C.A. §§ 831, 2280-81, 2332b (West 2015); 18 U.S.C.A. § 351 (West 2012); 18 U.S.C.A. § 1751 (West 2011); 18 U.S.C.A. § 1091 (West 2009); 18 U.S.C.A. § 2442 (West 2008); 18 U.S.C.A. § 1992 (West 2007); 18 U.S.C.A. §§ 32, 1366 (West 2006); 18 U.S.C.A. §§ 844(f), (i), 2332a (West 2004); 18 U.S.C.A. §§ 842(m)-(n) (West 2003); 18 U.S.C.A. § 2332f (West 2002); 18 U.S.C.A. §§ 81, 1362-63, 2155, 2340A (West 2001); 18 U.S.C.A. §§ 1114, 1116, 1203, 1361, 2156,

include “attempt” in their definition,¹⁵⁸ so there is no possibility of a preventive arrest to stop those particular offences before they have taken place.

Returning to the scenario at the beginning of this article, if the two people in the café had been praising an ISIS attack and expressing a desire to replicate an attack in furtherance of that cause, the FBI might be able to seek a warrant to arrest pursuant to 18 U.S.C. § 2339B. But, were enough steps taken on those minimal facts to justify a finding of probable cause? If the two persons in the café had been praising a right-wing terror group, and desirous of perpetrating an attack in that name, it is extremely unlikely that the material support statutes would apply, or that the threshold of a substantial step would have been reached to justify a finding of attempt. Yet, if this set of facts had occurred in the U.K., there may have been sufficient activity to justify a finding of reasonable suspicion of preparation to commit a terrorist act pursuant to section 5 of the Terrorism Act 2006.

The scope of attempt laws in the U.S. is not as broad as the British crime of preparation. Thus, in some cases of activity connected with international terrorism, and most cases of domestic terrorism, it seems that U.S. law enforcement has fewer tools at its disposal to investigate and prosecute than its British counterparts. This article therefore recommends that legislators equip law enforcement more fully to thwart terror attacks.

To that end, some prosecutors might wish to be able to use the material support laws in domestic terror cases. However, currently it seems most unlikely that material support laws will be amended and made applicable to domestic terrorism, mainly because of the major focus on policy and resources invested in combatting Islamic terrorism. Furthermore, domestic organizations such as KKK are not considered to be terror organizations.¹⁵⁹ The law as it stands permits these groups “more space to operate, organize and preach without

2332 (West 1996).

158. 18 U.S.C.A. §§ 37, 956 (West 1996) (violence at international airports); 18 U.S.C.A. § 175 (West 2002) (using biological weapons); 18 U.S.C.A. § 930(c) (West 2008) (using a firearm in a federal facility), and 956 (conspiring in the U.S. to kill, kidnap or injure persons abroad).

159. See McCord, *supra* note 120 (arguing that the United States does not charge federal criminal laws to terrorist attacks inside the United States).

heavy surveillance or government interference.”¹⁶⁰ Some believe that the government fears that extending material support to domestic terrorism cases, with the additional investigatory tools that accompany these statutes, might lead to many challenges on the grounds of infringement of the First and/or Second Amendments.¹⁶¹ In addition, no list or infrastructure exists for compiling a list of Domestic Terror Organizations comparable with the State Department’s List of Foreign Terror Organizations. Compiling such a list, with all that it entails, is likely to be too burdensome for the authorities to contemplate.¹⁶²

If there is no political appetite to apply material support laws to domestic terrorism, the least that could be done is to amend criminal legislation to include “preparation” in the definition of crimes. There is no constitutional reason to preclude doing this. If there is political will to legislate in this way it would be a useful additional tool for both federal and state prosecutors to deal with international and domestic terrorism. That step would also bring the tackling of domestic right-wing terrorism closer to the treatment of Islamist terrorism.

160. See Daniel Byman, *Treating Right-Wing Violence as Terrorism: What if Deeds Match Rhetoric?*, LAWFARE BLOG (Oct. 17, 2017, 7:30 AM), <https://www.lawfareblog.com/treating-right-wing-violence-terrorism-what-if-deeds-match-rhetoric> (explaining that the government’s lack of recognition of violent right-wing groups as terror organizations provide such groups more space to operate and organize threats without surveillance).

161. Byman, *supra* note 52.

162. See Daniel Byman, *Should We Use the ‘T-Word’ for Right-Wing Violence?*, LAWFARE BLOG (Oct.16, 2017, 8:00 AM), <https://www.lawfareblog.com/should-we-use-t-word-right-wing-violence> (arguing that determining who to put on the list would be challenging since many of the activities held by extremist domestic groups have First Amendment protection).