Convergences and Divergences: Countering Terrorist Organisations in the United States and the United Kingdom

C.R.G. Murray[*]

Keywords

Proscription/Designation of Organisations as Terrorist – Freedom of Association – Militant Democracy – United Kingdom – United States

Abstract

Criminalising membership of terrorist organizations raises serious freedom of association and freedom of speech/expression concerns. Governments in the United States of America and the United Kingdom have a long history of restricting organisations which express dissent, particularly at times when they perceive national security to be subject to acute threat. Until the mid-twentieth century, both jurisdictions regarded proscription as the appropriate means of tackling political organisations which were committed to using violence to achieve their goals or equivocal about their attitude to violence. Thereafter, the approaches of these two jurisdictions to proscription diverged. This paper analyses these distinct approaches to tackling terrorist organisations by comparing their proscription offences, the mechanisms for listing organisations as terrorist, and whether adequate safeguards for freedom of association and freedom of speech/expression are provided in both jurisdictions. It also evaluates the effectiveness of such proscription regimes as a response to the threat posed by "networked" groups which actively adapt to the efforts by states to tackle their activities by listing them as terrorist.

Introduction

When states employ their criminal justice system to tackle terrorism 'a heavily modified criminal process' often results, featuring novel rules of procedure and evidence gathering, as

[*] Senior Lecturer, Newcastle Law School, Newcastle University, UK. My thanks to Tom Frost (University of Sussex), Alan Greene (Durham University) and Professor Satvinder Juss (King's College London) for their advice and encouragement regarding earlier drafts of this article. Any errors remain my own.

well as counter-terrorism offences which dramatically extend the nature of criminal conduct.[1] Such modifications build into what Karl Loewenstein described in the 1930s as a 'militant democracy'; a liberal-democratic governance order which has supposedly shaken off 'legalistic self-complacency' in response to an existential threat.[2] Writing in the 1930s, Loewenstein regarded such an approach as essential to defeating fascist and communist groups seeking to abuse rights and liberties maintained by liberal democracies to subvert such governance orders, but the threat posed by groups such as al Qaeda, Islamic State and extreme right-wing terrorism has brought renewed attention to militant democracy theory.[3] For Louise Richardson, protections for freedom of association make liberal democracies 'convenient operating grounds for terrorism'.[4] Militant democracy theory therefore seeks to legitimate the criminalisation of manifestations of political identity and thereby undermine the support base of groups linked to political violence.[5] In the United States (US) criminal prosecution on the basis of support groups designated as Foreign Terrorist Organizations (FTOs) has become 'a critical mode of response' to terrorism.[6] In the United Kingdom (UK) the criminalisation of membership of banned groups, as the UK Government explained on the occasion of banning the extreme right-wing group National Action, 'is an important part of the Government's strategy to disrupt the full range of terrorist activities'.[7] These measures are not primarily intended to tackle active participants in terrorist cells, as such activity is already covered by offences of criminal conspiracy.[8] Instead they provide a basis for criminalising broader adherence to a targeted group, with the UK Government placing considerable emphasis in banning National Action that its 'views and ideology stand in direct contrast to the core values of Britain and the United Kingdom'.[9] This article explores the uneasy

[1] David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Aldershot: Ashgate, 2007) 87.
[2] Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *American Political Science Review* 417, 431.
[3] See Clive Walker, 'Militant Speech about Terrorism in a Smart Militant Democracy' (2011) 80 *Mississippi Law Journal* 1395, 1395-1396.
[4] Louise Richardson, *What Terrorists Want: Understanding the Terrorist Threat* (London: John Murray, 2006) 72.
[5] See András Sajó, 'From Militant Democracy to the Preventive State' (2005) 27 *Cardozo Law Review* 2255, 2274.
[6] Robert Chesney, 'Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism' (2007) 80 *Southern California Law Review* 425, 493. See also Robert Chesney, 'Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique' (2003) 101 *Michigan Law Review* 1408, 1410.
[7] Ben Wallace MP, HC Deb, vol. 618, col. 911 (14 Dec 2016). See also *Attorney General's Reference (4/2002)* [2003] EWCA Crim 762, [20] (Latham LJ).
[8] Marie Breen-Smyth, 'Theorising the "Suspect Community": Counterterrorism, Security Practices and the Public Imagination' (2014) 7 *Critical Studies on Terrorism* 223, 225.
[9] Ben Wallace MP, HC Deb, vol. 618, col. 911 (14 Dec 2016).

relationship between such claims and official assurances that proscription 'is not targeted at any particular faith, social group or ideological motivation'.[10]

The UK proscription and US designation regimes harness the inherent flexibility in criminal justice standards to attempt to shut "banned" groups off from society. But there must be limits to this flexibility when a liberal democracy responds to terrorism.[11] The erosion of established criminal justice safeguards threatens the rule of law, and in doing so can de-legitimate counter-terrorism efforts.[12] Measures which hollow out such safeguards also attract potentially embarrassing legal challenges on the basis of fundamental rights.[13] This latter concern has long resonated in the US, where counter-terrorism policy has been channelled by established constitutional rights.[14] By contrast, the absence of any higher-order constitutional rights in the UK's legal systems led generations of US-based constitutional theorists to marvel at the special measures adopted in the UK to tackle security threats.[15] Their successors maintain that were the US Congress to enact many of the counter-terrorism measures currently employed in the UK, they would violate the protections contained within the Bill of Rights.[16] In comparative terms, militant democracy theory therefore appears to fit much more naturally within the UK's constitutional order. This article uses militant democracy theory to examine the overlaps which remain between the legal regimes intended to disrupt organisations which the UK and US governments believe threaten political violence. The US designation and UK proscription provisions, enacted before the 9/11 attacks and extended thereafter, may not be the most high-profile elements of these countries counter-terrorism responses, but they criminalise association with banned groups, short of the level of conduct which would ordinarily be expected under the criminal law.[17]

---

[10] Ibid., col.920.
[11] See Conor Gearty, 'The Superpatriotic Fervour of the Moment' (2008) 28 *Oxford Journal of Legal Studies* 183, 189.
[12] See Laura Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge: CUP, 2008) 356-357. See also Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (3rd Ed, London: Routledge, 2011) 5.
[13] See Colin Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989, 990.
[14] See David Cole and James Demsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2006) 1.
[15] See, for example, Harold Bowman, 'Martial Law and the English Constitution' (1916-17) 15 *Michigan Law Review* 93 and David Lowry, 'Terrorism and Human Rights: Counter-Insurgency and Necessity at Common Law' (1977-78) 53 *Notre Dame Lawyer* 49.
[16] See Ellen Parker, 'Implementation of the UK Terrorism Act 2006 – The Relationship Between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States' (2007) 21 *Emory International Law Review* 711, 748.
[17] See Donohue, above n.12, 315-316.

The proscription/designation regimes confront us with the question of whether these countries are criminalising individuals for simply manifesting their beliefs, and thereby facilitate a comparative analysis of whether 'militant democracy' theory has taken root within their legal orders. This article first evaluates the development of designation/proscription powers and outlines their value as counter-terrorism measures. Although the US and UK share a common legal history, their designation/proscription regimes have been conditioned by the different protections for freedom of association and freedom of speech/expression within their legal orders. The second part of the article addresses how and why US and UK approaches towards proscription diverged in the later twentieth century, with the US courts challenging the "guilt-by-association" rationale of group bans under protections of freedom of speech. As we shall see in the third section of this article, the usefulness of proscription to the authorities has seen renewed efforts to circumvent these restrictions within the US and further extensions to proscription powers in the UK. This continued focus on proscription is of questionable counter-terrorism value; measures which are reactive against organised groups already known to the authorities seem ill-designed as responses to the contemporary threat posed by "networked" terrorist groups. Moreover, although designation/proscription powers have proven to be adaptable counter-terrorism tools, these cumulative adaptations could now be undermining the legitimacy of the US and UK criminal justice systems. The time has come to reassess this continued reliance on measures which criminalise political identity.

The Emergence of Proscription

The term proscription has its origins in the twilight years of the Roman Republic. Appearance on a list of individuals promulgated in 82 BCE by Sulla and by the triumvirate of Marcus Antonius, Marcus Aemilius Lepidus and Gaius Iulius Caesar Octavianus in 43 BCE amounted to a death sentence.[18] The Fourth Act of William Shakespeare's *Julius Caesar* opens with the triumvirate, having driven Caesar's assassins from Rome, locked in discussions over whom to proscribe. Mark Antony settles the issue by declaring that '[t]hese many, then, shall die; their names are prick'd'.[19] Proscription became a modern security measure, however, when it was transformed from a method of "outlawing" listed individuals

[18] See John Henderson, 'Sulla's List: The First Proscription' 9 *Parallax* 39, 39-40 (2003).
[19] William Shakespeare, *Julius Caesar*, Act IV, Scene I.

to criminalising any association with banned organisations.[20] Criminalising the mere fact of membership of a particular group was an infamous feature of the Terror which followed the French Revolution. The Law of Suspects of 1793 made it an offence to support the Girondin deputies' proposals, in effect criminalising association with this political faction.[21]

Under the shadow of the French Revolution, William Pitt's administration 'saw in rapidly developing working-class organisations and in the mass acceptance of [Thomas] Paine, an overt threat to every value to which they clung'.[22] It sought to avert revolution by tackling groups which espoused radical political views and opposed war with France.[23] Failed attempts to prosecute the leaders of the London Corresponding Society, including radical shoemaker Thomas Hardy,[24] for treason, highlighted the difficulty with using ancient criminal offences when groups had not perpetrated or advocated violent acts. Indeed, the acquittals went some way to embolden radical groups in the capital.[25] Temporary extensions to treason and sedition were therefore enacted,[26] and the Government's desire for pre-emptive action satisfied by the suspension of habeas corpus (permitting detention of individuals on the basis of mere suspicion[27]), but these responses generated widespread discontent. The problem was how to counter organisations which may be spreading revolutionary sentiment within the working classes without impinging upon the activities of aristocratic debating societies. The Government's solution came against the backdrop of the uprising organised by the United Irishmen in 1798, which Pitt used to persuade a frightened Parliament to pass the Corresponding Societies Act 1799.[28] This Act banned membership of specific groups 'whose

[20] Bills of Attainder, employed by the UK Parliament into the eighteenth century to declare the guilt of specific individuals, were effectively a continuation of the proscription of individuals. These Bills were specifically prohibited under Article I, sections 9 and 10, of the US Constitution.
[21] See Colin Lucas, 'The Theory and Practice of Denunciation in the French Revolution' (1996) 66 *Journal of Modern History* 768, 779.
[22] Eugene Black, *The Association: British Extraparliamentary Political Organization, 1766-1793* (Cambridge, MA: Harvard University Press, 1963) 234.
[23] See Clive Emsley 'Repression, "Terror" and the Rule of Law in England during the decade of the French Revolution' (1985) 100 *English Historical Review* 804-805 and Mary Thale, 'London Debating Societies in the 1790s' (1989) 32 *Historical Journal* 57, 61-64.
[24] *R v Hardy* (1794) 24 St. Tr. 199. See James A. Epstein, 'The Constitutional Idiom: Radical Reasoning, Rhetoric and Action in Early Nineteenth-Century England' (1990) 23 *Journal of Social History* 553, 562.
[25] See Thale, above n.23, 69.
[26] See Michael Lobban, 'Treason, Sedition and the Radical Movement in the Age of the French Revolution' (2000) 22 *Liverpool Law Review* 205, 225-228.
[27] Habeas Corpus Suspension Act 1794, 34 Geo. III, c. 54, entitled 'An act to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government'. See AV Dicey, *An Introduction to the Study of the Law of the Constitution* (8th Ed., first published 1915, Indianapolis: Liberty Fund, 1982) 139-142.
[28] 39 Geo. III, c.79, entitled 'An Act for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious Practices'.

existence was regarded as detrimental to the state'[29] including the United Irishmen and London Corresponding Society.[30] The wave of arrests that followed stifled the latter organisation. The Act, as a future Solicitor General would point out, went beyond suppressing named organisations; 'it also declared other societies to be unlawful which were constituted in a particular way, such as imposing oaths, engagements, tests, declarations, &c.'.[31] Although the legislation would remain in force for much of the nineteenth century, this test would prove too tailored to the secret societies of the 1790s to of long-term use.

The Corresponding Societies Act might therefore have become all-but-unusable within decades, but the UK continued to make extensive use of powers to ban groups which threatened the social order. Passed alongside the Corresponding Societies Act, the Combination Act 1799[32] prohibited the operation of trade unions. In 1887, faced with the Irish Republican Brotherhood, Parliament permitted the authorities in Ireland to proclaim associations with republican aims to be dangerous.[33] Such measures changed proscription from a legislative means to criminalise involvement with specific groups into broad powers, delegated to the executive branch, to ban a range of organisations which shared certain means or aims. Proscription soon became the remedy prescribed across the British Empire when groups were labelled a threat to society. The Unlawful Associations Act 1916-17,[34] for example, was part of a concerted effort by the Australian Government to silence opposition to the First World War by banning organisations such as the International Workers of the World (IWW). In line with the developing pattern for proscription regimes, when some IWW factions began organising under different names to avoid the ban, an amendment was swiftly introduced 'to authorise the government to declare any organization illegal whose purposes were proscribed'.[35] In subsequent years, amidst fears sparked by the Russian Revolution and exaggerated accounts of IWW efforts to sabotage US entry into the First World War, over twenty US state legislatures would follow Australia's lead by enacting "criminal syndicalism" laws against radical workers' organisations.[36] These measures banned the

[29] Sir Samuel Shepherd MP, HC Deb, vol. 35, col. 852 (3 Mar 1817).
[30] Corresponding Societies Act 1799, s.1.
[31] Sir Samuel Shepherd MP, HC Deb, vol. 35, col. 852 (3 Mar 1817), paraphrasing the Corresponding Societies Act 1799, s.2. Under s.5 the Freemasons were specifically excluded from this test as being a loyal organisation.
[32] 39 Geo. III, c.81, entitled 'An Act to prevent Unlawful Combinations of Workmen'.
[33] Criminal Law and Procedure (Ireland) Act 1887, 50 & 51 Vict., c.25.
[34] Unlawful Associations Act 1916-1917 (No. 41, 1916; and No.14, 1917).
[35] Michael Head, *Crimes Against the State: From Treason to Terrorism* (Farnham: Ashgate, 2011) 90.
[36] See Vincent Blasi, 'The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*' (1988) 29 *William & Mary Law Review* 653, 655. Although Blasi emphasises the influence of the Australian legislation at the outset of the First Red Scare, many of the states which enacted criminal syndicalism laws subsequently drew on earlier legislation used to restrict anarchist groups and the Ku Klux Klan.

knowing membership or organisation of any group dedicated to promoting or participating in criminal syndicalism, which was defined under the influential Idaho statute as 'the doctrine which advocates crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform'.[37] Although the IWW was the initial focus of these provisions, over the next half century this broad framework allowed their adaptation to curtail the activities of a swathe of dissident groups.[38]

Justifying Proscription

Proscription criminalises the membership of, or showing support for, an organisation on the basis that its continued existence is in some way inimical to the public good. The power is intended to destabilise a group's structure and stifle its message without the authorities having to establish any more substantive criminal action on the part of adherents than the mere fact of voluntary membership or some voluntary show of support. To maintain the legitimacy of the criminal justice process, official accounts of membership offences have often drawn parallels to criminal conspiracy.[39] Membership offences, however, widen the net of criminalisation beyond the co-conspirators active within terrorist cells,[40] potentially 'catching persons whose connection with terrorist acts is at best indirect'.[41] Proscription provides a means to criminalise the "political" aspect of terrorist conduct, although in a distinct manner from classifying certain motivations for crime as aggravating factors. Under race-relations legislation, courts in England and Wales are required to increase sentences imposed upon individuals who perpetrate violent offences on the basis of racist motivations.[42] In the counter-terrorism context, in the case of a politically-motivated assassination believed to have been carried out by the members of a banned group, charging suspects with

[37] Act of March 14, 1917, ch. 145, §1, 1917 Idaho Sess. Laws 459, 459-460.
[38] Ahmed White, 'The Crime of Economic Radicalism: Criminal Syndicalism Law and the Industrial Workers of the World 1917-1927' (2006) 85 *Oregon Law Review* 649, 701.
[39] See Lord Diplock, *Report of the Commission to consider Legal procedures to Deal with Terrorist Activities in Northern Ireland* (1972) Cm. 5185, para. 21. On the relationship between membership offences and conspiracy offences, see Liat Levanon, 'Criminal Prohibitions on Membership in Terrorist Organisations' (2012) 15 *New Criminal Law Review* 224, 245-255.
[40] See Andrew Peterson, 'Addressing Tomorrow's Terrorists' (2008) 2 *Journal of National Security Law & Policy* 297, 304.
[41] David Anderson, *Report on the Operation in 2010 of the Terrorism Act 2000* (London: TSO, 2011) 122.
[42] For a concise discussion of the use of a legal definition of terrorism as a trigger for extended sentencing powers, see Lord Carlile, *The Definition of Terrorism* (2007) Cm. 7052, 19.

membership offences alongside murder allows the authorities to address the challenge of politically-motivated violence to constitutional politics.[43]

Few terrorists, however, are so naïve as to carry incriminating evidence of their membership of a banned organisation, notwithstanding the convictions of the rather hapless defendants in *Hundal*,[44] who arrived in the UK carrying membership cards and paraphernalia bearing the name and insignia of a banned organisation. This makes it difficult to realise the prosecutorial dividend ascribed to proscription. The difficulty in securing convictions on the basis of bare membership of a group does not, however, negate the value of proscription, but shifts the primary rationale for the power onto its "presentational" effects. Proscription expresses 'public aversion to organisations which use, and espouse, violence as a means to a political end'.[45] Proscription therefore provides some symbolic support for constitutional politics; it seeks to deter some individuals from joining violent groups and to dissuade others from undertaking "revenge attacks" in response to terrorist outrages.[46] Nonetheless, even carefully-targeted banning orders amount to something of a double-edged sword; 'their effect is to drive underground (thereby making harder to penetrate) a membership that is committed to a programme that involves criminal acts'.[47] In attempting to tackle terrorism emanating from Northern Ireland in the 1970s, the then Home Secretary cautioned that any banned group would soon 'reappear under a multiplicity of different names'.[48] These concerns did not prevent the subsequent extension of proscription powers throughout the UK. Indeed, just months after he struck this cautionary note, Roy Jenkins rushed such legislation through Parliament, not because of much hope that doing so would prevent terrorist attacks, but because 'the public should no longer have to endure the affront of public demonstrations in support of [terrorist groups]'.[49] The groups involved in the Northern Ireland conflict were, nonetheless, particularly susceptible to proscription because they were monolithic and

[43] Viscount Colville, examining the use of proscription during the Northern Ireland conflict, noted that membership of a banned group was 'not infrequently' employed as a secondary count in prosecutions; Viscount Colville, *Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987* (1990) Cm. 1115, para.15.5.For an example of the use of membership offences to extend a charge sheet, see *R v McCaugherty* [2010] NICC 35, [2] (Hart J).
[44] *R v Hundal* [2004] EWCA Crim 389; [2004] 2 Cr App R 19.
[45] Earl Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976* (1983) Cm. 8803, para.207.
[46] See Brice Dickson, 'Law versus Terrorism: Can Law Win?' [2005] *European Human Rights Law Review* 11, 16-17.
[47] Conor Gearty, 'Terrorism and Human Rights' (2007) 42 *Government and Opposition* 340, 357.
[48] Roy Jenkins MP, HC Deb, vol. 874, col. 1227 (10 Jun 1974).
[49] Roy Jenkins MP, HC Deb, vol. 882, col. 636 (28 Nov 1974).

organised in a hierarchical fashion.[50] Today, however, both the US and UK Governments maintain that much of the terrorist threat emanates from an ever-changing patchwork of 'networked'[51] groups and 'lone wolves'[52] inspired by al Qaeda or Islamic State but rarely, if ever, subject to their direct control.[53]

Persisting with bans on named groups, when the evidence to suggest fixed organisational structures is often scant, smacks of retaining a response because of its familiarity rather than its effectiveness. Indeed, the changed nature of terrorism only amplifies the risks of misuse of proscription:

> Where wrongly applied, the orders choke off political discussion that should be allowed in a liberal democracy as a matter of principle. It needs to be remembered as well that such bans often reach well beyond the bodies subject to them, being both over-broadly interpreted by the authorities and misconstrued by the general public as prohibitions on whole categories of speech.[54]

Even with these drawbacks, in the context of an internationalised counter-terrorism response which obliges the US and UK to work with self-interested foreign regimes, proscription powers can operate as a useful lever for securing cooperation. It may well appear axiomatic that 'when a state declares an organisation a terrorist one, it views this organisation as an enemy and consequently its relations with other states, which do not share this view, deteriorate'.[55] The inverse of this statement, however, is just as important to security policy. By banning organisations which pose a threat to partner governments, the US and UK Governments can extend a relatively inexpensive olive branch in the hope of garnering intelligence concerning al Qaeda, Islamic State and their offshoots.[56] Failing to take action

[50] The authorities, however, frequently overstated their operational knowledge of the command structures of groups such as the Provisional IRA. See Lord Diplock, above n.39, para.31.
[51] See Bruce Hoffman, *Inside Terrorism* (2nd Ed., New York: Columbia University Press, 2006) 38-40. The importance attributed to this supposed shift has arguably been 'exaggerated' to suit the ends of security agencies; see Antony Field, 'The 'New Terrorism': Revolution or Evolution?' (2009) 7 *Political Studies Review* 195, 202-203.
[52] Anderson, above n.41, 32.
[53] See CONTEST, *The United Kingdom's Strategy for Countering International Terrorism* (2011) Cm. 8123, 21.
[54] Gearty, above n.47, 357.
[55] Beril Dedeoglu, 'Bermuda triangle: comparing official definitions of terrorist activity' (2003) 15 *Terrorism and Political Violence* 81, 82.
[56] See Mark Muller, 'Terrorism, Proscription, and the Right to Resist in the Age of Conflict' (2008) 20 *Denning Law Journal* 111, 119-120.

against a group which operates against a potential or active partner state, by contrast, risks 'undermining cooperative efforts between nations to prevent terrorist attacks'.[57]

The Late-Twentieth Century: Divergent US and UK Approaches

In the US criminal syndicalism offences became a focal point of the struggle for freedom of speech and association in the 1950s and 1960s. In this era, members of groups as diverse as the National Association for the Advancement of Colored People (NAACP), the Communist Party and the Ku Klux Klan claimed that either Federal or state legislation impeding their ability to organise contravened their freedom of association, which they argued was inherent within the First and Fourteenth Amendments.[58] The suppression of the Communist Party and associated groups under the Smith Act[59] was the most high-profile example of the use of Federal law to outlaw the membership of an organisation in this era. In *Dennis v United States*,[60] the Supreme Court rejected assertions that this legislation violated the First Amendment on the basis that members of the Communist Party were engaged in a conspiracy to overthrow the US Government. The plurality of justices, led by Chief Justice Vinson, adopted a conception of freedom of speech by which the content of the right varied according to the threat that statements (and the group behind them) posed to society. This approach required the courts to assess 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger'.[61] Criminalisation of Communist Party membership was found to be acceptable under this test, with this outcome predetermined by the Supreme Court's 'risk assumptions'.[62] In accepting widespread restrictions on association with the Communist Party, including the imposition of loyalty oaths by bodies such as universities and trade unions,[63] the Court was explicitly concerned with the underlying potential for the use of political violence at the behest of the

[57] *Holder v Humanitarian Law Project* (2010) 561 US 1; (2010) 130 S. Ct. 2705, 2726. The UK Government has affirmed that 'we engage with other countries in considering whether an organisation should be proscribed or deproscribed'; Lord Bates, HL Deb, vol. 769, col. 1988 (17 Mar 2016).
[58] The Assembly Clause of the First Amendment protects the right of individuals 'peaceably to assemble', thereby providing a basis for a right of association. This is supported by the Fourteenth Amendment's requirement of equal protection before the law.
[59] Alien Registration (Smith) Act of 1940, Pub. L. No. 76-670, 54 Stat. 670.
[60] *Dennis v United States* (1951) 341 US 494.
[61] ibid., 510.
[62] Sajó, above n.5, 2276.
[63] For an overview of these loyalty-security schemes see Daniel Steinbock, 'Designating the Dangerous: From Blacklists to Watch Lists' (2006) 30 *Seattle University Law Review* 65, 73-77.

Party to further its ends; 'The international police state has crept over Eastern Europe by deception, coercion, *coup d'état*, terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them'.[64]

Under Chief Justice Warren, the Supreme Court moved decisively away from this approach to freedom of speech and association. In *NAACP v Alabama*[65] it ruled that a court order requiring the NAACP to disclose membership records violated the organisation's freedom of association. This case marked the beginnings of the concept of expressive association, by which the Court linked the association of individuals to the freedom of speech it was intended to advance.[66] Mere membership of the Communist Party, without evidence of personal intention to further violent insurrection, was treated as protected.[67] *Brandenburg v Ohio*[68] capped this jurisprudence. The Supreme Court invalidated Ohio's criminal syndicalism law, which had criminalised 'voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism',[69] and under which Ku Klux Klan leader Charles Brandenburg had been convicted. After *Brandenburg*, advocacy would have to be 'directed to inciting or producing imminent lawless action and … [be] likely to incite or produce such action'[70] before it could be criminal. In *Roberts v United States Jaycees*, the Supreme Court affirmed that freedom of association was protected as a corollary to freedom of speech, stating that 'we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends'.[71] Having accepted that association was protected alongside speech which did not advocate imminent violence, the Supreme Court accepted that offences criminalising mere membership of an organisation, without evidence of participation in unlawful activities, imposed a form of 'guilt by association' which was 'alien to traditions of a free society'.[72] For Mark Tushnet, the US might have 'briefly flirted with

[64] *American Communications Association v Douds* (1950) 339 US 382, 429.
[65] *NAACP v Alabama ex rel. Patterson* (1958) 357 US 449.
[66] See Ashutosh Bhagwat, 'Terrorism and Associations' (2013-2014) 63 *Emory Law Journal* 581, 605-606.
[67] See *Scales v United States* (1961) 367 US 203, 229. See also, as an example of the later "loyalty oath" jurisprudence, *Elfbrandt v Russell* (1966) 384 US 11, 17. This jurisprudence permitted legislation like the Subversive Activities Control Act of 1950, Pub. L. No. 831, 64 Stat. 987, which restricted Communist organisations (requiring their registration), but which did not ban them; see, *Communist Party of United States v Subversive Activities Control Board* (1961) 367 US 1.
[68] *Brandenburg v Ohio* (1969) 395 US 444.
[69] Act of April 15, 1919, 108 Laws of Ohio 189-90; Ohio Rev. Code Ann. §2923.13.
[70] *Brandenburg v Ohio*, above n.68, 447.
[71] *Roberts v United States Jaycees* (1984) 468 US 609, 622.
[72] *NAACP v Claiborne Hardware Co.* (1982) 458 US 886, 932.

the idea that some political organizations might be so threatening to the political order that they might be outlawed', but the Court had pulled back from this position.[73]

Although the decades of practice that preceded these cases certainly amounted to more than a flirtation, this relinquishment of proscription powers in the 1960s contrasts starkly with the UK's wholehearted embrace of such powers in the same period. Proscription was first employed as part of efforts to counter terrorism in the Northern-Ireland context and, having proven its usefulness, would be repurposed as a mechanism for addressing international as well as domestic terrorist threats. A year after the US Supreme Court's decision in *Brandenburg v Ohio* the case of *McEldowney v Forde* reached the UK House of Lords.[74] With the outbreak of the Northern Ireland conflict in the late 1960s the Unionist Government, which dominated the then Northern Ireland Parliament, reacted by clamping down on Irish republican organisations. John McEldowney was found to be a member of the Slaughtneil Republican Club, in breach of the Special Powers Regulations.[75] These provisions proscribed organisations such as the IRA and 'any like organisations howsoever described'. No evidence was presented that either McEldowney or the Club, which was a local branch of the Gaelic Athletic Association, were at any time a threat to peace. Nonetheless, the House of Lords' majority upheld the regulations as valid. Lord Pearson found that organisations deemed to be unlawful under these valid regulations included (i) any organisation describing itself as a "republican club," whatever its actual objects may be, and (ii) any organisation which has the characteristic object of a republican club, namely, to introduce republican government into Northern Ireland, whatever its name may be.[76] Lord Diplock, dissenting, was much less comfortable with this provision's breadth:

> It is possible to speculate that the Minister when he made the regulation now challenged *bona fide* believed that the sort of club which at that date described itself as a "republican club" was likely to have unlawful objects which would endanger the preservation of the peace and the maintenance of order and by the words that he added he may have intended to do no more than to prevent such clubs from evading the regulation by dissolving and re-forming or by changing their names. If this was his

[73] Mark Tushnet, 'United States of America', in Markus Thiel (ed.), *The 'Militant Democracy' Principle in Modern Democracies* (Farnham: Ashgate, 2009) 357, 357-358.
[74] *McEldowney v Forde* [1971] AC 632.
[75] Regulation 24A, promulgated under the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922-1943.
[76] *McEldowney v Forde*, above n.74, 657.

> intention he signally failed to express it in the regulation, for by no process of construction can it be given this limited effect.[77]

Brandenburg v Ohio and *McEldowney v Forde* illustrate how the legal systems of the US and UK came to adopt diametrically opposing conceptions of freedom of association and the criminalisation of membership of dissident organisations. This divergence was underpinned by the different value attached to freedom of speech/expression and association under the US Bill of Rights and under the UK's common-law protections of civil liberties. The US Constitution seeks to channel criminal law responses:

> When the government claims that a political party or group threatens democracy, the individualistic tendency in US constitutional law almost instinctively shifts from the group to its individual members, allowing regulation when an identified individual has engaged in threatening action, but not simply on the basis of the individual's affiliation with an extremist group.[78]

By contrast, even when confronted with a statute which criminalised membership of a non-violent organisation which merely shared some objectives with terrorist groups, the House of Lords majority in *McEldowney v Forde* was unwilling to adopt a restrictive interpretation of the statutory proscription power because of the security interests at stake.[79] This divergence continues even after the European Convention on Human Rights (ECHR)[80] was incorporated into the UK's domestic legal systems through the Human Rights Act 1998.

Banning a group potentially infringes both freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR).[81] Under the ECHR, however, these rights are hedged with greater limitations than freedom of speech under the US Bill of Rights. Qualifications on the freedom of expression and association are acceptable provided that they are proportionate to the need to secure important community interests, including public order and national security. The European Court of Human Rights' jurisprudence permits

[77] ibid., 665.
[78] Tushnet, above n.73, 376.
[79] See John McEldowney, 'Political security and democratic rights' (2005) 12 *Democratization* 766, 773-775.
[80] European Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950) 213 UNTS 221.
[81] The European Court of Human Rights maintains that any effort to restrict an organisation's activities 'on account of the political views it promoted' will almost certainly raise Article 10 ECHR issues; *Parti Nationaliste Basque - Organisation Régionale d'Iparralde v France* (2008) 47 EHRR 47, [30].

restrictions, including enforced dissolution and consequent criminalisation of membership, when organisations are linked to political violence or maintain counter-democratic aims.[82] In the *Refah Partisi*[83] case the Grand Chamber explained the three factors which underpinned its assessment of state action which restricted a political organisation:

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society".[84]

Despite its superficial resemblance to the US Supreme Court's approach, this formulation leaves 'more room for case by case balancing than does the stricter "imminent lawless action" prong under *Brandenburg*'.[85] As subsequent jurisprudence establishes, ECHR states enjoy considerable latitude where groups give even 'tacit support' to acts of violence committed in furtherance of their political aims.[86] The closer the connection between an organisation and political violence, the more likely restrictions upon the rights to expression and association will be justified.[87] Such restrictions must also be 'prescribed by law', which requires provisions to have sufficient clarity to guide individual conduct.[88] In sum, there is 'little doubt that the proscription and dissolution of terrorist organisations would not raise serious Article 11 obstacles'.[89]

Against this relatively compliant backdrop the UK reconsidered its proscription arrangements at the beginning of the twenty-first century. The Terrorism Act 2000, in

---

[82] These requirements were established in cases in which restrictions on association and expression were successfully challenged. For an example of a ban on a political party not being upheld, see *Freedom and Democracy Party (ÖZDEP) v Turkey* (App. No. 23885/94, 8 Dec 1999) [37]-[40]. For an example of restrictions on an 'active member' of a non-violent 'extremist' group (the Communist Party) not being upheld, see *Vogt v Germany* (1996) 21 EHRR 205, [59]-[61].
[83] *Refah Partisi (and Others) v Turkey* (2002) 35 EHRR 3.
[84] ibid., [104].
[85] Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Oxford: Hart, 2008) 171.
[86] *Herri Batasuna and Batasuna v Spain* (App. Nos. 25803/04; 25817/04, 30 Jun 2009) [88]. See Jon-Mirena Landa Gorostiza, 'Terrorism and Crimes Against Humanity: Interferences and Differences at the International Level and their Projection upon Spanish Domestic Law', in Aniceto Masferrer and Clive Walker (eds.), *Counter-Terrorism, Human Rights and the Rule of Law* (Cheltenham: Edward Elgar, 2013) 128, 141-142.
[87] See Conor Gearty, 'Terrorism and Human Rights' (1999) 19 *Legal Studies* 367, 373.
[88] *Vogt v Germany*, above n.82, [48].
[89] Sottiaux, above n.85, 162.

contrast to the avowedly temporary and largely domestic-focused measures which preceded it, established 'a more unified and permanent regime … with a greater emphasis upon international terrorism'.[90] The first tranche of counter-terrorism powers contained within this new Act covered the proscription of terrorist organisations[91] and attendant offences for individuals linked to banned groups.[92] The Home Secretary has the power to issue a statutory instrument (which must be approved by the UK Parliament) to proscribe any organisation which she believes to be 'concerned in terrorism'.[93] This 'clumsy term'[94] covers committing, participating in, promoting or, in a circular catch-all element of the definition, being in some other way concerned in terrorism.[95] The interpretation of this term has been left to the courts.[96] Once a group is banned it becomes 'a criminal offence for a person to belong to a proscribed organisation, invite support for a proscribed organisation, arrange a meeting in support of a proscribed organisation, or wear clothing or carry articles in public which arouse reasonable suspicion that an individual is a member or supporter of a proscribed organisation'.[97] The combination of these offences is explicitly intended to foreclose outlets by which terrorist groups might engage with wider society in their effort to gain recruits or support, with little concern for any guilt-by-association critique.

The US Designation Regime and the Post-9/11 Threat

Following the US Supreme Court's phased recognition of the unconstitutionality of banning domestic dissident groups, proscription fell into disuse. This did not mean, however, that successive US administrations did not appreciate the usefulness of such a power.[98] When

[90] Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) *Criminal Law Review* 311, 311.
[91] Terrorism Act 2000, s.3.
[92] ibid., s.11, s.12 and s.13.
[93] ibid., s.3(4).
[94] Sofia Marques da Silva and Cian Murphy, 'Proscription of Organisations in UK Counter-Terrorism Law', in Iain Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Cambridge: Intersentia, 2013) 199, 204.
[95] Terrorism Act 2000, s.3(5). In exercising the discretionary power to ban groups, the Home Secretary has regard to 'the nature and scale of the organisation's activities', 'the specific threat that it poses to the United Kingdom', 'the specific threat that it poses to British nationals overseas', 'the extent of the organisation's presence in the United Kingdom' and 'the need to support other members of the international community in the global fight against terrorism'. See Lord Bassam, HL Deb, vol. 613 col. 252 (16 May 2000).
[96] See *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443; [2008] 1 WLR 2341, [38] (Lord Phillips).
[97] James Brokenshire MP, HC Deb, vol. 578, col. 948 (2 Apr 2014). This explanation accompanies each addition to the list of banned groups; see also Damian Green MP, HC Deb, vol. 521, col. 964 (19 Jan 2011).
[98] See David Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights-Civil Liberties L.Rev.* 1, 2.

international terrorism began to pose an increasing threat to US interests, the issue became not whether a proscription regime for terrorist organisations would be useful, but how to engineer one which would circumvent the strictures imposed by the Court. The first phase of the response came in the 1970s and 1980s, when the State Department took advantage of jurisprudence that foreign nationals could be excluded from the US without reference to First Amendment rights of US citizens thereby prevented from associating with them[99] to exclude members of the Palestinian Liberation Organisation.[100] These immigration exclusions came to depend on whether a foreign national had provided material support for terrorism. In the wake of the 1993 World Trade Centre bombing Congress adapted this immigration power into the basis of the criminal offence of direct material support for terrorist activities, codified at 18 USC section 2339A.[101] Once offences linked to the designation of a group as terrorist had entered Federal criminal law they were swiftly extended. In 1996, in the immediate aftermath of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, the US Secretary of State[102] gained the power to designate any group based outside the US as an FTO if it engages in terrorist activity, or has in the past done so and retains the capability and intent to do so.[103] Providing any prohibited form of aid to any such organisation would trigger the new offence, codified as 18 USC section 2339B.[104] This measure did not criminalise membership, as mere membership would not satisfy the requirement of personal culpable action, but it expanded the circumstances in which it would be criminal for an individual to provide material support. This offence was more useful to prosecutors than the older section 2339A; 'there was no need to determine whether the specific aid was of a type that supported specific terrorist activity or that it did in fact support terrorist activity'.[105] Working in combination with the law of criminal attempts and conspiracy this meant that all that is required for a successful prosecution under section 2339B is for an individual to knowingly attempt or conspire to give some support to a designated group. By this circuitous process, which paid lip service to the Supreme Court's injunction upon imposing guilt by association,

[99] See *Kleindienst v Mandel* (1972) 408 US 753.
[100] The exclusion relied upon Immigration and Nationality Act of 1952, s.212(a)(28)(F). See Donohue, above n.12, 312.
[101] Violent Crime Control and Law Enforcement Act of 1994, §120005(a), Pub. L. No. 103-322, 108 Stat. 1796.
[102] Executive control over the designation process had been resisted by Congress in the 1980s. Congress sought to control the process, as seen in its restriction of the PLO through the Anti-Terrorism Act of 1987, §§1001-1005, Pub. L. No. 100–204, 101 Stat. 1406 (codified at 22 USC §§5201-5203).
[103] Immigration and Nationality Act of 1952, §219, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 8 USC §1189).
[104] Antiterrorism and Effective Death Penalty Act of 1996, §323, Pub. L. No. 104-132, 110 Stat. 1214.
[105] Peterson, above n.40, 326.

criminal syndicalism offences had been all but reanimated as material-support offences attendant upon FTO designation.

Following the 9/11 attacks the definition of 'material support or resources' was extended by the USA Patriot Act to encompass providing 'expert advice or assistance',[106] and then extended again (and clarificatory definitions added) in the Intelligence Reform and Terrorism Prevention Act of 2004.[107] By these progressive extensions, 'material support' under section 2339B came to curtail almost any engagement with a designated group:

> Providing property ... or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

Before 9/11 prosecutions under section 2339B had been 'few and far between'.[108] After the attacks the extended material-support offence became the 'lynchpin'[109] of US criminal justice responses to terrorism. It enabled preventative action against the early stages of a terrorist plot and extended the reach of the criminal law over peripheral actors; 'support' does not have to advance any specific attack, it simply has to be intentionally provided to a listed FTO which the defendant knows to be engaged in terrorism.[110] Because prosecutors can introduce information about suspects' general political beliefs to evidence the requisite elements of *mens rea*, jurors can come to be more influenced by such opinions than any actual activity. This covers subtly different territory to section 2339A, its 'close cousin'[111] offence. Although section 2339A does not require the prosecution to establish a link to a specific FTO, the defendant must 'provide support or resources *with the knowledge or intent* that such resources be used to commit specific violent crimes'.[112] For David Cole this system of

[106] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), §805, 115 Stat. 377.
[107] Intelligence Reform and Terrorism Prevention Act of 2004, §6603, 118 Stat. 3762–3764.
[108] John Vervaele, 'The Anti-Terrorist Legislation in the US: *Inter Arma Silent Leges*?' (2005) 13 *European Journal of Crime, Criminal Law & Criminal Justice* 201, 212.
[109] Cole, above n.98, 8.
[110] See *United States v Al Kassar* (2nd Cir., 2011) 660 F.3d 108, 129. At the time of writing 61 organisations are designated. See US Department of State, 'Foreign Terrorist Organizations', available at: http://www.state.gov/j/ct/rls/other/des/123085.htm.
[111] Chesney, above n.6, 474.
[112] *United States v Stewart* (2nd Cir., 2009) 590 F.3d 93, 113 (emphasis in original).

interlinking offences 'is for all practical purposes indistinguishable from a law imposing guilt for mere membership in a proscribed group'.[113]

Such claims were addressed by the Supreme Court in *Holder v Humanitarian Law Project*,[114] in which the plaintiff pressure group challenged the constitutionality of section 2339B on the basis that it was vague and criminalised the provision of any support to designated groups (including training in international humanitarian and human rights law) without the prosecution having to establish that the support contributed to terrorist violence. Delivering the six-judge majority opinion, Chief Justice Roberts considered that association rights were not engaged as the offences in question stopped short of an outright ban on membership.[115] Freedom of association therefore protects no more than bare association, and permits neither meaningful activity on a FTO's behalf, which would amount to providing personnel, nor the payment of membership fees, which would constitute providing funds.[116] Even where such support is not directed towards violent ends, its criminalisation under section 2339B is constitutionally acceptable because it allows a terrorist group to transfer other resources towards political violence.[117] This meant that any advocacy conducted in coordination with, or under the direction of, a FTO could be restricted notwithstanding First Amendment concerns.[118] This prohibition of coordinated speech gives little practical guidance as to the degree of coordination necessary and whether unilateral advocacy in support of a FTO could be criminal.[119] The three-judge minority opinion, delivered by Justice Breyer, would have imposed a limiting construction on section 2339B, 'criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions'.[120]

After *Holder*, in *United States v Mehanna*, the First Circuit Court of Appeals found that a District Court judge, conducting a trial in which a section 2339B offence was at issue, had 'appropriately treated the question of whether enough coordination existed to criminalise the

[113] David Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War' (2009) 97 *California L.Rev* 693, 723.
[114] *Holder v HLP*, above n.57.
[115] ibid., 2723.
[116] See Wadie Said, 'Humanitarian Law Project and the Supreme Court's Construction of Terrorism' (2011) *BYU L. Rev*. 1455, 1507. For Bhagwat, freedom of association arises in *Holder* as something of an 'afterthought', central neither to the arguments of the plaintiffs, nor to majority's reasoning, which both focus upon free speech concerns; Bhagwat, above n.66, 621.
[117] See *Holder v HLP*, above n.57, 2728.
[118] ibid., 2722-2723. Wadie Said, *Crimes of Terror: The Legal and Political Implications of Federal Terrorism Prosecutions* (Oxford: OUP, 2015) 66.
[119] George Brown, 'Notes on a Terrorism Trial – Preventive Prosecution, "Material Support" and the Role of the Judge after *United States v. Mehanna*' (2013) 4 *Harvard National Security Journal* 1, 22-23.
[120] *Holder v HLP*, above n.57, 2739-2740.

defendant's translations as factbound and left that question to the jury'.[121] The Supreme Court's refusal to review this conviction indicates that it is content to allow the lower courts to adopt this jury-led approach to the concept of coordinated advocacy. Although bare membership or the profession of membership is not criminalised, as they are under the UK's Terrorism Act 2000, the need for some speech or action to evidence intention under section 2339B means that in practice the two regimes cover very similar conduct.[122] Moreover, treating affiliated organisations as falling under the al Qaeda listing closely mirrors the umbrella approach adopted by the UK courts.

The focus of successive US Administrations' efforts to construct a designation regime has been on securing minimal compliance with constitutional rights. The restriction of the regime to foreign organisations, for example, is the product of the gradual introduction of these measures into general criminal law by way of immigration law, and an evident caution where First Amendment concerns are at issue, but serves no security purpose.[123] One beneficial side-effect for the executive of this restriction upon the regime is that judicial review of a FTO's designation is restricted by the long-standing reluctance of the courts to question executive action in pursuit of foreign-policy goals. In one of the earliest challenges to a designation decision, in *Humanitarian Law Project v Reno*,[124] the Ninth Circuit Court of Appeals set the standard that would remain in place after 9/11:

> So the heart of the matter is whether [the designation regime] is well enough tailored to its end of preventing the United States from being used as a base for terrorist fundraising. 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.[125]

Well might Wadie Said assert that the designation of a group 'should necessitate stronger proof that the FTO is an actual threat to national security, not merely a "foreign policy interest"' as required under the current law,[126] but the US courts remain singularly reluctant to evaluate the intelligence basis for designation orders as falling within the Executive

[121] *United States v Mehanna* (1st Cir., 2013) 735 F.3d 32, 49.
[122] ibid., 65. See Said, above n.118, 70-71.
[123] See Bhagwat, above n.66, 621.
[124] *Humanitarian Law Project v Reno* (9th Cir., 2000) 205 F.3d 1130.
[125] ibid., 1136.
[126] Said, above n.116, 1458.

Branch's broad discretion over foreign affairs.[127] The ill effects of this judicial reluctance are partially mitigated by the State Department's review of its own FTO list, which has seen several organisations de-listed since 9/11, but this review is a far cry from independent scrutiny of the executive decision. As Julie Shapiro notes, '[t]he combination of statutory breadth and the lack of judicial oversight empowers the Executive Branch to pick and choose – with relative ease – which groups to label as terrorists'.[128]

Although the Supreme Court has upheld the constitutionality of the designation system and its attendant offences, the resultant security dividend remains open to question. Andrew Peterson is sharply critical of the operation of section 2339B where 'new or unrecognized groups'[129] are at issue:

> The current approach sends the wrong message by targeting a list of organizations, rather than a type of conduct. Even when it reaches its intended audience, the signal is often too late. Section 2339B only deters contributions after an organization is listed, and terrorist violence is a prerequisite to listing. … If the goal of the material support statutes is to prevent terrorism, conviction should not require a predicate terrorist act.[130]

For Peterson, this inadequacy is matched by limitations afflicting section 2339A. Although this provision does not require support to be provided to a listed group, it does require an intention on the part of the supporter to aid terrorist activity, an intention which Peterson considers 'extremely hard' to evidence.[131] Together, these limitations supposedly restrict the material-support offences as pre-emptive counter-terrorism measures. These claims, however, underplay the mutually-supporting nature of sections 2339A and 2339B, which allow prosecutors to tailor charges to fit the available evidence. As a question of fact, which Federal Courts have been willing to leave to juries, prosecutors enjoy considerable leeway to argue that a "new" organisation actually amounts to an offshoot of a parent umbrella group like al Qaeda for the purpose of 2339B.[132] If no evident link to a listed FTO exists, then section 2339A can fill in, by criminalising conduct as limited as 'providing one's self as personnel to others with the goal of assisting in the commission of, or simply preparation for the

[127] See *Youngstown Sheet & Tube Co. v Sawyer* (1952) 343 US 579, 637 (Justice Jackson).
[128] Julie Shapiro, 'The Politicization of the Designation of Foreign Terrorist Organizations: The effect on the Separation of Powers' (2007) 6 *Cardozo Public Law, Policy, and Ethics Journal* 547, 577.
[129] Peterson, above n.40, 337.
[130] ibid., 344-345.
[131] ibid., 348.
[132] See Bhagwat, above n.65, 633.

commission of, a predicate offence (including an offence in the nature of a conspiracy)'.[133] The material-support offences might therefore pose a still greater risk to liberal democratic values than have been evidenced to date. As a presidential candidate, Donald Trump pledged increasingly 'aggressive' use of these provisions, which potentially points to speculative prosecutions of more equivocal activity.[134] The ability of Federal prosecutors to use intercepted communications as evidence moreover provides an avenue for establishing intention not open to their UK counterparts.[135] These considerations narrow what, on paper, appears to be the gulf between the UK and US approaches to terrorist organisations. Or they would have done so, but for the expansion of UK proscription powers since 2001.

The UK Proscription Regime and the Post-9/11 Threat

September 2001 found the UK's proscription regime much more developed than the US system of designation. In the absence of any strict constitutional injunction against guilt by association, and with common law principles of criminalisation flexible when national security is at issue, the UK Government found no immediate need to overhaul the membership and support offences attendant upon proscription in the wake of the attacks.[136] Senior judges have subsequently endorsed the UK's approach:

> Criminalising membership serves a legitimate purpose by making it difficult for members of the organisation to demonstrate publicly in a manner that affronts law-abiding members of the public. Moreover, not only do people by their mere membership give credence to the claims of the organisation but, in addition, members are a potential network of people who may be called on to act for the organisation at some time in the future, even if they have not yet done so. It follows that it is no defence for most members of the organisation to show that they have never taken an

[133] Chesney, above n.6, 480.
[134] See Donald Trump, 'Speech on Fighting Terrorism' *Politico* (15 Aug 2016). Available at: http://www.politico.com/story/2016/08/donald-trump-terrorism-speech-227025.
[135] See Wayne McCormack, 'Inchoate Terrorism: Liberalism Clashes with Fundamentalism' (2005) 37 *Georgetown Journal of International Law* 1, 13-16. The Regulation of Investigatory Powers Act 2000, s.17, excludes the use of intercept evidence in UK criminal trials.
[136] See Nathan Rasiah, 'Reviewing Proscription under the Terrorism Act 2000' [2008] *Judicial Review* 187, 189-190. At the time of writing 85 organisations are proscribed. See Home Office, 'Proscribed Terrorist Groups or Organisations', available at: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2.

active part in the activities of the organisation. The crime is being a member, not being an active member.[137]

Criminal sanction even extends to mere profession of membership, which has the potential to 'contribute to an exaggerated impression of the strength of the organisation in question'.[138]

These offences continued to be the prosecutorial response of choice to terrorism in Northern Ireland,[139] but their usefulness in that context could not mask growing concerns that proscription 'might not fit with the post-September 11 paradigm'.[140] In an environment in which terrorist groups fractured (exemplified by the Real IRA and Continuity IRA, hard-line factions which sheared off the Provisional IRA when it committed to the Northern Ireland peace process) or were naturally fluid (as exemplified by al Qaeda's affiliates) the retrospective nature of the proscription regime left it in danger of obsolescence.[141] The first efforts to keep the proscription regime relevant to the changing terrorist threat were judge-led, resulting from the failed prosecution of a four alleged Real IRA members. The trial collapsed on the basis that the Real IRA was not a banned organisation; the "Irish Republican Army" was the group listed in Schedule 2 of the Terrorism Act 2000, and the Real IRA had been formed as an organisation distinct from other groups describing themselves as "the IRA". When the Attorney General referred this interpretation of the Terrorism Act to the appellate courts, the House of Lords found no difficulty, however, in reading Schedule 2 'to embrace all emanations, manifestations and representations of the IRA, whatever their relationship to each other'.[142] This decision allowed prosecutors to continue to pursue new manifestations under the umbrella term IRA without the need for specific proscription of such groups. It also opened up the possibility of treating al Qaeda and its affiliates in the same manner, on the basis that al Qaeda is 'in truth a name which often represents a set of strategies, philosophies and inspirations and which can be assumed as a nom de guerre by those who are so stirred'.[143]

In the Terrorism Act 2006 Parliament facilitated the process by which the Home Secretary can make a new entry on the list of banned organisations to cover a manifestation

[137] *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264, [62] (Lord Rodger). For a justification of this approach to terrorist groups, see Levanon, above n.39, 256.
[138] ibid., [63].
[139] Anderson, above n.41, 32.
[140] Marques da Silva and Murphy, above n.94, 216.
[141] Dickson, above n.46, 18.
[142] *R v Z (Proscription of Real IRA)* [2005] UKHL 35; [2005] 2 WLR 1286, [19] (Lord Bingham).
[143] Clive Walker, 'Terrorist Offences: Terrorism Act 2000 s.11(1)' (2005) *Criminal Law Review* 985, 989.

or new alias for an already proscribed group.[144] In cases where prosecutors can establish 'that an organisation is the same as an organisation listed in Schedule 2',[145] this statute also permitted membership/support prosecutions even if the new group name was not listed at the time when the impugned conduct took place. By this mechanism, drawing heavily upon the interpretation adopted by the House of Lords in *R v Z*,[146] proscription gained a prospective force which circumvented the need for a cat-and-mouse game of name changes and fresh proscription orders. Some judges have also shown considerable flexibility towards what activity constitutes membership, on the basis that '[a] criminal association is inherently more likely to lack formality than an innocent one'.[147] Under this approach, by which the involvement of an organisation can be inferred by evidence of structured interactions between individuals (such as one person issuing orders to another), successful membership prosecutions of all of those linked to a suspected terrorist cell could follow from evidence affiliating any of them to a banned group.

Parliament also reconsidered the range of conduct which could justify proscription amid concerns, after the July 2005 attacks on the London transport network, that "cheerleader" organisations were playing a role in radicalising individuals. Groups which promoted or encouraged terrorism fell within the ambit of section 3 of the Terrorism Act 2000 as enacted, even if they did not participate in violence,[148] but statements by a group's leadership which praised past terrorist acts but did not advocate future attacks, could not provide the basis for a banning order. The Terrorism Act 2006 therefore extended the meaning of promoting or encouraging terrorism to encompass glorification (including 'any form of praise or celebration') of terrorist acts with a view to their emulation.[149] A further enhancement of the proscription regime was to extend its geographical reach. Membership of a group banned by the UK Parliament can now be prosecuted as an offence of universal jurisdiction, criminalising the overseas membership of listed organisations.[150] The reach and impact of proscription have therefore been enhanced, even if 'significant interference with human rights is in issue'.[151]

---

[144] Terrorism Act 2000, s.3(6) (as amended by the Terrorism Act 2006, s.22(2)).
[145] ibid., s.3(9) (as amended by the Terrorism Act 2006, s.22(2)).
[146] *R v Z*, above n.142.
[147] *R v Ahmed* [2011] EWCA Crim 184; [2011] Crim LR 734, [87]. In this case the defendants professed membership of Al Qaeda to third parties.
[148] Terrorism Act 2000, s.3(5)(c).
[149] ibid., s.3(5A)-s.3(5C) (as amended by the Terrorism Act 2006, s.21).
[150] Terrorism Act 2006, s.17(2)(c).
[151] *Home Secretary v Lord Alton*, above n.96, [43] (Lord Phillips).

These extensions have wrenched the proscription power from its theoretical moorings as an exceptional response required by 'the special threat posed by terrorist organisations to the security of the State and the safety of the public'.[152] Proscription can be a justifiable response given the threat political violence poses to a liberal democracy; 'the (immoral) choice to join an exclusively terrorist organisation is a dangerous and culpable conduct that seems sufficiently linked to the eventual harm to justify prosecution'.[153] When banning membership of a group is closely tied to its involvement in political violence the European Court has accepted this as an acceptable ascription of criminality.[154] Indeed, judicial efforts to facilitate the use of proscription could have been intended to diminish the need for executive counter-terrorism measures beyond the criminal justice system.[155] Each extension of proscription, however, has weakened the connection between an individual's membership of a group and political violence, as evident in the UK Government's efforts to constrain offshoots of al Muhajiroun. Founded by Omar Bakri Muhammad in 1996, this group was regarded by UK authorities as a vehicle for radicalisation, even though it was not directly involved in terrorist attacks. Subject to increasingly close surveillance from 2001 onwards, al Muhajiroun was on the verge of being proscribed for promoting violence when it was wound up in 2004. Within months of the Terrorism Act 2006 coming into effect the Government banned two successor groups, al Ghurabaa and the Saviour Sect/Saved Sect, not for involvement in political violence, but for its glorification.[156] Since then, in January 2010,[157] June 2011[158] and June 2014[159] the Government has issued curt notices officially recognising a slew of names as being aliases for this organisation. Even before these official proscription notices are promulgated, moreover, membership of any of these groups could be prosecuted by virtue of their being 'the same' as an already banned organisation.[160]

[152] Lord Macdonald, 'Review of Counter-Terrorism and Security Powers' (2011) Cm. 8003, 7.
[153] Levanon, above n.39, 262.
[154] *Brogan v United Kingdom* (1989) 11 EHRR 117, [50]. See Clive Walker, 'The Legal Definition of Terrorism in United Kingdom Law and Beyond' [2007] *Public Law* 331, 341.
[155] See Colin Murray, 'Nudging or Fudging? The UK Courts' Counterterrorism Jurisprudence Since 9/11' (2016) 21 *Journal of Conflict and Security Law* 91, 113.
[156] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2008, SI 2006/2016.
[157] Al Muhajiroun, Islam4UK, Call to Submission, Islamic Path, London School of Sharia were added by The Proscribed Organisations (Name Changes) Order 2010, SI 2010/34.
[158] Muslims Against Crusades was added by The Proscribed Organisations (Name Changes) Order 2011, SI 2011/2688.
[159] Need4Khilafah, the Shariah Project and the Islamic Dawah Association were added by The Proscribed Organisations (Name Changes) Order 2014, SI 2014/1612.
[160] Terrorism Act 2000, s.3(9).

The chilling effect upon freedom of expression and association resultant from proscription should not be underestimated.[161] Proscription impacts upon 'persons who are not members of the proscribed organisation, but merely of the ethnic community from which the organisation derives its support'.[162] And the limits of the offence of providing support for a banned group remains vague under the statute, prompting calls for specific examples to be listed.[163] The threat of membership or support offences carrying prison sentences of up to ten years,[164] hangs over any person who might be attracted to a group which projects itself as staunchly opposed to UK policy in the Middle East or committed to the introduction of Sharia Law. These ends are not, of themselves, violent or criminal, but potential members will have no way of knowing if the group in question is a new alias for al Muhajiroun (and thereby under the Terrorism Act 'the same' organisation,[165] even if the new name is not yet listed). Indeed, the banning of its satellite group Islam4UK in 2010 was accompanied by considerable speculation that it was more closely connected to Anjem Choudary's proposals for a provocative march through Wootton Bassett (a town close to RAF Lyneham associated with the repatriation of UK service personnel killed in action in Iraq and Afghanistan), rather than evidence that their members were plotting terrorist attacks.[166] But when a group is explicitly banned for glorifying terrorism, its connections to terrorist activities can be tenuous. When it came to banning National Action in 2016[167] (and some of its offshoots in 2017[168]) the UK Government acted on the basis that the group was glorifying terrorism through social media accounts it controlled disseminating messages and images which condoned and celebrated the murder of Jo Cox MP and the Pulse Nightclub attack in Orlando; 'If we allow such events to be celebrated and encouraged, we live with the risk that they will be repeated'.[169]

That a group's adherents do not, themselves, hear or approve any statement that glorifies terrorism is irrelevant for the purposes of their criminal liability. In these circumstances the only course of action safe from criminal sanction for an individual is to avoid such groups. Dissenting speech, rather than terrorism, comes to be constrained by

[161] See Marques da Silva and Murphy, above n.94, 212.
[162] David Anderson, *Report on the Operation in 2011 of the Terrorism Act 2000* (London: TSO, 2012) 50.
[163] David Anderson, *Report on the Operation in 2015 of the Terrorism Act 2000* (London: TSO, 2016) 81.
[164] Terrorism Act 2000, s.11(3)(a) and s.12(6)(a).
[165] ibid., s.3(9).
[166] See Deborah Orr, 'Is the Islam4UK ban a blow against democracy?' The Guardian (14 January 2010).
[167] The Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2016, SI 2016/1238.
[168] Scottish Dawn and NS131 (National Socialist Anti-Capitalist Action) were added by The Proscribed Organisations (Name Changes) Order 2017, SI 2017/944.
[169] Ben Wallace MP, HC Deb, vol. 618, col. 914 (14 Dec 2016).

law.[170] When 'mutual respect and shared citizenship'[171] have been acknowledged to provide the surest barrier against radicalisation, uses of proscription which threaten the expression of dissenting opinion sustain narratives that certain groups in society enjoy second-class citizenship. In the face of mounting political rhetoric surrounding the banning of groups, and frequent use of the membership offences as the basis for counter-terrorism arrests, cautious prosecutorial approaches will not suffice to alleviate such concerns.[172] The threat of criminalisation, without an official ban on a particular name, through an all-but strict liability offence,[173] sunders the principle that the criminal law should be clear enough to guide conduct, raising the possibility of fresh Articles 10 and 11 ECHR challenges.

Even though the UK legislation makes more allowance for oversight of proscription than exists under the US designation regime, groups can struggle to be deproscribed even if they no longer pose a terrorist threat. The Home Office used to periodically review the list of banned groups but, with ministers eager to be seen to be toughening counter-terrorism responses in light of the emergent Islamic State threat, this check was discontinued in 2014.[174] Groups or affected individuals must now apply to the Home Secretary before deproscription will be considered.[175] Few people are eager to submit themselves to the scrutiny that inevitably attends such a request, and applications have been rare. Should a group have the means to do so, it can challenge the rejection of such an application before the Proscribed Organisations Appeals Commission (POAC).[176] This specialist tribunal is in certain respects better placed than the ordinary courts to assess the rationale behind a particular ban, being able to consider materials which the security services would not disclose in open court.[177] The cost, however, is to open justice. The POAC operates in closed session to consider such material, and its public determinations might not cover the full reasoning behind its decision. The applicants' interests in such proceedings are represented by Special

[170] See Christina Pantazis and Simon Pemberton, 'From the "Old" to the "New" Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation' (2009) 49 *British Journal of Criminology* 646, 652-653.
[171] Home Affairs Select Committee, *Roots of Violent Radicalisation* (2012) HC 1446, para.88.
[172] David Anderson, whilst independent reviewer of counter-terrorism legislation, maintained that the 'good sense' of prosecutors as the surest safeguard where proscription-related offences are at issue; ibid., Q389.
[173] Terrorism Act 2000, s.11(2)(a) provides a defence if defendants can prove that an organisation was not proscribed when they joined, but s.3(9) operates on the basis that the proscription of an earlier name continues when a group adopts a new name. There is no defence that an individual did not know of the group's past or its connections to political violence.
[174] David Anderson, *Report on the Operation in 2013 of the Terrorism Act 2000* (London: TSO, 2014) 34.
[175] Terrorism Act 2000, s.4. See James Brokenshire MP, HC Deb, vol. 572, col. 206 (10 Dec 2013).
[176] ibid., s.5.
[177] *R (PKK) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin), [76] (Richards J).

Advocates, not their chosen representatives.[178] Moreover, although it is styled as an appellate body, the POAC is limited to reviewing the Home Secretary's decisions on the basis of judicial review principles.[179] For all of the promises of 'intense scrutiny' given the human rights at stake, this effectively means that only perverse listing decisions are open to challenge.[180] Much as the European Court of Human Rights has accommodated similar special procedures given the national security interest at stake in cases involving the restriction of an individual's liberty,[181] in practice the limitations imposed upon the POAC operate to reinforce the substantive restrictions upon expression and association. This calls into question whether sufficient safeguards exist to establish that the UK's proscription regime really is 'prescribed by law' under Articles 10 and 11 ECHR. Given the degree to which overturning a ban would amount to a 'propaganda victory' for an affected group, the POAC operates to provide a veneer of oversight whilst minimising the possibility of embarrassing defeats for the government.[182] This system is not immune from legal challenge. *Gillan v United Kingdom* saw the European Court closely evaluate the effectiveness of safeguard processes in determining whether this requirement for restricting qualified rights was fulfilled in the context of police stop-and-search powers for counter-terrorism purposes.[183] An Article 10 or 11 ECHR challenge by a banned group could likewise expose the limitations in an oversight system which is, at best, designed to appear robust.

No matter how effective the POAC is in reviewing the Home Secretary's listing decisions, its secretive processes have hardly encouraged challenges. It gives all the appearances of a body designed to rubber stamp executive decisions. On the one occasion when the POAC has accepted the contention that a banned group, the People's Mojahadeen of Iran (PMOI), was not concerned in terrorism, the Court of Appeal upheld this finding (as discussed above)[184] and a deproscription order resulted.[185] But as Keith Ewing notes, few banned groups can rely upon 'the same quality of establishment support' to advance their cause as the PMOI and, in any event, this one-off display of independence appeared to

[178] See Aileen Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 *MLR* 836.
[179] Terrorism Act 2000, s.5(3).
[180] *Home Secretary v Lord Alton*, above n.96, [46] (Lord Phillips).
[181] It can be assumed that "gisting test" imposed by the European Court in *A v United Kingdom* would apply equally to POAC processes for the purposes of the right to a fair hearing under Article 6 ECHR; *A v United Kingdom* (2009) 49 EHRR 29, [220].
[182] Gordon Brown MP, HC Deb, vol. 504, col. 311 (20 Jan 2010).
[183] See *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45, [87].
[184] *Home Secretary v Lord Alton*, above n.96.
[185] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2008, SI 2008/1645.

vindicate the POAC oversight system at little cost to official policy.[186] Another application by the International Sikh Youth Federation to the POAC in 2015 obliged the UK Government, which had previously rejected an application for deproscription,[187] to delist the group.[188] The UK Government was quick, in this instance, to assert that diplomatic pressure from India 'did not lead to the ban on the ISYF having been maintained since 2001' and that a group will only remain banned 'if there is compelling evidence to support a reasonable belief that it is currently concerned in terrorism'.[189] In spite of these developments, given the limited use made of the POAC, the UK system has in practice generated little pressure on the executive to relinquish these constraints on association and expression where they are no longer necessary.

Even these powers are insufficient for Theresa May, who as Home Secretary informed the 2014 Conservative Party Conference that:

> I want to see new banning orders for extremist groups that fall short of the existing laws relating to terrorism. I want to see new civil powers to target extremists who stay just within the law but still spread poisonous hatred. So both policies – Banning Orders and Extremism Disruption Orders – will be in the next Conservative manifesto.[190]

In spite of the official 2011 review of counter-terrorism powers concluding that banning groups on the basis that they incite hatred would be 'strikingly illiberal',[191] proscription's deterrent effect evidently maintains a sufficient hold over UK security policy to eclipse its practical shortcomings and supposedly exceptional nature. Years after Theresa May's pledge, however, new legislative proposals have yet to take shape (although they could well emerge again). Even the Home Office has acknowledged the risk that counter-extremism banning orders could 'close down debate or limit free speech'.[192] Within the UK Government a predilection for proscription might exist, but it is becoming increasingly difficult to extend these powers without further attenuating the connection between banning a group and

[186] Keith Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford: OUP, 2010) 190.
[187] David Anderson, *Report on the Operation in 2014 of the Terrorism Act 2000* (London: TSO, 2015) 19.
[188] Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2016, SI 2016/391.
[189] Lord Bates, HL Deb, vol. 769, col. 1988 (17 Mar 2016).
[190] Theresa May, *Speech to Conservative Party Conference* (30 Sept. 2014), available at: http://press.conservatives.com/post/98799073410/theresa-may-speech-to-conservative-party-conference. These proposals were drawn from The Prime Minister's Task Force on Tackling Radicalisation and Extremism, *Tackling Extremism in the UK* (London: TSO, 2013) 3.
[191] Lord Macdonald, above n.152, 8.
[192] Theresa May, *Counter-Extremism Strategy* (2015) Cm. 9145, para. 106.

political violence. If this connection breaks proscription becomes, quite simply, a means of constraining political thought adjudged deviant by the authorities.[193]

Conclusion

Notwithstanding the prominence accorded to proscription within the Terrorism Act 2000 and high-profile convictions such as Anjem Choudary for supporting Islamic State,[194] the difficulties of applying these powers to al Qaeda-inspired terrorism have often relegated them to a peripheral role in UK counter-terrorism prosecutions since 9/11.[195] By contrast, the US designation system is on paper a pale shadow of the UK's proscription regime, but compliant interpretation by the higher federal courts has put the material support offences at the heart of US domestic counter-terrorism policy. Along these very different arcs, the mechanisms for proscribing terrorist groups in the UK and of designating FTOs in the US tell us much about these two countries' approaches to counter terrorism under the criminal law. In the UK proscription has been gradually transformed from a means of tackling organisations which are engaged in political violence to a regime covering groups which talk, even obliquely, of violence but which do not engage in it. Proscription orders are a convenient means to signal that the Home Office is managing the terror threat, and it is therefore unsurprising that their use has soared in recent years.[196] But given the limited number of convictions for proscription offences, successive extensions to the UK's proscription regime seem geared more towards exerting social control than punishing criminal activity. According to Max Hill, the independent reviewer of counter-terrorism legislation, the UK 'should not criminalise thought without action or preparation for action' through new counter-extremism banning orders.[197] Welcome as this shot across the UK Government's bows might be, this is a line that has, in important respects, already been crossed.

If the UK has stretched the domestic proscription regime to the point of 'corruption'[198] of criminal law standards, in the US counter-terrorism policy has been adapted to fit the available criminal offences. For years after the 9/11 attacks the designation regime and

[193] See David Anderson, *Report on the Operation in 2014 of the Terrorism Act 2000* (London: TSO, 2015) 57.
[194] See Dominic Casciani, 'How Anjem Choudary's Mouth was Finally Shut' BBC News (16 Aug 2016). Available at: http://www.bbc.co.uk/news/magazine-36979892.
[195] See David Anderson, *Report on the Operation in 2015 of the Terrorism Act 2000* (London: TSO, 2016) 29.
[196] ibid., 28.
[197] Max Hill, *Tom Sargant Memorial Lecture: Rights vs Security: The Challenge Engaged* (2017) 6-7. Available at: https://justice.org.uk/max-hill-tom-sargant-lecture-2017/.
[198] Kent Roach, 'The Criminal Law and Terrorism' in Victor Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge: CUP, 2005) 129, 130.

attendant offences encouraged the authorities to treat groups like al Qaeda as centralised multi-national organisations, replete with sophisticated recruitment mechanisms. Marc Sageman characterises the resultant US domestic counter-terrorism policy as a "ghost chase" for 'alleged al Qaeda spotters and recruiters, under the guise of material support for terrorism'.[199] The "al Qaeda recruiters" whom defendants have aided have almost always turned out to be Federal agents.[200] The US Supreme Court's majority in *Holder* would have done better to heed Justice Jackson's warning that '[i]n times of anxiety, the public demands haste and a show of zeal on the part of judges, whose real duty is neutrality and detachment'.[201] Their acceptance that a broad reading of the material-support offences is compatible with the First Amendment gave way to the desires of the executive branch, rather than its needs, and created an environment in which most terrorism prosecutions in the US could be poured into a mould which is shorn of meaningful protections. Time will tell what the Trump Administration's Department of Justice will make of such powers.

[199] Marc Sageman, 'The Stagnation in Terrorism Research' (2014) 26 *Terrorism and Political Violence* 565, 567.
[200] See *United States v Augustin* (11th Cir., 2011) 661 F.3d 1105 and *United States v Farhane* (2nd Cir., 2011) 634 F.3d 127.
[201] Robert Jackson, 'Wartime Security and Liberty under Law' (1951) 1 *Buffalo Law Review* 103, 112.