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The Mens REA for the Crime of Providing Material Resources to a Foreign Terrorist Organization

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THE MENS REA FOR THE CRIME OF PROVIDING MATERIAL RESOURCES TO A FOREIGN TERRORIST ORGANIZATION

Randolph N. Jonakait*

TABLE OF CONTENTS

I.	INTRODUCTION	862
II.	THE STATUTORY SCHEME.....	863
	<i>A. Section 2339B</i>	863
	<i>B. The Designation of a Foreign Terrorist Organization</i> ..	864
	<i>C. Judicial Review of the Designation</i>	868
III.	SOME CONSIDERATIONS IN DETERMINING THE MENS REA FOR SECTION 2339B.....	869
IV.	THE STATUTE'S MENS REA REQUIREMENT	872
	<i>A. The Government's Position</i>	872
	<i>B. Basic Mens Rea Requirements</i>	874
	<i>C. Public Welfare Offenses</i>	875
	<i>D. Judicial Interpretation of Mens Rea for Section 2339B</i>	878
V.	GOVERNMENTAL INFRINGEMENT ON THE RIGHT OF ASSOCIATION.....	884
	<i>A. The Right of Association</i>	884
	<i>B. Association By Donation</i>	887
	<i>C. The Framework for Assessing Impingements on the Right of Association</i>	889
	<i>D. The Associational Interests to Be Balanced in a Section 2339B Prosecution</i>	893
VI.	THE SPECIFIC INTENT REQUIRED BY THE RIGHT OF ASSOCIATION.....	895
VII.	JUDICIAL INTERPRETATIONS OF SECTION 2339B AND THE RIGHT OF ASSOCIATION.....	902
VIII.	CONSEQUENCES OF SECTION 2339B WITHOUT A INTENT	

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REQUIREMENT913
IX. CONCLUSION914

I. INTRODUCTION

The government has begun to prosecute the crime of providing material support or resources to designated foreign terrorist organizations, codified at 18 U.S.C. § 2339B (§ 2339B). The United States criminalized such activity in the 1996 Anti-Terrorist and Effective Death Penalty Act, but few indictments alleging the crime were returned before September 11, 2001.¹ Since then, prosecutions have increased and can be expected to increase further because the broad provisions of the statute create a major, new prosecutorial tool criminalizing behavior connected to terrorism. Indeed, one commentator notes, “[v]irtually every criminal ‘terrorism’ case that the government has filed since September 11 has included a charge that the defendant provided material support to a terrorist organization.”²

One of the crucial unsettled issues concerning § 2339B is the mens rea required for a conviction. The government has contended that the crime is essentially one of strict liability where a person can be convicted without having a guilty mental state. This article contends, on the other hand, that the statute as enacted requires that a person know that he is donating to a group that has been designated by the Secretary of State as a foreign terrorist organization. The article further contends that the First Amendment requires the government to prove that a donation to an organization was made with the specific intent to further an organization’s terrorist activities in order for a conviction to be constitutional.

Part II of the article sets out the statutory framework of which § 2339B is a part. Part III discusses important considerations in determining what the mens rea should be for a § 2339B prosecution. Part IV explores how other crimes have been interpreted to determine the mens rea required by this statute. Part V examines the framework for determining when a criminal statute infringes the First Amendment’s right of association. Part VI analyzes the cases that have held that a person can be penalized for associating with groups that have both legal and illegal goals only if the

¹See DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 127 (2d ed. 2002) (“[A]s of December 2001, the government had prosecuted only three cases involving material support to terrorist organizations.”).

²David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9 (2003).

person had the specific intent to further the illegal aims of the group. Part VII discusses judicial interpretations of § 2339B and the right of association. Part VIII explores various consequences that can occur if a person can be convicted of violating § 2339B without the specific intent to further the terrorist goals of the organizations where donations have gone.

II. THE STATUTORY SCHEME

A. *Section 2339B*

The basic criminalizing provision of the statute provides:

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.³

“Material support or resources” is broadly defined. This term, as defined by the statute:

[M]eans 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.⁴

Section 2339B, however, neither lists the proscribed organizations nor defines them. Instead, the statute states that a terrorist organization is “an organization designated as a terrorist organization under § 219 of the Immigration and Nationality Act,”⁵ which is codified at 8 U.S.C. § 1189 (§ 1189).

³ 18 U.S.C.A. § 2339B(a)(1) (West Supp. 2004).

⁴ 18 U.S.C.A. § 2339A(b) (West Supp. 2004).

⁵ 18 U.S.C. § 2339B(g)(6) (2000).

B. The Designation of a Foreign Terrorist Organization

The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, is authorized to designate a group as a foreign terrorist organization if the Secretary finds that the group is foreign, engages in, or has the capacity or intent to engage in terrorist activity, and “threatens the security of United States nationals or the national security of the United States.”⁶

Before making the designation, the Secretary of State must confidentially inform the leaders of Congress of the intent to designate a group as a foreign terrorist organization and the reasons for the proposed action.⁷ The designation takes effect when it is published in the Federal Register seven days after this communication.

Congress has the power to override the designation,⁸ and the Secretary of State can find that changed circumstances support the designation’s revocation.⁹ Otherwise, the classification lasts for two years, at which time a group can be redesignated a foreign terrorist organization for another two year term with no limit on the number of possible redesignations.¹⁰

⁶ 8 U.S.C.A. § 1189(a)(1)(C) (West Supp. 2004).

⁷ *Id.* § 1189(a)(2)(A)(i) (West Supp. 2004).

Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and the Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefore.

Id.

⁸ *Id.* § 1189(a)(2)(B)(ii) (“Any designation under this subsection shall cease to have effect upon an Act of Congress disapproving such designation.”).

⁹ *Id.* § 1189(a)(6)(A).

The Secretary may revoke a designation made under paragraph (1) or redesignation made under paragraph (4)(B) if the Secretary finds that -- (i) the circumstances that were the basis for the designation or redesignation have changed in such a manner as to warrant revocation; or (ii) the national security of the United States warrants a revocation.

Id.

¹⁰ *Id.* § 1189(a)(4)(B).

The Secretary of State may designate an organization under § 1189 only if it engages in terrorist activity or “retains the capability and intent to engage in terrorist activity or terrorism”¹¹ This provision incorporates two definitions of “engages in terrorist activity.”¹² The first is limited to violent action and states that “‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹³ The second definition, however, is more expansive and goes beyond the commission of violent or politically motivated acts. A “terrorist activity” is an illegal act where committed or under United States law if committed here and involves any of the following:

- (I) The hijacking or sabotage of any conveyance. . . .
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in § 1116(b)(4) of Title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain)with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

¹¹ *Id.* § 1189(a)(1)(B).

¹² *Id.*

¹³ 22 U.S.C. § 2656f(d)(2) (2000).

(VI) A threat, attempt, or conspiracy to do any of the foregoing.¹⁴

“Engage in terrorist activity” includes not only the commission or incitement of a terrorist act but also planning a terrorist activity, soliciting money, goods, or people for a terrorist activity or organization, or providing material support to a terrorist organization unless the actor demonstrates that he did not know and should not have reasonably known that the act would further terrorism.¹⁵

¹⁴ 8 U.S.C.A. § 1182(a)(3)(B)(iii) (West Supp. 2004).

¹⁵ 8 U.S.C.A. § 1182(a)(3)(B)(iv) (West Supp. 2004).

As used in this chapter, the term “engage in terrorist activity” means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II) [organizations designated by the Secretary of State under 8 U.S.C.A. § 1189 or otherwise designated by the Secretary as terrorist organization]; or

(cc) a terrorist organization described in clause (vi)(III) [a group of two or more who engage in the activities set forth in (I), (II), or (III) above]...

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this clause;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization’s terrorist activity; or

(VI) to commit an act that the actors knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

The definitions of terrorism include much of what might not usually be thought of as terrorism but just ordinary criminal behavior. For example, the kind of car bombing often ascribed to organized crime would be covered since it would be sabotage of a vehicle. An ordinary kidnapping would be covered as the detention of one person in order to compel money from another. The provision does not narrow assassination. A dictionary definition, however, includes many murders because assassination, while often thought of as a political killing, is not so limited. Assassinate is defined as "to kill suddenly or secretly, esp. to murder a politically prominent person."¹⁶ Arson often uses accelerants to speed the progress of a fire, and those accelerants are chemical agents, and therefore such an arson, for any motive, is a terrorist activity. The use of a firearm with intent to harm someone is covered if there is some motive other than mere personal monetary gain. Many shootings will qualify since many are motivated at least partly by animosity, fear, thrills, or revenge. Under these definitions, an incredibly large number of groups around the world commit terrorism.¹⁷

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or

(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

Id.

At least one of the qualifications that might seem to limit this definition seems to be wiped out by the subsequent clause. Thus, the definition includes the commission or incitement to commit a terrorist activity only "under circumstances indicating an intention to cause death or serious bodily injury. . . ." *Id.* § 1182(a)(3)(B)(iv)(I). But the next phrase includes the preparation or planning for every terrorist activity without any limitation, and activities can be "terrorist" according to 8 U.S.C.A. § 1182(a)(3)(B)(iii) without an intent to cause death or serious bodily injury. The limitation on the commission of terrorist acts to those with the intent to cause serious bodily injuries hardly matters unless the excluded actions are undertaken without any preparation or planning, for if there has been preparation or planning it is covered in the definition even without the intent to cause death or serious bodily injury.

¹⁶RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 80 (2d ed. 1999).

¹⁷See COLE & DEMPSEY, *supra* note 1, at 120 ("There are literally hundreds if not thousands of groups worldwide that engage at least in part in violent activities.").

To be designated a foreign terrorist organization the organization must not only be foreign and engage in terrorist activity, that activity must also “threaten[] the security of United States nationals or the national security of the United States.”¹⁸ This qualification, however, broadly defines national security as “the national defense, foreign relations, or economic interests of the United States.”¹⁹ With a global economy and a direct or indirect American corporate presence nearly everywhere, the criminal conduct that qualifies as terrorism could nearly always be thought to threaten the economic interests of the United States.²⁰

The result of these broad definitions is that much discretion is ceded to the Secretary of State. The Secretary is not required to designate every group that qualifies as a foreign terrorist organization but is merely authorized to make the designation if a group falls within the definitions. From the many organizations around the world that fall within the definitions, the Secretary, exercising basically unchecked discretion, determines which organizations actually will be designated a foreign terrorist organization,²¹ and thus the Secretary determines whether giving material support to an organization will be a crime.

C. Judicial Review of the Designation

A designated organization “may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit” but must do so no later than thirty days after the designation is published in the Federal Register.²² The Secretary in making a designation must create an administrative record and may consider classified information. The reviewing court may only consider that administrative record and any

¹⁸ 8 U.S.C.A. § 1189(a)(1)(C) (West Supp. 2004).

¹⁹ 8 U.S.C. § 1189(c)(2) (2000).

²⁰ See COLE & DEMPSEY, *supra* note 1, at 120 (“The Act’s terms encompass groups whose activities threaten the security of U.S. nationals, meaning any U.S. tourist or corporate outpost anywhere in the world.”).

²¹ See Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism*, 73 IND. L.J. 693, 701 (1998) (“[T]he Secretary of State has the broad power to designate a wide variety of groups with limited safeguards against wrongful designation.”). See also COLE & DEMPSEY, *supra* note 1, at 119–20 (“Since courts are reluctant to second-guess the Secretary of State on what threatens our foreign policy, the law effectively gives the Secretary of State a blank check to blacklist disfavored foreign groups.”).

²² 8 U.S.C. § 1189(b)(1) (2000).

classified information, which the court receives *ex parte* and *in camera*, used in making the designation.²³ The court may set aside the designation only if the Secretary acted unconstitutionally, illegally, or arbitrarily in making it, or if the designation does not have substantial support in the administrative record or classified information.²⁴

While a designated organization is permitted judicial review of the designation, the designation procedures prohibit a person accused of providing a designated organization with material support or resources from challenging the legality of the designation in the criminal case: "A defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing."²⁵

III. SOME CONSIDERATIONS IN DETERMINING THE MENS REA FOR SECTION 2339B

Some aspects of this statutory scheme have special relevance in considering the mental states necessary for a conviction under § 2339B. First, it is only a crime under § 2339B to donate resources when a group has been officially designated a foreign terrorist organization by the Secretary of State. While the definitions of terrorist activity are so broad that many organizations could be designated, only a comparative handful out of the potential pool have been so designated.²⁶ Seldom will it be a crime to

²³ 8 U.S.C.A. § 1189(a)(3)(B) (West Supp. 2004).

²⁴ *Id.* § 1189(b)(3).

The Court shall hold unlawful and set aside a designation the Court finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or

(E) not in accord with the procedures required by law.

Id.

²⁵ *Id.* § 1189(a)(8) (West 2000 & Supp. 2004).

²⁶ See COLE & DEMPSEY, *supra* note 1, at 120–21.

donate to an organization that could be designated because most often that group will not have been designated.

Second, it is quite likely that a donor will not know that his donation is going to a designated organization. The official designation notice is placed in the Federal Register, and nothing indicates that the government publicizes the designations beyond that official notice. Few people in the general population are avid readers of the Federal Register, and the donor can easily be unaware that a donation is going to a designated group and that it is, therefore, illegal.

Furthermore, a person donating to a designated organization is not necessarily aware that his action is somehow aiding terrorism. The designated groups often do much more than commit terrorist acts. They also undertake important and worthwhile charitable, humanitarian, educational, or political activities.²⁷ Indeed, organizations that might seem praiseworthy to many, and indeed may in fact be praiseworthy, can be designated. For example, "[i]f this law had been on the books in the 1980s, it would have been a crime to give money to the African National Congress during Nelson Mandela's speaking tours here, because the State Department routinely listed the ANC as a 'terrorist group.'"²⁸

Resources, then, may have been solicited by a designated group for the organization's good deeds; the donor may have given solely to further those

The designation authority invites selective enforcement. The Secretary of State can pick and choose which groups to designate, based on the politics of the moment. . . . There are literally hundreds if not thousands of groups worldwide that engage at least in part in violent activities. Practically speaking, the government must necessarily enforce such authority selectively.

Id.

²⁷ See, e.g., COLE & DEMPSEY, *supra* note 1, at 85.

Movements and groups that can be labeled terrorist are often engaged in both legal and illegal activities. The IRA had Sinn Fein, a legal arm engaged in legitimate political activity. The African National Congress engaged in both violent "terrorist" acts and nonviolent anti-apartheid activity. And according to Israeli security services, Hamas, one of the world's most notorious "terrorist groups," devotes ninety-five percent of its resources to nonviolent social services.

Id.

²⁸ COLE & DEMPSEY, *supra* note 1, at 118.

non-terrorist activities;²⁹ and in fact the donation may have been used not for terrorism but for charitable, humanitarian, educational, or political goals. Two organizations at the center of the most important litigation about § 2339B illustrate these possibilities.

By October 1997, the Secretary of State had designated thirty organizations as foreign terrorist organizations including the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).³⁰ While the PKK and LTTE were officially labeled terrorist by the government, the litigation also indicated that the two organizations did much more than commit violent actions.³¹ They also performed peaceful educational, humanitarian, diplomatic, and advocacy functions.³²

The PKK, formed about twenty-five years ago, consists of Turkish Kurds and seeks self-determination for the Kurds in Southeastern Turkey. It has undertaken worldwide advocacy and diplomatic activities to further its goal, including organizing political forums, international conferences, and cultural festivals outside Turkey.³³ In *Humanitarian Law Project v. Reno*, the court concluded that the PKK "publishes and distributes newspapers and pamphlets championing the Kurds' cause and denouncing human right violations"³⁴ It provides social services and humanitarian aid to Kurds in exile, has established a quasi-governmental structure in areas of

²⁹ See, e.g., Jacqueline Benson, *Send Me Your Money: Controlling International Terrorism by Restricting Fundraising in the United States*, 21 HOUS. J. INT'L L. 321, 343 (1999).

A good example of an organization with multiple purposes is HAMAS. HAMAS was created as a nonprofit religious and charitable organization focused on conservative religious activity. Some estimate that as much as ninety-five percent of HAMAS' activities are focused on social welfare and religious work and only five percent are terrorist. HAMAS attracts funds from donors due to its reputation for providing relief to poor people, especially those in the Gaza Strip. Many view HAMAS as less corrupt than other relief networks.

Id.

³⁰ 9 F. Supp. 2d 1176, 1180 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (9th Cir. 2000), *vacated by* Humanitarian Law Project v. United States Dep't of Justice, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004).

³¹ *Id.* At 1180–82.

³² See *id.* at 1180–81.

³³ *Id.*

³⁴ *Id.*

Turkey under its control, and defends the Kurds from alleged Turkish human rights abuses.”³⁵

The Liberation Tigers of Tamil Eelam seek self-determination for Tamil residents in a portion of Sri Lanka, where the Tamils allegedly have been subjected to human rights abuses by the governing majority in Sri Lanka.³⁶ The LTTE engages in advocacy and diplomacy to aid its goal, runs orphanages, aids refugees and provides other social services, and supports economic development of the Tamils.³⁷

A person donating money or other resources to these organizations may have different mental states concerning terrorism and their donations. The donors may not know that the organizations are designated. From the donors’ standpoint, they are merely making a charitable donation like any other laudable charitable gift. The donors, on the other hand, might be aware that the organizations have been designated and be giving the resources either with the aim of aiding its terrorism or its non-terrorist functions, or both, or be simply indifferent to how the donation is used. Finally, the donor could be aware that the organization has committed terrorist acts, but not aware of the designation, and be giving the resources either with the aim of aiding its terrorism or its non-terrorist functions, or both, or be simply indifferent to how the donation is used.

Which, if any, of these acts is illegal depends on the mental state required by § 2339B. This requires two inquiries. First, the statute must be interpreted to see what mens rea it requires. Then, the First Amendment’s right of association must be examined to see what, if any, mental state it requires for a § 2339B conviction to be constitutional.

IV. THE STATUTE’S MENS REA REQUIREMENT

A. *The Government’s Position*

Section 2339B makes it a crime when a person “knowingly provides material support or resources to a foreign terrorist organization. . . .”³⁸ Congress defines the elements of a crime,³⁹ and its use of the word

³⁵ *Id.*

³⁶ *Id.* at 1182.

³⁷ See *Humanitarian Law Project v. United States Dep’t of Justice*, 352 F.3d 382, 391 (9th Cir. 2003), *vacated by* 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004).

³⁸ 18 U.S.C.A. § 2339B(a)(1) (West Supp. 2004).

³⁹ See *Liparota v. United States*, 471 U.S. 419, 424 (1985) (“The definition of the elements of

“knowingly” in § 2339B indicates that it intended to require *some* mental state with respect to *some* element of the crime.⁴⁰ The statutory language, however, is not clear. “Knowingly” could just modify “provides,” but it could also modify the other elements: “material support or resources” and “to a foreign terrorist organization.”

The differences are significant. If “knowingly” only modifies “provides,” the mental state will be satisfied by any donation that is not accidental or inadvertent of material support to a group that is a designated foreign terrorist organization. The donor would not have to know that the aid is material support and, more important, would not have to know that the contribution is going to a designated foreign terrorist organization. The act could be perfectly innocent, indeed normally praiseworthy, for a person could be writing a check to a group whom she believes will use the money for humanitarian or political purposes unaware that the organization has been designated as terrorist by the Secretary of State. If “knowingly” only modifies “provides,” however, the intended good deed is criminal and can result in a fifteen year sentence. Charitable giving will have taken on previously unknown risks.

The government advocates this limited mens rea. It has maintained that a person is guilty under § 2339B, as the Ninth Circuit has summarized in *Humanitarian Law Project v. United States Dep’t of Justice*:

[I]f he or she donates support to a designated organization *even if he or she does not know the organization is so designated*. That is, according to the government, it can convict an individual who gives money to a designated organization that solicits money at their doorstep so long as the organization identifies itself by name. It is no defense, according to the government, that the organization describes to the donor only its humanitarian work to

a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.”).

⁴⁰ Compare this to *Liparota*, which considered the mental state required by a federal statute criminalizing food stamp fraud by stating that “‘whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations’ is subject to a fine and imprisonment.” *Id.* at 420 (quoting Food Stamp Act of 1964, Pub. L. No. 88-525, § 14, 78 Stat. 708, *amended by*, 7 U.S.C. § 2024(b)(1) (1984) (current version at 7 U.S.C. § 2024(b)(1) (2000)) (alteration in original). The Court concluded that “Congress certainly intended by the use of the word ‘knowingly’ to require *some* mental state with respect to *some* element of the crime. . . .” *Id.* at 424.

provide basic services to support victims displaced and orphaned by conflict, or to defend the cultural and linguistic rights of ethnic minorities. And, the government further contends, it is no defense that a donor contributes money solely to support the lawful, humanitarian purposes of a designated organization.⁴¹

In other words, according to the government, personal guilt is not required to convict a person of donating material resources to a foreign terrorist organization under § 2339B, for the crime is essentially one of strict liability that requires no scienter. This conclusion, however, flies in the face of Supreme Court jurisprudence concerning the issue of mens rea.

B. Basic Mens Rea Requirements

The Court has long recognized that at our criminal law's core is the concept that, in the words of Justice Jackson, "wrongdoing must be conscious to be criminal. . . ."⁴² Consequently, as Justice Thomas said for

⁴¹*Humanitarian Law Project*, 352 F.3d at 397. The court also stated that according to the government's interpretation:

[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, . . . 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.

Id. at 402.

⁴²*Morrisette v. United States*, 342 U.S. 246, 252 (1950). In a frequently quoted passage, Justice Jackson explained:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to' Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

the Court in *Staples v. United States*, a criminal statute is construed “in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded.”⁴³ Even if the statute does not expressly require scienter, courts generally interpret the statute to require conscious wrongdoing.⁴⁴ Justice Rehnquist, writing for the Court in *United States v. X-Citement Video, Inc.* concluded, the Court’s cases indicate “that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.”⁴⁵

These principles indicate that § 2339B should be read so that “knowingly” modifies each of its elements. Normally it is innocent conduct to provide an organization with goods and services. Such an act can be considered conscious wrongdoing, and therefore subject to criminal penalties, only if the person knew that the donation was going to a terrorist organization.

C. Public Welfare Offenses

The Court, however, has also accepted a subset of crimes that do not require a showing of personal guilt. These crimes of strict liability, as Chief Justice Burger stated in *United States v. United States Gypsum Co.*, however, are limited and disfavored.⁴⁶ Such crimes, often labeled public welfare offenses, usually concern dangerous products or items that are often subject to extensive regulation in the interest of public safety.⁴⁷ Such crimes can dispense with the normal *mens rea* requirements because those involved with dangerous products can reasonably be expected to be aware of the possibility of regulation. They should learn the requisite law, and if

Id. at 250–51 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *21).

⁴³ 511 U.S. 600, 605 (1994) (citation omitted).

⁴⁴ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (stating that there is a presumption “that some form of scienter is to be implied in a criminal statute even if not expressed. . .”).

⁴⁵ *Id.* at 72.

⁴⁶ 438 U.S. 422, 437–38 (1978) (citations omitted) (“While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status.”).

⁴⁷ See *Staples*, 511 U.S. at 607 (“Typically, our cases recognizing such [public welfare] offenses involve statutes that regulate potentially harmful or injurious items.”).

they do not, they act at their own peril.⁴⁸ Consequently, the government does not have to show that those accused of such offenses knew of the regulations or intended to break them.

The crime of providing material resources to a foreign terrorist organization, however, is not a public welfare offense. Such a donor is not akin to the person dealing in dangerous products who reasonably can expect extensive regulation of those substances. Indeed, just the opposite exists. Society encourages charitable donations; there is no settled expectation that such gifts are stringently regulated, much less banned.⁴⁹ Normally, when the law permits a conviction without a willful violation, as Justice Jackson explained in *Morissette v. United States*, “[t]he accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”⁵⁰ The charitable donor, however, has not assumed any responsibilities where society can reasonably expect that she take steps to avoid breaking a law of which she is unaware.

Furthermore, the Court has indicated that statutes should not be interpreted so as to sweep within a crime otherwise significant innocent

⁴⁸ See *id.* (quoting *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)) (discussing public welfare offenses stating that “we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him ‘in responsible relation to a public danger,’ ... he should be alerted to the probability of strict regulation. . . .”); see also *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (“[W]here . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”). Cf. *United States v. Balint*, 258 U.S. 250, 254 (1922) (upholding a statute restricting sales of drugs without requiring knowledge by the seller that such sales were restricted and stating that the statute’s “manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him.”); see also Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 330 (2003) (stating that when a person should know that the conduct is subject to stringent regulation, “the failure to investigate and discern whether the behavior is criminal equates to a type of negligent behavior, which can serve as the substitute for a criminal mens rea. Hence, the unwitting or innocent conduct is really tinged with a negligence that belies lack of culpability.”).

⁴⁹ See *X-Citement Video*, 513 U.S. at 71 (deciding that a statute criminalizing the shipment of sexually explicit images of minors required proof that the accused knew a performer was underage “is not a public welfare offense. Persons do not harbor settled expectations that the contents of magazines and films are generally subject to stringent public regulation.”).

⁵⁰ 342 U.S. 246, 256 (1952).

activities. Justice Thomas, writing for the Court, has stated, “[W]e have taken [particular care] to avoid construing a statute to dispense with *mens rea* where doing so would ‘criminalize a broad range of apparently innocent conduct.’”⁵¹ If § 2339B does not require knowledge that a donation is going to a designated organization, then much non-blameworthy conduct will be swept within the crime. The guilty act can merely be a gift to what the donor thinks is a charity, and a charitable donation is certainly not an inherently guilty act. The person who responds to an appeal for relief after an earthquake or to fund orphanages in a war torn area or a similar request is not doing something intrinsically bad, but the opposite. If, however, unknown to the donor, the recipient of the donation has been designated a foreign terrorist organization, the charitable giving, according to the government, is a serious crime. A limited *mens rea* for § 2339B would criminalize a broad range of apparently innocent conduct.

Finally, public welfare offenses tend to carry comparatively minor penalties that do little harm to the reputation of the offender.⁵² In contrast, a violation of § 2339B is a felony carrying a severe punishment.⁵³ For these reasons, as Justice Thomas said for the Court in *Staples v. United States*, “absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.”⁵⁴

Both because the norm for a criminal conviction requires the showing of a willful violation and because § 2339B is not a public welfare offense, the statute mandates a *mens rea* requirement. Since § 2339B states that a violation must be knowingly made, that mental state should apply to each

⁵¹ *Staples*, 511 U.S. at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)); see also *X-Citement Video*, 513 U.S. at 69 (describing how interpreting a statute to eliminate a scienter requirement would sweep within its ambit much innocent behavior, and stating, “We do not assume that Congress, in passing laws, intended such results.”); cf. *United States v. Freed*, 401 U.S. 601, 609 (1971) (“[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act.”).

⁵² See *Morissette*, 342 U.S. at 256 (“[P]enalties [for public welfare offenses] commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”); see also *Carpenter*, *supra* note 48, at 321 (“[T]he hallmark of a public welfare offense is the relatively modest punishment and stigma.”).

⁵³ See *Staples*, 511 U.S. at 618 (“[P]unishing a violation as a felony is simply incompatible with the theory of the public welfare offense.”).

⁵⁴ *Id.*

element of the crime. Most significantly, to be convicted, a person must know that he is donating to a foreign terrorist organization.⁵⁵

D. Judicial Interpretation of Mens Rea for Section 2339B

In *Humanitarian Law Project v. United States Department of Justice*,⁵⁶ the Ninth Circuit, in the leading interpretation of the mens rea required by § 2339B, agreed that the crime was not one of strict liability.⁵⁷ But it then fashioned a mental element that cannot be derived from the statutory language:

[W]e believe that when Congress included the term “knowingly” in § 2339B, it meant that proof that a defendant knew of the organization’s designation as a terrorist organization or proof that a defendant knew of the

⁵⁵ If a conviction under § 2339B does not require an accused to know that a group was designated, then it should be permissible to criminalize the provision of resources to any group that has some illegal purposes even without a designation and even without the accused knowing of those illegalities. The accused, even if he were a faithful reader of the Federal Register, would not know if his charitable act was criminal. Perhaps this crime might be constitutionally attacked as unconstitutionally vague because it does not give fair warning of what is criminal. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). But even if the crime does require a designation, but not knowledge of the designation, the notice problem in reality is only slightly different since few read the Federal Register before making a charitable donation.

⁵⁶ 352 F.3d 382 (9th Cir. 2003), *vacated by* 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004).

⁵⁷ The court noted that crimes normally require a mens rea. *Id.* at 397–98. Further, crimes without a guilty intent are generally limited to “public welfare offenses.” *Id.* at 399. Section 2339B, with its punishments of fifteen years and even life, is not the kind of crime that permits the elimination of scienter. *Id.* at 401. Congress, by inserting “knowingly” into § 2339B, indicated that it was not creating a crime of strict liability:

The language of 18 U.S.C. § 2339B does not in any way suggest that Congress intended to impose strict liability on individuals who donate “material support” to designated organizations. It is significant that Congress used the term “knowingly” to modify “provid[ing] material support or resources to a foreign terrorist organization.” . . . Indeed, the Supreme Court and our circuit have construed Congress’ inclusion of the word “knowingly” to require proof of knowledge of the law and an intent to further the proscribed act.

Id. at 399 (alteration in original).

unlawful activities that caused it to be so designated was required to convict a defendant under the statute.⁵⁸

The fact that the second prong of this knowledge requirement is not in the statute, makes little sense, and sweeps together both guilty and non-guilty mental states.

The court in essence devised two definitions for foreign terrorist organizations. Thus, a person can be convicted if he knew that the organization to which he made a donation was designated by the Secretary of State as a foreign terrorist organization *or* if he knew of the “organization’s unlawful activities that caused it to be so designated.”⁵⁹ The statute, however, has but one definition. The statute does not generically define a terrorist organization. It does not state that a terrorist organization is any group which commits certain acts and then forbids donations to such an enterprise. Instead, § 2339B states that a terrorist organization is an “organization designated as a terrorist organization under § 219 of the Immigration and Nationality Act,” which is codified at 8 U.S.C. §1189.⁶⁰ A group may have to commit terrorist acts to be designated, but all such organizations are not terrorist organizations within the meaning of § 2339B. The crime forbids donations only to those groups actually designated by the Secretary, not any others.

Indeed, what the Ninth Circuit meant by its second knowledge prong is not exactly clear. It said that a conviction could be sustained if “the donor had knowledge of the organization’s unlawful activities that caused it to be

⁵⁸ *Id.* The court subsequently stated:

Thus, to sustain a conviction under § 2339B, the government must prove beyond a reasonable doubt 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.

Id. at 403. A previous panel of the Ninth Circuit, however, had seemingly concluded that § 2339B was a crime of strict liability. The court stated that “the term ‘knowingly’ modifies the verb ‘provides,’ meaning that the only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support.” *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 n.5 (9th Cir. 2000), *vacated by Humanitarian Law Project v. United States Dep’t of Justice*, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004). The court apparently treated this earlier conclusion as dictum.

⁵⁹ *Humanitarian*, 352 F.3d at 403.

⁶⁰ 18 U.S.C. § 2339B(g)(6) (2000).

so designated.”⁶¹ Taken on its face, this requires knowledge that could never be proved. An accused would have to know what motivated the Secretary of State to make a designation. The Secretary has discretion in choosing among the groups that qualify as terrorist, and many factors, most notably foreign policy ones, must affect whether an organization is designated. On this level, it would seem impossible for anyone not privy to the inner counsels of the State Department, to know what “caused” a designation.

On the other hand, this prong of the Ninth Circuit’s alternative mens rea only requires knowledge of the group’s “unlawful” actions that caused the designation. However, that also seems unprovable in a criminal trial. Even if a donor is aware that the organization to whom he has donated has committed terrorist acts, he cannot know which among those acts has caused the designation. Indeed, presumably the superior intelligence of the United States government should normally allow the Secretary to operate on knowledge that a donor would not have. Even if the designation is caused by only part of the information that the Secretary has, the donor will not know what the determinative information was.

Furthermore, a criminal trial will not have the evidence indicating what caused the designation. The Secretary does not have to disclose to the jury the information upon which a designation is based. The only time he is required to reveal any basis for the designation is if the organization has challenged it, and then the disclosure is restricted to the D.C. Circuit.⁶² If in what appears to be the usual case, the organization has not challenged the designation, the Secretary has no duty to reveal the basis for the designation.⁶³ Even if the organization does challenge the designation, the full basis for the Secretary’s action does not have to be publicly presented. The Secretary is permitted to rely on classified information, and that information only has to be disclosed to the reviewing court and not to a court trying an accused.⁶⁴ A criminal jury will not learn what unlawful activities of an organization caused it to be designated and will not be able to assess whether the accused had the Ninth Circuit’s second-prong knowledge.⁶⁵

⁶¹ *Humanitarian*, 352 F.3d at 403.

⁶² *Id.* at 386.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

Perhaps, in spite of its language, what the Ninth Circuit intended was that a person can be convicted under § 2339B if a person donates to an organization knowing that it has committed terrorist acts, not that the donor had to know what caused the Secretary of State to designate the organization. This, too, would make for difficult proof problems at trial. Apparently the government would have to prove both those terrorist acts and the accused's knowledge of them, and establishing proof of illegal acts in foreign lands would not be an easy task. On the other hand, an accused could defend himself presumably by showing that the illegal acts had not been committed by the foreign third parties, but that would be a difficult task at best for any accused.

In addition, this mental state—allowing a conviction because the accused knew the organization had committed terrorist acts—sweeps together both the guilty and the not guilty.⁶⁶ It is not against the law to give to an organization knowing that it has committed illegalities unless that group has been designated by the Secretary of State.⁶⁷ And giving to such a non-designated group is not clearly blameworthy. Assume there is a charitable day care organization, and some of the group's leaders have abused their charges. If I give money to this group, knowing of those misdeeds, but intending to help provide better care for the children, have I done something wrong? Is it a guilty act to give to the Catholic Church knowing that members of that organization have engaged in unlawful activities? An organization can have some members committing terrorist

⁶⁶ See *Aptheker v. Sec'y of State*, 378 U.S. 500, 510 (1964). A provision of the Subversive Activities Control Act of 1950, Pub. L. No. 831, § 4, 64 Stat. 987, 993–95 (1950) (codified as amended at 50 U.S.C. § 785(a)(1)(D) (repealed 1993)), stated that when a Communist organization was under a final order to register under the Act, it was unlawful for a member with knowledge or notice of the final order to use a passport. The Act further stated that publication in the Federal Register of a final order was notice. *Id.* The Court concluded that under the statute a member neither had to know of the final order or that she was a member of a “Communist-front” organization. *Aptheker*, 378 U.S. at 509. Thus, “[t]he provision . . . sweeps within its prohibition both knowing and unknowing members.” *Id.* at 510. The Court then went on to hold that this indiscriminate lumping of innocent with knowing activity violated due process: “Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.” *Id.* at 510 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

⁶⁷ Cf. COLE & DEMPSEY, *supra* note 1, at 122 (“[I]t is not a crime to raise and contribute money for violent conduct abroad that is not otherwise a crime under U.S. law, if carried out by a group that is not designated by the Secretary. . .”).

acts while the organization as a whole does good works.⁶⁸ Trying to advance good works is not blameworthy. It can only be seen as a guilty act if the donor knows that the organization has been designated and, therefore, knows that the donation is illegal.⁶⁹

It may be a guilty act if a person makes a donation intending it to be used for illegal purposes, or it may be a guilty act if he has knowledge that the donation would be used for illegal purposes, but it is not a guilty act to give to a group to further humanitarian, educational, or political goals. It is only a guilty act under our law if the receiving group has been designated by the Secretary of State. The Secretary's designation is crucial in separating a guilty act from an innocent one.⁷⁰

⁶⁸ Cf. Beall, *supra* note 21, at 701 (“[M]any politically unpopular organizations may be unnecessarily designated simply because one extreme member, for example, attempted to harm someone with a firearm.”).

⁶⁹ Cf. *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) (holding that the statute's willfulness provision requires the government to “prove that the defendant acted with knowledge that his conduct was unlawful”). *Ratzlaf* dealt with financial institutions that are required to file reports with the Secretary of the Treasury whenever they are involved with a cash transaction that exceeds \$10,000. 31 U.S.C. § 5313(a) (2000). It is illegal to structure such a transaction into smaller amounts to avoid the reporting requirement. 31 U.S.C. § 5324(a)(3) (2000). “A person willfully violating” this anti-structuring provision is guilty of a crime. 31 U.S.C. § 5322. The government had contended that a criminal statute does not require proving that a person violates the law if the accused's action indicates a wrongful purpose and that structuring a transaction into less than \$10,000 amounts indicates such a wrongful purpose because people would not do it innocently. *Ratzlaf*, 510 U.S. at 144. The Court, however, concluded that a person might so structure a transaction to reduce the risk of an IRS audit, because of a fear of burglaries, or to hide wealth from a former spouse, and these purposes are “not inevitably nefarious.” *Id.* The Court concluded,

In light of these examples, we are unpersuaded by the argument that structuring is so obviously ‘evil’ or inherently ‘bad’ that the ‘willfulness’ requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring. Had Congress wished to dispense with the requirement, it could have furnished the appropriate instruction.

Id. at 146.

⁷⁰ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (holding that the crime of knowingly distributing or receiving sexually explicit images of minors required proving that an accused knew that the performers were underage). Writing for the majority, Chief Justice Rehnquist stated, “[O]ne would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the crucial element separating legal innocence from wrongful conduct.” *Id.*

If § 2339B requires personal guilt, as it should and as the Ninth Circuit suggested is constitutionally necessary,⁷¹ then § 2339B requires that the donor know that the organization has been designated, not simply that the donor know of information that might have caused the organization to be designated.⁷² The government may contend that this places an unduly heavy burden on prosecutions obstructing the proper functioning of § 2339B, but time and again the Supreme Court in extending a mens rea requirement to all elements of a variety of crimes has rejected a similar argument. A jury can infer such knowledge from all the facts and circumstances.⁷³

⁷¹ See *Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 385 (9th Cir. 2003), vacated by 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004). The court held that § 2339B:

[B]y not requiring proof of personal guilt, raises serious Fifth Amendment due process concerns. But we conclude that there is no need to address those constitutional concerns because we construe 18 U.S.C. § 2339B to require proof that a person charged with violating the statute had knowledge of the organization's designation or knowledge of the unlawful activities that caused it to be so designated.

Id.

⁷² See *Liparota v. United States*, 471 U.S. 419, 420 (1985) (quoting the Food Stamp Act of 1964, Pub. L. No. 88-525, § 14, 78 Stat. 703, 708 (1964), amended by 7 U.S.C. § 2024(b)(1) (2000), stating "whoever knowingly uses, transfers, acquires, alters, or possesses [food stamps] in any manner not authorized by [the statute] or the regulations" commits a crime). The Court concluded that "knowingly" extended to all the elements, and, therefore, "the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations." *Id.* at 433. In *Staples v. United States*, where the Court interpreted a statute that made it a crime to possess an unregistered machine gun and concluded that the government had to prove that the defendant knew the characteristics of his firearm that brought it within the statutory definition of a machine gun. 511 U.S. 600, 619 (1994) (quoting the Food Stamp Act of 1964, Pub. L. No. 88-525, § 14, 78 Stat. 703, 708 (1964), amended by 7 U.S.C. § 2024(b)(1) (2000)).

⁷³ See, e.g., *Staples*, 511 U.S. at 615–16 n. 11 (citation omitted) ("The Government contends that . . . requiring proof of knowledge would place too heavy a burden on the Government and obstruct the proper functioning of [The National Firearms Act]. But knowledge can be inferred from circumstantial evidence. . ."). See also *Liparota*, 471 U.S. at 434 ("Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal."). Cf. Jacqueline Benson, *Send Me Your Money: Controlling International Terrorism by Restricting Fundraising in the United States*, 21 HOUS. J. INT'L L. 321, 356–57 (1999) (asserting that:

Section 2339B requires knowledge that the donation is going to an organization designated by the Secretary of State. Basic principles of criminal law and normal statutory interpretation lead to that conclusion, but that does not end the analysis. The Constitution requires that the prosecution prove something more. The prosecution must establish not only knowledge, but also that the donor specifically intended for the donation to further the organization's illegal activities.

V. GOVERNMENTAL INFRINGEMENT ON THE RIGHT OF ASSOCIATION

A. *The Right of Association*

The crime of providing material resources to a designated foreign terrorist organization serves the laudable goal of inhibiting foreign terrorists from raising money, goods, and personnel in the United States. The law, however, can be viewed from another angle. It prohibits Americans from affiliating with others by donating money, goods, and their efforts to organizations that have, in effect, been outlawed by the decree of a particular government official. Seen this way, the criminal statute implicates the constitutional right of association, which, although not explicitly mentioned in the Constitution, the Supreme Court has found implicitly protected by the First Amendment.⁷⁴

The right of association can link with the right of free speech to further the opportunity for the promotion of beliefs and ideas of all stripes.⁷⁵ The Supreme Court has concluded:

[T]he intent requirement may prevent innocent people from being convicted of supporting terrorists unknowingly. However, it also provides an easy means of sidestepping the statute. The intent requirement gives soliciting organizations greater incentive to create false fronts and to lie to donors. It also gives donors incentive to avoid carefully researching organizations with questionable backgrounds. Some jurisdictions find the knowledge requirement satisfied in criminal cases where the defendant is willfully blind. However, it is premature to assume that the willful blindness doctrine would be applied to these antiterrorism statutes. Thus, even if the federal government tries to enforce the statutes, it may be virtually impossible to produce enough evidence to support a conviction.).

⁷⁴ See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966) (referring to "the cherished freedom of association protected by the First Amendment").

⁷⁵ See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 300 (1981) ("the right of association [and] the right of expression . . . overlap and blend. . ."); *Buckley v. Valeo*,

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . .⁷⁶

The right of association, then, is implicated whenever people band together in pursuit of common goals, whether those aims are political or not.⁷⁷ Indeed, the First Amendment goal of open debate can be harmed

424 U.S. 1, 25 (1976) (per curiam) (citations omitted) ("The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'"). The right of association also has another strand. In this component, the Supreme Court:

[H]as concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984). *Roberts* stated that the "creation and sustenance of" family relationships best exemplifies this right. *Id.* at 619–20.

⁷⁶*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citations omitted). *See also Citizens Against Rent Control*, 454 U.S. at 294 (recognizing that the value of the right of association "is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost").

⁷⁷*See* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 338 (Simon & Schuster 2000) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 190 (J.P. Mayer ed., George Lawrence trans., 1969)).

Externally, voluntary associations, from churches and professional societies to Elk clubs and reading groups, allow individuals to express their interests and demands on government and to protect themselves from abuses of power by their political leaders. Political information flows through social networks, and in these networks public life is discussed. As so often, Tocqueville saw this point clearly: "When some view is represented by an association, it must take clear and more precise shape. It counts its supporters and involves them in its cause; these supporters get to know one another, and numbers increase zeal. An association unites the energies of divergent minds and vigorously directs them toward a clearly directed goal."

more when associations for non-political purposes are restricted than when restrictions are imposed on political associations. If ten of us each have \$100 to spend to advocate for a candidate or ballot measure, our money may have more impact if pooled than if spent separately, but in elections many people are usually willing to advocate on the relevant topics and the chances are good that our viewpoints will still be aired and heard by many in the relevant audience even if our association is somehow restricted. If, however, ten of us decide that our part of town would benefit from a new private hospital, forbidding us from associating may mean that our view will not reach the relevant audience. Individual \$100 expenditures advocating a new hospital may easily be drowned out in the chatter of contemporary culture while the coordinated expenditure of \$1,000 might be heard and begin a debate or movement. With the non-political, private matter an important viewpoint might simply be lost without an association.

The purpose of association, however, is not just limited to advocacy. The point to protected association is to achieve lawful aims. Just as advocacy can be enhanced by banding together, so can the accomplishment of legitimate goals. I may believe that more people ought to make their clothes available for the homeless. I can speak on the topic. I can join others with similar thoughts to multiply our voices. But my goal is the distribution of clothing. I, of course, could act individually to do this; I could solicit clothing and then find recipients. But my goal will be more efficiently accomplished if I join together with others to receive clothing and to distribute it. The right of association protects not just group advocacy but also associations to advance lawful objectives.⁷⁸ It makes

When people associate in neighborhood groups, PTAs, political parties, or even national advocacy groups, their individual and otherwise quiet voices multiply and are amplified.

Id.

⁷⁸ Cf. Robert K. Vischer, *The Good, The Bad and The Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 953 (2004) (concluding that “[t]here has been little comprehensive effort to identify and classify the paths by which individual participants and the democratic state derive value from associations and to explore how those paths are implicated in the adjudication of disputes involving associations”). Vischer identifies core values served by associations:

First, associations are uniquely capable of carving out a shared identity that is valued by the individual. . . . Second, associations provide a voice to individuals who, absent collective expression, would not be heard above the din of modern America. . . . Third, associations empower individuals to

little sense to say a group of us can come together to argue for a new hospital, but that we cannot band together to try to build that hospital. If the Constitution protects one, it protects the other. What is deeply embedded in our culture is not just group advocacy, but the coming together to actually accomplish common goals.⁷⁹ As the Supreme Court has stated in stressing the importance of the right of association, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . .”⁸⁰ On one level, § 2339B prevents persons sharing common views from banding together to achieve common ends.

B. Association by Donation

The Supreme Court has not given a comprehensive definition of what “associates” individuals together to bring their affiliation within the right of association, but it has indicated that contributions to a group, or at least to a political organization, are an aspect of that right. Thus, in *Buckley v. Valeo*,⁸¹ the Court, in considering the limitations in the Federal Election Campaign Act of 1971⁸² on the amount of money individuals could contribute to political candidates, stated:

pursue common objectives that would otherwise be beyond their reach, and that may not be shared by those around them or by the state...Fourth, any mediating role played by associations presupposes a degree of autonomy that is sufficient to allow the association to facilitate shared meaning among its members.

Id. at 1019–20.

⁷⁹ The Court in *Roberts v. United States Jaycees* stated that:

[A] broad range of human relationships . . . may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual’s freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

468 U.S. 609, 620 (1984).

⁸⁰ *Citizens Against Rent Control*, 454 U.S. at 294.

⁸¹ 424 U.S. 1 (1976) (per curiam).

⁸² Pub. L. No. 92-225, 86 Stat. 3 (1972), amended by Pub. L. No. 93-443, 88 Stat. 1263 (1974) (current version at 2 U.S.C.A. § 431 et. seq. (West Supp. 2004)).

[T]he Act's contribution and expenditure limitations . . . impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. . . .

. . . .

. . . [T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association.⁸³

Contributing to a political campaign is an act of affiliation that implicates the right of association, but because the right of association protects banding together not just to advance political beliefs but any kind of belief,⁸⁴ contributing resources to any organization is an act of affiliation with that group implicating the right of association.⁸⁵

⁸³ *Buckley*, 424 U.S. at 22–24. The Court also stated, “[T]he present Act’s contribution . . . limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties. . . .” *Id.* at 18.

⁸⁴ See *supra* text accompanying note 77.

⁸⁵ At issue in *Buckley* were monetary donations. 424 U.S. at 7. Section 2339B, however, makes it illegal to provide not only financial resources to a designated foreign terrorist organization, but also “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. § 2339B(g)(4) (2000) (incorporating the definition of “material support or resources” from 18 U.S.C.A. § 2339A(a) (West Supp. 2004)). The right of association, however, does not disappear because resources other than money are provided. When I provide lodging to an official in town on NAACP business, I am associating with the NAACP. When I lend public address equipment to a union for a rally, I am affiliating with that union. When I run a jobs workshop at a homeless organization, I am allying myself with the homeless organization. Indeed, such actions may bring me into a closer connection with the groups than merely impersonally donating the money for a hotel room, a bullhorn rental, or the hiring of someone else to lecture about how to interview. These are acts that bring the right of association into play just as does the mere donation of money, and being prosecuted for them impinges on that constitutional right.

C. *The Framework for Assessing Impingements on the Right of Association*

The Court has acknowledged that the right of association is not absolute,⁸⁶ but it has been unclear about the proper standard for measuring whether an impingement on that right is constitutional. A half-century ago, the Supreme Court indicated that strict, or even higher, scrutiny must be applied whenever the state infringed on the right of association, regardless of whether the association had political or other aims: “[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”⁸⁷ However, the Court has also indicated that the level of constitutional protection for the right of association varies with the kind of association at issue,⁸⁸ and while nodding in the direction of a strict scrutiny standard,⁸⁹ has said that even government regulation that significantly interferes with association for political purposes “may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”⁹⁰ Most recently, in *McConnell v. Federal Election Commission*, the Court stated that even a significant interference with the right to association does not normally require strict scrutiny but is “valid if it satisfies the ‘lesser demand’ of being “‘closely drawn’” to match a ‘sufficiently important interest.’”⁹¹

⁸⁶ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (“The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”).

⁸⁷ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958).

⁸⁸ See, e.g., *Roberts*, 468 U.S. at 618 (“[T]he nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case.”).

⁸⁹ See *Buckley*, 424 U.S. at 25 (“In view of the fundamental nature of the right to associate, governmental ‘action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.’”) (quoting *NAACP*, 357 U.S. at 460–61).

⁹⁰ *Id.*

⁹¹ 124 S. Ct. 619, 656 (2003) (quoting *Fed. Election Comm’n v. Beaumont*, 123 S. Ct. 2200, 2210–11 (2003)). *McConnell* also stated that “a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny[,]” but that the law before the Court did “not present such a case.” *Id.* at 659 n.43.

The level of examination does not change even when an association is prohibited, not merely limited. According to *Federal Election Commission v. Beaumont*:

[T]he degree of scrutiny turns on the nature of the activity regulated. . . . It is not that the difference between a ban and a limit is to be ignored; it is just that the time to consider it is when applying scrutiny at the level selected, not in selecting the standard of review itself.⁹²

On the other hand, *McConnell* indicates that even if the same constitutional standard applies to both contribution bans and restrictions, a complete prohibition on contributions could more easily run afoul of the constitution than a limitation. The Court stated that political parties, and also presumably people, give money to an organization for a number of reasons, "not the least of which is to associate themselves with certain causes and, in so doing, to demonstrate the values espoused by the party. A complete ban on donations prevents parties from making even the 'general expression of support' that a contribution represents."⁹³

Therefore, in determining whether a right of association has been unconstitutionally infringed, the first step is to assess the importance of the kind of association at stake. Second, the governmental interest that is sought to be furthered by the regulations impinging on the association must be weighed. Third, if that governmental interest is sufficient to restrict or prohibit the kind of association at issue, the impinging regulations must be examined to see if they are precisely drawn so as to affect the right of association no more than is necessary to accomplish the governmental goal.

The Court has refined and applied this standard in a series of cases limiting or prohibiting campaign contributions. The Court held, as we have seen, that such donations are acts of affiliations implicating the right of association. That kind of association, the Court indicated, is due the highest protection, because First Amendment guarantees are at their strongest when elections are at issue. *Buckley* itself noted:

⁹² 123 S. Ct. 2200, 2211 (2003). See also *id.* at 2210 ("[T]he basic premise we have followed in setting First Amendment standards for reviewing financial restrictions [is that] the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association.").

⁹³ *McConnell*, 124 S. Ct. at 681 (quoting *Buckley*, 424 U.S. at 21).

In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. . . . '[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'⁹⁴

Even though the kind of association at issue was of the most important, *Buckley v. Valeo* found that the law limiting contributions to candidates served a compelling enough interest to limit association.⁹⁵ This interest is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."⁹⁶ *Buckley* found the campaign law to be constitutional partly because the law was drawn narrowly enough so that it only marginally restricted First Amendment rights.⁹⁷ A contribution does indicate support for the candidate, but:

The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.⁹⁸

Not every government interest, however, even if it is offered to support a better governing process, is sufficient to abridge associational rights, as the Court made clear in *Citizens Against Rent Control v. City of Berkeley*.⁹⁹ The city of Berkeley had placed a limit of \$250 on contributions to

⁹⁴ 424 U.S. at 14–15 (citation omitted).

⁹⁵ *Id.* at 29.

⁹⁶ *Id.* at 25.

⁹⁷ *Id.* at 21.

⁹⁸ *Id.*

⁹⁹ 454 U.S. 290 (1981).

committees formed to support or oppose ballot measures.¹⁰⁰ The Court stated that "the practice of persons . . . banding together to achieve a common end is deeply embedded in the American process,"¹⁰¹ is protected by the First Amendment's right of association, and its regulation "is always subject to exacting judicial review."¹⁰² The limitation on contributions infringed this right,¹⁰³ an infringement that could not be justified under *Buckley*. The Court stated, "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*. . . ."¹⁰⁴ The rationale that allowed the impingements on association in *Buckley* did not apply to committees to advocate for or against ballot measures. The City of Berkeley responded that the contribution limitations were also "necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures."¹⁰⁵ The Court indicated that this might be a valuable goal, but that a provision of the ordinance separate from the contribution limits required publication of contributor's names before the vote and concluded that the identified interest of the limits was insubstantial since voters could identify the contributors under the other provisions. The Court concluded, "It is clear, therefore, that [the contribution limit] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights."¹⁰⁶ The regulation did not promote a strong enough interest; therefore, the Court held, "The restraint imposed by the Berkeley ordinance on rights of association and in turn on

¹⁰⁰ *Id.* at 292.

¹⁰¹ *Id.* at 294.

¹⁰² *Id.*

¹⁰³ The Court stated:

To place a Spartan limit--or indeed any limit--on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association. [The limit on contributions] does not seek to mute the voice of one individual, and it cannot be allowed to hobble the collective expressions of a group.

Id. at 296.

¹⁰⁴ *Id.* at 296-97.

¹⁰⁵ *Id.* at 298.

¹⁰⁶ *Id.* at 299.

individual and collective rights of expression plainly contravenes both the right of association and the speech guarantees of the First Amendment.”¹⁰⁷

D. The Associational Interests to Be Balanced in a Section 2339B Prosecution

The campaign contribution cases, while providing an application of the framework to be used in determining whether a § 2339B prosecution infringes the right of association, do not indicate how the constitutional question concerning that crime should be resolved. On the one hand, the kind of association at issue in the campaign cases is of the highest constitutional importance. Surely associating with a foreign organization is not as central to First Amendment concerns as are affiliations for the purposes of a political election, and, therefore, it would seem easier to impinge constitutionally on associations with foreign organizations than on affiliations with political candidates and parties.

On the other hand, the goals of the upheld campaign contribution limits were to promote central concerns of our governmental system. The country’s foundations are corrupted without honest elections and government, and without trust in governmental and electoral honesty. Association for electoral politics may be at the core of the First Amendment, but honest elections and the appearance of honest elections are at the core of our whole government. This state interest is strong enough to allow impingement on the right of association to limit large political donations that could corrupt or give the appearance of corrupting political candidates.

The governmental interest furthered by § 2339B is the prevention of terrorism in foreign lands. This is an important goal, but there is little in the Court’s association cases about whether it is of sufficiently significant rank to prohibit a right of association. While it is easy without reflection to assume that the prevention of foreign terrorism is a goal of the highest order,¹⁰⁸ in an important way the interest does not approach the one identified in *Buckley*. The country’s foundations are destroyed without

¹⁰⁷ *Id.* at 300. The Court added, “A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression.” *Id.*

¹⁰⁸ See, e.g., *Boim v. Quaranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1027 (7th Cir. 2002) (concluding that “we conclude that the government’s interest in preventing terrorism is not only important but paramount”).

honest elections and government, and trust in that honesty, while those foundations are not directly touched by terrorism abroad.

Compared to the political contribution cases, the § 2339B scales have less weighty concerns on each side, and the Supreme Court decisions about the campaign restrictions reveal little about how the § 2339B balancing should be done. At most, perhaps, it can be concluded that with less momentous interests filling each balance pan, the government should be able to impinge on the right to associate with foreign organizations for the purpose of preventing foreign terrorism. If so, then the issue is whether § 2339B's scheme is closely drawn so as to infringe associational rights no more than necessary to accomplish the law's goal.¹⁰⁹

Here again, the campaign cases give little guidance. *Buckley*, for example, upheld an impingement on the right of association, but that impingement was only a limitation on the right, not a prohibition on

¹⁰⁹See *United States v. O'Brien*, 391 U.S. 367, 381–82 (1968). O'Brien was convicted of destroying his draft card when he burned it to protest the Vietnam War and the draft. *Id.* at 369–70. The Court stated that even if the destruction was symbolic speech, it did not necessarily follow that the First Amendment protected the speech. *Id.* at 382. Furthermore, the Court recognized "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court reviewed various terms used to define what the necessary governmental interest could be and stated:

Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. But see *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (concluding that restrictions on campaign contributions were different from the conduct regulated in *O'Brien*:

We cannot share the view that the present Act's contribution . . . limitations are comparable to the restriction on conduct upheld in *O'Brien*. The expenditure of money simply cannot be equated with such conduct as the destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself . . . to reduce the exacting scrutiny required by the First Amendment.).

association. An individual could associate with a candidate by giving money; only the amount of money was limited. Section 2339B, however, does not just restrict the amount of donated resources; it prohibits them no matter what the size. Unlike *Buckley*, this is not a mere limit on the extent of an association, but a ban of certain associations, a much greater intrusion into First Amendment rights.

Furthermore, limiting contributions to a candidate does not prohibit other effective methods for advancing the donor's goals. He can speak out directly about the candidate or the ideas the candidate stands for, or give to other groups who advance those ideas. The donor to a designated foreign terrorist organization may wish to advance the welfare of people he believes are oppressed by supporting schools and orphanages where they live. That designated organization may be the only effective one in the affected region undertaking such activities. If donations are banned, the donor may have no other way to accomplish his worthwhile goals.

The campaign contribution cases give little guidance as to what might constitute acceptable, closely drawn, governmental regulations that would allow the constitutional impingement on association with groups like the designated organizations that have both legal and illegal goals. In another line of cases explicating the right of association, however, the Supreme Court has directly addressed that issue. Indeed, those cases concerned organizations that were once viewed by many government officials as the equivalent of terrorists, the Communist Party and civil rights groups.

VI. THE SPECIFIC INTENT REQUIRED BY THE RIGHT OF ASSOCIATION

Junius Scales, a member of the Communist Party, was convicted for violating the membership provision of the Smith Act.¹¹⁰ Under the Smith Act, it was a crime to organize a group to teach, advocate, or encourage the overthrow of any government in the United States, and the Act made it a crime for anyone who "bec[ame] or [wa]s a member of, or affiliate[d] with, any such society, group, or assembly of persons, knowing the purposes thereof. . . ."¹¹¹ Scales contended that the membership and affiliation provision violated the Due Process Clause of the Fifth Amendment "in that it impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal

¹¹⁰ *Scales v. United States*, 367 U.S. 203, 205 (1961).

¹¹¹ 18 U.S.C. § 2385 (2000). See *Scales*, 367 U.S. at 205 n.1.

involvement in criminal conduct; and . . . in that it infringes on free political expression and association.”¹¹²

The Court stated that, as the doctrines of conspiracy and complicity demonstrate, associational relationships can be criminal.¹¹³ However, the Court also indicated that criminalizing membership in organizations with a criminal purpose can infringe constitutional freedoms.¹¹⁴ A membership may only indicate a sympathy to an organization’s goals without any significant act advancing the group’s criminality:

[A] person who merely becomes a member of an illegal organization, by that ‘act’ alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. . . . A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.¹¹⁵

The Court concluded that prohibiting membership in an organization whose goals are not solely criminal would violate the First Amendment.

It is, of course, true that quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired. . . .¹¹⁶

¹¹² *Scales*, 367 U.S. at 220.

¹¹³ *Id.* at 225.

¹¹⁴ *Id.* at 227.

¹¹⁵ *Id.* at 227–28.

¹¹⁶ *Id.* at 229 (emphasis in original).

The Court solved these constitutional dilemmas by reading into the statute knowledge, conduct, and intent provisions that were not explicitly there. In order to convict a donor, the government must prove that the donor had knowledge of the group's illegal aims;¹¹⁷ be an "active" member of the organization; and specifically intend to accomplish its illegal purposes.¹¹⁸ The Court concluded:

When the statute is found to reach only "active" members having also a guilty knowledge and intent, [it] therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.¹¹⁹

The Court stressed the importance of the requirement that the accused have the intent to further the organization's illegal aims. "[T]he member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite specific intent. . . ."¹²⁰

¹¹⁷ *Id.* at 229. The Court stated:

If it is said that the mere existence of [the membership] enactment tends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted.

Id.

¹¹⁸ In *Noto v. United States*, another prosecution under the Smith Act membership clause, the Court stated a specific intent is required:

[F]or otherwise there is a danger that one in sympathy with legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

367 U.S. 290, 299–300 (1961).

¹¹⁹ *Scales*, 367 U.S. at 228.

¹²⁰ *Id.* at 229–30.

Scales did not expressly say that the freedom of association required the specific intent that the Court read into the Smith Act, but *Elfbrandt v. Russell*, decided five years later, did.¹²¹ The State of Arizona had required state employees to take a loyalty oath and specifically provided that anyone taking the oath who was a knowing member of the Communist party or a related organization committed perjury.¹²² The Supreme Court stated, "This Act threatens the cherished freedom of association protected by the First Amendment. . . ."¹²³ The Court noted that members of groups who do not agree with and do not participate in a group's illegal goals are not a danger and held that "[a] law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."¹²⁴

The year following *Elfbrandt*, the Supreme Court in *United States v. Robel*¹²⁵ held that the portion of the Subversive Activities Control Act of 1950 that prohibited a member of certain Communist organizations from working in any defense facility violated the right to freedom of association.¹²⁶ The Court stated that this provision could not be limited by statutory interpretation to active members who have the specific intent of furthering the illegal goals of the organization, and it, therefore, applied to all categories of membership.¹²⁷ *Robel* concluded:

It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment. . . .

. . . .

¹²¹ 384 U.S. 11 (1966).

¹²² *Id.* at 13 n.2.

¹²³ *Id.* at 18.

¹²⁴ *Id.* at 19.

¹²⁵ 389 U.S. 258, 266 (1967).

¹²⁶ See Subversive Activities Control Act of 1950, Pub. L. No. 831, § 4, 64 Stat. 987, 991-92 (1950) (codified as amended at 50 U.S.C. § 784(a)(1)(D) (repealed 1993)).

¹²⁷ The Court noted that while *Scales* had read such limitations into the membership clause of the Smith Act, the Smith Act required an accused to have knowledge of the organization's illegal aims, a requirement that allowed the Court to limit that statute to active members who had the specific intent to further the organization's illegalities. *Robel*, 389 U.S. at 262. A similar knowledge requirement was not in the Subversive Activities Control Act. *Id.*

[T]he operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by provisions of the First Amendment.¹²⁸

The Court noted that precision of regulation is required for government restrictions of First Amendment rights,¹²⁹ and the challenged provision "contains the fatal defect of overbreadth because it seeks to bar employment for both association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights."¹³⁰

The Court in *Scales*, *Elfbrandt*, and *Robel* indicated that the government can place burdens on membership in a group with both legal and illegal goals only if the government establishes that the member was active in the organization and had the specific intent to further the group's illegal goals. *NAACP v. Claiborne Hardware Co.* extended that doctrine to affiliations other than formal memberships.¹³¹

Claiborne Hardware arose out of a civil rights boycott. In spring of 1966, a petition seeking equal rights and opportunities for blacks in Claiborne County, Mississippi, was presented to a meeting held by the local branch of the NAACP where it was unanimously approved by 500 people.¹³² When the local officials did not accede to the requests, several hundred people attended another meeting and unanimously agreed to boycott the county's white merchants until the petition was satisfied, a boycott that continued for years.¹³³ While most actions to further the boycott—meetings, speeches, picketing, demonstrations, the recording and reporting of boycott violators—were legal and peaceful, a few violent acts occurred for the purpose of intimidating some from trading with the white merchants.¹³⁴

The merchants sued the NAACP, another organization, and 146 individuals for damages resulting from the boycott.¹³⁵ A state chancellor in equity found 130 individuals and the NAACP jointly and severally liable

¹²⁸ *Id.* at 262–63.

¹²⁹ *Id.* at 265 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

¹³⁰ *Id.* at 266.

¹³¹ 458 U.S. 886 (1982).

¹³² *Id.* at 899.

¹³³ *Id.* at 889.

¹³⁴ *Id.* at 902–06.

¹³⁵ *Id.* at 889.

for the merchants' lost earnings and good will, entered a judgment of over \$1.2 million, and issued an injunction.¹³⁶ The Mississippi Supreme Court affirmed the judgment against ninety people and the NAACP, concluding that the entire boycott was illegal because "[i]n carrying out the agreement and design, certain of the defendants, acting for all others," engaged in violence, physical force, and threats to further the boycott.¹³⁷

The individuals were not found liable for mere membership in the NAACP or any other organization that had supported the boycott. Instead, they were held liable for their acts that effectuated the boycott.¹³⁸ The merchants divided the actions justifying liability into three groups. The first group was the management of the boycott as evidenced by regular attendance at weekly NAACP meetings and by taking leadership roles at the meetings.¹³⁹ The second group consisted of boycott enforcers who stood outside the stores and noted individuals who traded with the white merchants so that the boycott breakers' names could be publicized.¹⁴⁰ The third group consisted of those who committed or threatened acts of violence to further the boycott.¹⁴¹

The Supreme Court concluded that the First Amendment protected the defendants' right to band together to express their views collectively,¹⁴² but that the violent activities were not constitutionally protected by the First Amendment,¹⁴³ and those who committed the violence could be held liable for the losses resulting from the violence.¹⁴⁴ The boycott, then, was an

¹³⁶ *Id.* at 893.

¹³⁷ *Id.* at 894, 897.

¹³⁸ *Id.* at 897.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 907-08. The Court stated:

As we so recently acknowledged in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294, 'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.' We recognized that 'by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.'

Id.

¹⁴³ *Id.* at 916. (stating that "The First Amendment does not protect violence.").

¹⁴⁴ *Id.* at 918. Their liability, however, did not extend to all the losses resulting from the boycott. "While the State legitimately may impose damages for the consequences of violent

association where many members undertook legitimate, constitutionally-protected activities to further the boycott's aim, while some members committed crimes to advance those purposes. That some members acted violently, however, did not destroy the protected right of association for everyone, as the Mississippi Supreme Court had determined. The Supreme Court concluded, "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."¹⁴⁵ On the other hand, the Court continued, "[t]he presence of protected activity . . . does not end the relevant constitutional inquiry."¹⁴⁶ However, if liability is to be legitimately imposed for constitutionally unprotected conduct occurring "in the context of constitutionally protected activity . . . , 'precision of regulation' is demanded."¹⁴⁷ After reviewing *Scales* and the right of association cases it spawned, the Court held:

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.¹⁴⁸

The crime of providing material resources to a designated foreign terrorist organization does not penalize anyone for being a member of such an organization; instead, it criminalizes the act of providing material support or resources to such a group. As *Claiborne Hardware* concluded, however, the right of association protects more than just membership in an organization. "Association" is a broader term than "membership." One can associate with a group in more ways than just joining its formal membership rolls. *Claiborne Hardware* teaches that the First Amendment

conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered." *Id.*

¹⁴⁵ *Id.* at 908.

¹⁴⁶ *Id.* at 912. The Court noted economic regulations that have had incidental effects on First Amendment rights had been constitutionally sustained, but, the Court continued, a state's power "to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change to effectuate rights guaranteed by the Constitution itself." *Id.* at 914.

¹⁴⁷ *Id.* at 916.

¹⁴⁸ *Claiborne Hardware*, 458 U.S. at 920.

protects all forms of association with a group, and other Supreme Court cases establish that people have the right to associate with a group by donating their money, services, or goods.¹⁴⁹

That right is not absolute, but it can be infringed only if the government regulation serves important and legitimate state interests and is closely drawn so as to not impinge on associational freedom more than is necessary to effectuate that legitimate interest. When the association is with an organization that has both legal and illegal goals or methods, the necessary precision of regulation requires that an act of association can be constitutionally criminalized only if it is shown that the act was done with the specific intent to further the group's illegal aims or methods. The Supreme Court's right of association cases, thus, demonstrate that a person can be validly prosecuted for providing material resources to a designated foreign terrorist organization only if it is shown that the provision was made with the specific intent of furthering the designated organization's illegal goals or methods.

So far the Supreme Court has not interpreted § 2339B, but the lower courts have refused to follow these right of association cases and have not found that the Constitution requires that specific intent.

VII. JUDICIAL INTERPRETATIONS OF SECTION 2339B AND THE RIGHT OF ASSOCIATION

The major interpretation of the interplay between the constitutional right of association and § 2339B concerned the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), organizations designated as terrorist by the Secretary of State but also groups, as we have seen, that sought to advance important, legitimate goals.¹⁵⁰ American supporters of the PKK¹⁵¹ and the LTTE¹⁵² contended that they wished to give what they

¹⁴⁹ See COLE & DEMPSEY, *supra* note 1, at 142 ("But if the right to associate does not include the right to pay dues, raise money, or provide any material support to one's group of choice, the right is an empty formalism. Association cannot exist without the material support of their members.").

¹⁵⁰ See *supra* note 76.

¹⁵¹ The Humanitarian Law Project (HLP), a non-profit organization headquartered in Los Angeles, a consultant to the United Nations (UN) and a regular participant with the UN Commission on Human Rights that "works for the peaceful resolution of armed conflict" through, among other activities, fact-finding missions and reports, and Ralph Fertig, a federal administrative judge who was President of the HLP's Board of Directors and an active participant in HLP activities around the world, said that they wished to continue aid, begun in 1991, to the

feared would be considered material support to these groups in violation of § 2339B and sought an injunction barring enforcement of the act against them.

The first time this case made it to the Ninth Circuit, *Humanitarian Law Project v. Reno*,¹⁵³ the court brushed off the contention that the right of

PKK. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1181 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (9th Cir. 2000), *vacated by Humanitarian Law Project v. United States Dep't of Justice*, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004). Although they had supported the PKK before the designation, HLP and Fertig said that because the Secretary of State had designated the PKK a foreign terrorist organization HLP & Fertig had been deterred by the possibility of violating the criminal law from aiding the PKK's nonviolent humanitarian and political activities. They alleged that they would have liked to, but were deterred from, providing support in the following ways:

- (1) solicit funds for, and make cash contributions to the PKK's political branch, for its lawful political work on behalf of the Kurds' human rights and for humanitarian assistance to the Kurdish refugees;
- (2) advocate on PKK's behalf before the UN Commission on Human Rights and the United States Congress;
- (3) train the PKK in how to engage in political advocacy and on how to use international law to seek redress for human rights violations;
- (4) write and distribute publications supportive of the PKK and the cause of Kurdish liberation;
- (5) advocate for the freedom of Turkish political prisoners convicted of being PKK members or supporters;
- (6) work with PKK members at peace conferences and other meetings toward the cause of peace and justice for the Kurds; and
- (7) provide lodging to PKK members in connection with these activities.

Id. at 1182.

¹⁵²Four membership organizations and an individual said they sought to give aid to the LTTE. One group said it wished to offer its expert medical and health care advice and assistance to the designated terrorist organization. Another group claimed expertise in politics, law, and economic development which it sought to offer the LTTE for the purpose of achieving normalcy in a war-torn land. A third sought to develop school curricula and rebuild libraries in the areas controlled by the LTTE. A fourth group sought to offer expert economic development and information technology expertise to promote civil peace in the lives of Tamils. The individual was a doctor who had visited hospitals run by the LTTE and wished to return giving medical advice and offering his services for a six month period or more. *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1190–92 (C.D. Cal. 2004), *vacated by Humanitarian Law Project v. United States Dep't of Justice*, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004).

¹⁵³205 F.3d 1130 (9th Cir. 2000).

association cases culminating in *NAACP v. Claiborne Hardware Co.*¹⁵⁴ controlled: “*Claiborne Hardware* and similar cases address situations where people are punished ‘by reason of association alone’ . . . in other words, merely for membership in a group or for espousing its views.”¹⁵⁵ The court continued that § 2339B criminalizes neither membership nor advocacy; instead, it “prohibits . . . the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.”¹⁵⁶

The court concluded that the statutory scheme “was well enough tailored” so as not to infringe the First Amendment.¹⁵⁷ The government has a substantial legitimate interest in preventing international terrorism, and the political branches, because of foreign policy concerns, have great leeway in determining how best to fight international terrorism, including the determination that any donation to a designated organization aids terrorism.¹⁵⁸ The court concluded:

[A]ll material support given to such organizations aids their unlawful goals. . . . [M]oney is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts. We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion. Thus, we cannot say that [§ 2339B] is not sufficiently tailored.¹⁵⁹

The Ninth Circuit’s underlying premise was that because a donor cannot control the use to which his aid will be put, any donation to a designated organization can further terrorism.¹⁶⁰ Consequently, the First Amendment

¹⁵⁴ 458 U.S. 886 (1982).

¹⁵⁵ *Humanitarian*, 205 F.3d at 1133 (quoting *Claiborne Hardware*, 458 U.S. at 920).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1136.

¹⁵⁸ *See id.* (“Because the judgment of how best to achieve that end is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal.”).

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 1134 (“Material support given to a terrorist organization can be used to promote

does not require “the government to demonstrate a specific intent to aid an organization’s illegal activities before attaching liability to the donation of funds.”¹⁶¹

Humanitarian Law Project v. Reno consequently concluded that it did not violate the Constitution to make all monetary contributions or other donations to a designated foreign terrorist organization criminal.¹⁶² The intent of the donor does not matter. Even if the contributor intends the money to be used for advocacy, political organizing, or schooling, the donation is a crime if it is given to an organization designated by the Secretary of State.

The Ninth Circuit’s reasoning, however, misread the Supreme Court cases. The court of appeals found in *Claiborne Hardware* and related decisions an act-versus-mere-membership distinction for the right of association. The Supreme Court cases, in this view, were concerned with punishment “merely for membership in a group or for espousing its views. . . . What (§ 2339B) prohibits is the *act* of giving material support. . . .”¹⁶³ In this view, the right of association protects against liability for membership in an organization, but not against liability for actions.

That action-membership distinction fails for a number of reasons. First, organizational membership does not occur passively. Except for memberships resulting from birth, it takes some sort of act to become a member of a group. No one is a mere member of an organization; membership requires action.¹⁶⁴

Furthermore, *Claiborne Hardware* did not impose a specific intent requirement to protect mere membership or the espousal of group’s views, as the Ninth Circuit put it. Instead, the specific intent was required by the Supreme Court to protect “association.” “Association” includes “membership,” but “association” is the broader term. A person can be constitutionally protected in associating or affiliating with a group without

the organization’s unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used.”).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1136.

¹⁶³ *Id.* at 1133 (emphasis added) (quoting *Claiborne Hardware*, 458 U.S. at 920).

¹⁶⁴ *Cf. Cole*, *supra* note 2, at 11 (“[T]he distinction between association and material support is illusory. Groups cannot exist without the material support of their members and associates. If the right of association meant only that one had the right to join organizations but not to support them, the right would be empty.”).

being a formal member of it. As the political contribution cases indicate, a person can associate with a political candidate within the protections of the First Amendment without somehow being a "member" of the candidate. Indeed, *Claiborne Hardware* makes quite clear that the right of association protects more than mere membership and espousal of a group's views.

The association at issue in *Claiborne Hardware* was not some sort of formal organizational membership, but an association that came through the acts of individuals that allied themselves with an ad hoc group. Mississippi had not imposed liability for membership in the NAACP or some other organization but for acts that had furthered the boycott.¹⁶⁵ The Supreme Court's dispositions, however, indicated that taking actions to further the boycott did not remove the individual from the constitutional protection of the right of association.¹⁶⁶ Thus, Mississippi justified liability on some because they acted as "store watchers" recording names of shoppers with some of the watchers wearing distinctive clothes, apparently to intimidate people from entering the stores. The Court held that these acts in furtherance of the boycott were insufficient to impose liability for the illegal conduct without a showing of the requisite specific intent.¹⁶⁷ The Court stated:

There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. . . . [M]ere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is insufficient predicate for liability.¹⁶⁸

When it discussed the possible liability for the boycott's main leader, the Court explicitly stated that "liability may not be imposed . . . [for] active participation in the boycott itself."¹⁶⁹ *Claiborne Hardware* indicates that

¹⁶⁵ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 921 (1982).

¹⁶⁶ *Id.* at 908–15.

¹⁶⁷ *Id.* at 925–26.

¹⁶⁸ *Id.* The Court also held that liability could not be imposed for attendance at the meetings where the boycott was a topic but illegal conduct was not authorized, ratified, or discussed. *Id.* at 924–25. The Court stated, "To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute 'guilt by association,' since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a 'guilt for association' theory. Neither is permissible under the First Amendment." *Id.* at 925.

¹⁶⁹ *Id.* at 926. The Court did say that Charles Evers might be held liable for illegalities of

the right of association protects not just mere membership or espousal of views, but also actions that associate.

This right of association, however, is not absolute. The government can impinge on that right when it furthers a legitimate state goal and does so without unnecessarily abridging the right through precise regulations or closely drawn means.¹⁷⁰ The Ninth Circuit did conclude that § 2339B was “well enough tailored” to avoid First Amendment problems.¹⁷¹ Such tailoring did not require proof of a specific intent to further an organization’s terrorism because a donor cannot control how the money is used after it is given. It could be given with the intent to aid humanitarian or advocacy purposes, but still be used for violence. Because all money is fungible, Congress could prohibit all donations to a designated organization.¹⁷²

others if “he authorized, directed, or ratified specific tortious activity [of others]. . . . [A] finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period,” or “the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.” *Id.* at 927.

¹⁷⁰ *Cf.* Vischer, *supra* note 78, at 1007–08.

[F]or a society that values a vibrant associational life, checking the perceived excesses of certain associations is a course better left to the marketplace of associations (and individuals acting outside associations) rather than the trump of government dictates. Limiting government intervention to instances where an association threatens harm to nonmembers or nonconsenting members is one such avenue.

Id.

¹⁷¹ *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), *vacated by Humanitarian Law Project v. United States Dep’t of Justice*, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004).

¹⁷² *Cf.* 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, 1414–15 (2004).

On a practical level, it is unlikely that an innocent, reasonable Muslim giving obligatory zakat, for example, or another well-intentioned reasonable donor making a donation to his or her place of worship, to a humanitarian relief organization, or to any other seemingly legitimate charitable organization would consider, first, the notion that money is fungible, and second, the prospect that his or her altruism might assist a foreign terrorist group.

Id.

Section 2339B, however, prohibits not just fungible money, but also goods and services. The Ninth Circuit concluded that such non-fungible donations could also be completely prohibited for much the same reasons as money: "Congress explicitly incorporated a finding into the statute 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.' . . . It follows that all material support given to such organizations aids their unlawful goals."¹⁷³ Consequently, because all donations can be used by an organization for terrorism no matter what intent prompted the donation, a scheme prohibiting all donations is "sufficiently tailored."¹⁷⁴

This reasoning may have some power, but it still does not explain why *Scales* and the related associational rights cases do not control. Certainly § 2339B cannot be distinguished from the Supreme Court cases over the importance of the governmental goal. The government may have a substantial interest in preventing international terrorism, but the interest at stake in the cases concerning the Communist Party was even higher—the prevention of the violent overthrow of government. Indeed, it is hard to imagine a more important interest a representative government can have than the prevention of its forceful destruction.¹⁷⁵

Section 2339B involves foreign policy. *HLP I* noted that this is an area where the courts have extended the political branches special deference,¹⁷⁶ but that foreign policy concerns are at issue does not distinguish *Scales* and its progeny. Thus, at issue in *United States v. Robel*¹⁷⁷ was a portion of the

¹⁷³ *Humanitarian*, 205 F.3d at 1136 (citing Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247 (1996)).

¹⁷⁴ *Id.*

¹⁷⁵ See COLE & DEMPSEY, *supra* note 1, at 154.

But the principle prohibiting guilt by association was developed in the crucible of a battle against what appeared to be an even more formidable foe—the Communist Party, an organization that Congress found to be, and the Supreme Court accepted as, a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence. If association with such an organization deserves protection, surely association with much less powerful groups that have threatened or used some violence at some point deserves similar protection.

Id.

¹⁷⁶ See *supra* note 158.

¹⁷⁷ 389 U.S. 258 (1967).

Subversive Activities Control Act of 1950 that prohibited members of various Communist-action groups from working in any defense facility.¹⁷⁸ The Court held that because this provision was not limited to active members who have the specific intent of furthering the illegal goals of the selected organization, the Act violated the First Amendment right of association.¹⁷⁹ The Court reached this conclusion even though the statute was passed pursuant to congressional war powers. The Court acknowledged that the judiciary has given broad discretion to legislation adopted under these powers but added:

However, the phrase "war power" cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. . . . Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties--the freedom of association--which makes the defense of the Nation worthwhile.¹⁸⁰

If war powers do not justify the elimination of the specific intent requirement necessary to protect the right of association, it should not disappear merely because of the invocation of foreign affairs.

Finally, of course, the Ninth Circuit upheld the law because a group with terrorist and other goals could use any donation to enhance its terrorism. This logic does not distinguish *Scales* and its progeny. Instead, it confronts the issue from a perspective not used by the Supreme Court. The Ninth Circuit's focus is on how the organization could use the donation, not on the mental state of the donor. Consequently, according to the Court of Appeals, if the organization could use the donation corruptly, the donation, even though an act of association that otherwise would be protected by the First Amendment, can be criminalized even if the donor had no intent to further terrorism. In contrast, the Supreme Court's focus in *Scales* and the related cases is on the activities and mental states of the associating individual not on how an organization with both legal and illegal aims might further its illegalities from an act of association.

¹⁷⁸ Subversive Activities Control Act of 1950, Pub. L. No. 831, § 4, 64 Stat. 987, 993-95 (1950) (codified as amended at 50 U.S.C. § 785(a)(1)(D) (repealed 1993)).

¹⁷⁹ See *supra* note 123.

¹⁸⁰ *Robel*, 389 U.S. at 263-64.

Indeed, if the Court's focus had been on how the organization might advance its illegal goals from a person's association, not on the individual protected by the First Amendment, mere membership could be constitutionally criminalized. Size can matter to an organization for the accomplishment of its goals, whether legal or illegal. It would not be irrational for a legislature to conclude that when members are added to an organization with illegal goals, even if those members have no intention of furthering the illegality, the organization has become stronger, and the stronger the organization the more likely it will be to accomplish all its aims, including the illicit ones. The Court, however, has been clear—the criminalization of mere membership in an organization with both legal and illegal aims violates the First Amendment right of association. Instead, such association can constitutionally lead to criminal penalties only if the government proves that the person is an active member knowing of the illegal aims of such an organization and, in addition, specifically intends to aid those illegal purposes.

In contrast, under the Ninth Circuit's reasoning, active membership alone would be sufficient for a constitutionally valid conviction. If I donate books to a school run by a designated terrorist organization, *HLP I's* reasoning is that I can be sent to jail because in donating the books, I am freeing up resources that the organization might otherwise have spent on books, and those freed resources can now be allocated to terrorism. But the same could be said for "active membership." The Communist Party may have sought the violent overthrow of the government, but it also proclaimed itself "trying to remedy unsatisfactory social or economic conditions, carry out trade-union objectives, eliminate racial discrimination, combat unemployment, or alleviate distress and poverty."¹⁸¹ An active member in the Party may very well have picketed with the Party for union goals or to combat racial discrimination. In doing so, that picketer easily could have freed up another member from picketing and allowed that person to undertake actions to further the Party's illegalities. Active membership implies the donation of human resources to the organization, and such a donation could further the organization's criminality just as the school books donated to the foreign organization could further terrorism. Indeed, active membership might easily include stuffing envelopes for the solicitation of more members and money. That, of course, could bring additional money that could be used for the Party's illegalities. Even so,

¹⁸¹ *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 473 (1963).

the Court held that the government must establish more than just active membership in a group with both legal and illegal purposes; the government must show more than just the donation of human resources, or personnel, to the group.¹⁸² The Court held that government must show that the individual had the specific intent to further the criminal activities.¹⁸³

The Supreme Court has indicated that a person's association rights are not wiped out because of the donation of fungible money to a group with both legal and illegal purposes. Thus, in dealing with a deportation, the Supreme Court held that giving money to the Communist Party in the form of dues did not establish a "meaningful association" with the Party.¹⁸⁴ The Court had previously held that an alien could be deported for membership in the Communist Party only if the government established that the alien had a "meaningful association" with the Party and was aware that it operated "as a distinct and active political organization. . . ."¹⁸⁵ In *Gastelum-Quinones v. Kennedy*, the government established that the alien had been "a dues-paying member of a club of the Communist Party in Los Angeles, and that he attended about 15 meetings of his Party club, one executive meeting of the group, and one area Party convention."¹⁸⁶ The Court concluded that the evidence was insufficient to support deportation because the evidence was "extremely insubstantial in demonstrating the 'meaningful' character of the petitioner's association with the Party. . . ."¹⁸⁷ The mere giving of money to the proscribed organization did not allow for deportation. Once again, the Court's focus was not on how the organization could corruptly use what had been furnished to it, but on the individual making the donation.

The Ninth Circuit's approach in *HLP I* to the right of association, which has been followed by other lower courts,¹⁸⁸ reduces the right of association

¹⁸² *Id.* at 479–80.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 476–77.

¹⁸⁵ *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957) (citing *Galvan v. Press*, 347 U.S. 522, 528 (1954)).

¹⁸⁶ *Gastelum-Quinones*, 374 U.S. at 474.

¹⁸⁷ *Id.* at 476–77.

¹⁸⁸ See *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (holding that § 2339B does not violate the right of association). The court stated, "We join the Ninth Circuit in observing that 'there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.'" *Id.* at 1244–45 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135

so that it will often be an empty shell¹⁸⁹ and ignores the analytic approach that the Supreme Court has adopted in a long line of cases where an individual has associated himself in various ways with a group that has both legal and illegal purposes. These Supreme Court precedents instead indicate that a person can be convicted of violating § 2339B only if the person had the specific intent of aiding a designated organization's terroristic goals when making the donation, whether that donation was money, goods, or individual efforts.

And while the legislative history is scant as to the intent requirement of § 2339B, the little there is supports the specific intent embodied in the Supreme Court's right of association cases. The Congressional Record contains but one statement referring to § 2339B's intent element. It was made by Senator Orin Hatch, a cosponsor of the bill of which § 2339B was a part. When he presented the Senate Conference Report to the Senate, he stated:

This bill also includes provisions making it a crime to knowingly provide material support to the terrorist functions of foreign groups designated by a Presidential finding to be engaged in terrorist activities

(9th Cir. 2000), *vacated by* Humanitarian Law Project v. U.S. Dep't of Justice, 2004 U.S. App. LEXIS 18933 (9th Cir. Sept. 8, 2004); *see also* Boim v. Quranic Literacy Inst. & Holy Found., 291 F.3d 1000, 1026 (7th Cir. 2002) (citing *Humanitarian*, 205 F.3d at 1133) ("Conduct giving rise to liability under § 2339B, of course, does not implicate associational or speech rights."); *United States v. Sattar*, 272 F. Supp. 2d 348, 368 (S.D.N.Y. 2003) (rejecting the contention that § 2339B does not violate the right of association by relying on *Humanitarian Law Project v. Reno*); *United States v. Lindh*, 212 F. Supp. 2d 541, 571 (E.D. Va. 2002) (rejecting an accused's contention that § 2339B violated his right of association, the court stated that the "most apposite authority on the issue" is *Humanitarian Law Project v. Reno*).

¹⁸⁹ Cf. COLE & DEMPSEY, *supra* note 1, at 155.

The Supreme Court has repeatedly struck down laws that penalized association with the Communist Party absent proof that the individual specifically intended to further the group's illegal ends. If the provision of material support to a group were somehow different, then all of the anti-Communist measures declared invalid by the Supreme Court could have simply been rewritten to hinge punishment on the payment of dues, the volunteering of time, or any of the other material manifestations of political association. The right of association, in other words, would be left a meaningless formality.

Id.

....

I am convinced that we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up.¹⁹⁰

Senator Hatch indicated that the crime was not merely giving resources to a designated group. Instead the crime, according to him, was knowingly giving material support *to the terrorist functions* of a designated organization. According to the Senator, something more specific for conviction is required than just donating to a group labeled by the executive branch as terrorist. Although surely legislative intent cannot be conclusively determined from this one statement, what can be divined seems to indicate a congressional intent quite consistent with the Supreme Court cases that require that the donation of support or resources to a group with both legal and illegal goals and methods is criminal only if the donation was made with the specific intent to further the illegalities.

VIII. CONSEQUENCES OF SECTION 2339B WITHOUT A INTENT REQUIREMENT

Crimes should have a deterrent effect, and if § 2339B does not require the donor to have the specific intent to aid terrorism, that deterrence should be broad.¹⁹¹ Without a regular reading of the Federal Register, a person will always have to consider the possibility of committing a federal crime every time a donation goes to any foreign organization. This will have to deter those who seek to aid others abroad. As David Cole and James X. Dempsey state, "Persons legitimately concerned about conditions in other countries, and seeking to support the political and humanitarian activities of ethnic or nationalist groups, will be more hesitant to exercise their First Amendment rights to support them if they fear criminal prosecution."¹⁹²

¹⁹⁰ 142 CONG. REC. S3354 (daily ed. April 16, 1996) (statement of Sen. Hatch) (emphasis added), available at 1996 WL 179595.

¹⁹¹ See, e.g., 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, 1349 (2004). Crimm cites reports "that well-intentioned, law-abiding U.S. Muslims have been reticent to contribute their dutiful 'zakat' (2.5% of a Muslim's annual income), even to reputable Muslim charities, for fear that funds might be routed ultimately to terrorists and that they, as contributors, might be subject to prosecution." *Id.*

¹⁹² COLE & DEMPSEY, *supra* note 1, at 122.

Perhaps even more important, if § 2339B does not constitutionally require the specific intent requirement, a whole new class of political crimes could be created. There is no reason why the model presented by § 2339B has to be limited to foreign organizations. States could delegate to an official the power to designate groups as terrorist if some in the organizations sought to achieve goals through violence and then make donations to such designated groups criminal. Many enterprises, including charities, corporations, and advocacy groups, could conceivably be designated because many organizations have members and employees that have used violence to advance the group's goals. For example, one state might designate a pro-life group that has advocated for a constitutional amendment prohibiting abortion and has provided counseling and adoption services, but has also been implicated in violence against abortion providers. Another state might designate a labor union that provides normal union services but has also used violence in its strikes. A third might designate a corporation whose practices produced workplace injuries. With such crimes, donations to the pro-life group to help defray the medical costs of the women who plan to have their babies adopted or to provide goods to families of lawful strikers would be criminal. Working for the designated corporation would be against the law.¹⁹³

Penalizing association with an organization without requiring specific intent to further the illegal goals of the organization allows the creation of a powerful tool to outlaw disfavored groups.

IX. CONCLUSION

The statutory language of § 2339B, which makes it a crime to provide those groups designated by the Secretary of State foreign terrorist

¹⁹³ Cf. Cole, *supra* note 2, at 12.

[L]egislatures could penalize material support of any organization that has ever engaged in any illegal activity, without regard to the purpose and use of the particular material support. The state could make it a crime to provide newspapers or social services to gang members, to pay dues to the Communist Party, or to make a donation to the Republican Party, on the grounds that each of these organizations has engaged and may in the future engage in illegal activity and that giving them material support would free up resources that could then be used to further the group's illegal ends.

organizations with material resources is not clear what mental state is required for a conviction. The statute should be interpreted to require that the government prove that the donor knew the organization was so designated. In addition, the First Amendment's right of association requires that the government prove that the donor in making the donation intended to further the terroristic activities of the organization.

