

BIOTERRORISM OR OVER-DETERRENCE? THE USE OF FEDERAL TERRORISM STATUTES TO COUNTER COVID-19 “HOAXES”

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INTRODUCTION

As the COVID-19 pandemic surged and local governments began issuing stay-at-home orders, Florida police responded to a domestic violence call involving James Jamal Curry.¹ While police handcuffed Curry, he coughed on one of the officers and claimed that he had Coronavirus.² Curry, who later tested negative for COVID-19, was charged in federal court with perpetrating a biological weapons hoax under 18 U.S.C. § 1038(a)(1),³ which carries a maximum sentence of five years in prison.⁴

The charges against Curry coincided with a memorandum from then-Deputy Attorney General Jeffrey Rosen suggesting that intentionally exposing others to COVID-19, as well as purporting to do so with “malicious hoaxes,” could be prosecuted through federal terrorism statutes.⁵ Although the law surrounding the use of these statutes to prosecute COVID-19 hoaxes is still developing, the types of charges leveled against Curry and contemplated in the Rosen memorandum raise questions surrounding their applicability and desirability as a matter of policy.

This Comment argues that prosecuting the false spread of COVID-19 under federal terrorism statutes is not advisable. Part I of this Comment further describes the Rosen memorandum and identifies cases where prosecutors have applied federal terrorism statutes to Coronavirus-related hoaxes. Part II analyzes the viability of prosecutions under two of the most commonly used terrorism statutes, discussing how *Bond v. United States*⁶ might prevent the widespread extension of these laws to such cases. Part III

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1. Kavitha Surana, *St. Petersburg Man Spit on Officer, Claimed He Had Coronavirus. Now He Faces a Federal Charge*, TAMPA BAY TIMES (Apr. 8, 2020), <https://www.tampabay.com/news/crime/2020/04/08/st-petersburg-man-spit-on-officer-claimed-he-had-coronavirus-now-he-faces-a-federal-charge/>.

2. Kaelan Deese, *Florida Man Who Spit, Coughed on Police Officers After Claiming to Have the Coronavirus Indicted on Federal Terrorism Charges*, THE HILL (May 23, 2020, 1:34 PM), <https://thehill.com/homenews/state-watch/499306-florida-man-who-spit-coughed-on-police-officers-after-claiming-to-have>.

3. Criminal Complaint at 9, *United States v. Curry*, No. 8:20-mj-1367-AAS (M.D. Fla. Apr. 7, 2020).

4. 18 U.S.C. § 1038(a)(1)(A).

5. Memorandum from the Deputy Att’y Gen. on Dep’t of Just. Enf’t Actions Related to COVID-19, 2 (Mar. 24, 2020) [hereinafter *Rosen Memorandum*].

6. *Bond v. United States*, 572 U.S. 844 (2014).

raises policy concerns that further militate against the use of these federal terrorism statutes to prosecute COVID-19 hoaxes.

I. LANDSCAPE OF PROSECUTIONS

Then-Deputy Attorney General Rosen’s recent memorandum to U.S. attorneys and federal law enforcement agencies discussed a variety of criminal activities related to the COVID-19 pandemic, including the issues of malicious hoaxes, threats, and the purposeful exposure of others to COVID-19.⁷ The memorandum advised authorities that the Coronavirus “appears to meet” the definition of a biological agent, leading to the potential applicability of various federal terrorism statutes, namely 18 U.S.C. § 1038 (under which Curry was charged in Florida), § 175 (“development/possession of a biological agent for use as a weapon”), § 875 (“threats by wire”), § 876 (“threats by mail”), and § 2332a (“use of a weapon involving a biological agent”).⁸

This Comment focuses its analysis on § 1038 and § 2332a, as prosecutors have most frequently invoked these laws in cases arising out of the false spread of COVID-19 and analogous diseases. Regarding § 1038, in addition to the charges brought against Curry, prosecutors also charged⁹ a Texas man who posted a threat on Facebook claiming to have paid someone to spread Coronavirus at grocery stores around San Antonio.¹⁰ Under § 2332a it appears that no prosecutions have yet been initiated for COVID-19 hoaxes specifically, although a lawsuit by conservative political activist Larry Klayman invokes that law in a suit against the Chinese government for creating and releasing COVID-19.¹¹

II. VIABILITY OF PROSECUTIONS UNDER FEDERAL TERRORISM STATUTES

Although prosecutions for COVID-19 hoaxes or intentional exposure under certain federal terrorism statutes are potentially viable, there is Supreme Court precedent that advises against interpreting such laws to cover crimes that the states traditionally regulate.

7. *Rosen Memorandum*, *supra* note 5, at 2.

8. *Id.*

9. Press Release, U.S. Dep’t of Just., Federal Complaint Filed Against San Antonio Man for COVID-19-Related Hoax (Apr. 8, 2020), <https://www.justice.gov/usao-wdtx/pr/federal-complaint-filed-against-san-antonio-man-covid-19-related-hoax>.

10. Gerald Tracy, *FBI Arrests Man for Claiming He Paid Someone to Spread COVID-19 at Grocery Stores Locally*, NEWS 4 SAN ANTONIO (Apr. 8, 2020), <https://news4sanantonio.com/news/local/fbi-arrests-man-for-claiming-he-paid-someone-to-spread-covid-19-at-grocery-stores-locally>.

11. *Buzz Photos v. China*, No. 3:20-cv-00656-K, 2020 WL 1283705, at *2 (N.D. Tex. Mar. 17, 2020). Despite the lack of prosecutions for the fraudulent spread of COVID-19 under § 2332a, this Comment draws upon past prosecutions brought under § 2332a to penalize the threatened spread of other contagious diseases. *See, e.g.*, *United States v. Davila*, 461 F.3d 298, 299, 305 (2d Cir. 2006) (upholding a man’s conviction under § 2332a for mailing a powdery substance that appeared to be, but was not, anthrax).

Courts might find that COVID-19 violates federal terrorism laws based on the plain language of the broadly defined statutory term “biological agent,” meaning, among other things, a “virus[] . . . capable of causing . . . death, disease, or other biological malfunction in a human”¹² Many terrorism laws incorporate this definition. For instance, 18 U.S.C. § 1038 criminalizes “conduct with intent to convey false or misleading information”¹³ that the prohibited transfer of a “biological agent,”¹⁴ *inter alia*, “has taken, is taking, or will take place”¹⁵ In *United States v. Hale*, the Tenth Circuit construed this statute to cover a debtor’s purported spread of the deadly and untreatable hantavirus to a bankruptcy trustee.¹⁶

Similarly, courts have construed 18 U.S.C. § 2332a to cover the threatened spread of infectious diseases.¹⁷ Congress passed § 2332a as a supplement to the Biological Weapons Convention of 1972.¹⁸ It prohibits the “threaten[ed]” use of a “weapon of mass destruction,”¹⁹ defined, *inter alia*, as a “biological agent.”²⁰ In *Davila*, for example, the Second Circuit upheld the conviction under § 2332a of a defendant who had sent a hoax anthrax letter to a prosecutor.²¹

However, because the Supreme Court found an analogous federal terrorism statute inapplicable to local criminal conduct,²² prosecutors might face hurdles applying such laws to COVID-19 hoaxes. In *Bond v. United States*, the Supreme Court held that a federal terrorism statute, which implemented a treaty prohibiting chemical weapons, did not apply to a local crime in which a woman used a toxic cleaning agent to give her husband’s lover a minor chemical burn.²³ The Court found that federal terrorism statutes with broad definitions, like the one there that banned “toxic chemical[s] and [their] precursors,”²⁴ must not apply to criminal local

12. 18 U.S.C. § 178 (1)(A).

13. *Id.* § 1038(a)(1).

14. *Id.* § 175(a) (describing prohibited uses of biological agents); *see also id.* § 178(1) (defining biological agent); DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 23:1 (Sept. 2019) (discussing terrorism and espionage statutes passed by Congress before and after the September 11 attacks).

15. *Id.* § 1038(a)(1).

16. *United States v. Hale*, 762 F.3d 1214, 1225 (10th Cir. 2014).

17. *See, e.g.*, *United States v. Davila*, 461 F.3d 298, 299, 305 (2d Cir. 2006).

18. *See, e.g.*, *United States v. Wise*, 221 F.3d 140, 148–49 (5th Cir. 2000).

19. § 2332a.

20. *Id.* § 178(1).

21. *Davila*, 461 F.3d 298, 299, 305 (2d Cir. 2006).

22. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 858 (2014) (describing “the well-established principle that ‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ the ‘usual constitutional balance of federal and state powers’”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

23. *Id.* at 865–66.

24. § 229F(1)(A).

conduct typically left to the states, absent a clear indication from Congress.²⁵

Under the reasoning of *Bond*,²⁶ prosecutors may face an uphill battle when arguing that either § 1038 or § 2332a should cover COVID-19 hoaxes.²⁷ It is true that the biological agent definition in both laws might appear at first glance to cover COVID-19, a “virus[.]” “capable of causing . . . death [or] disease.”²⁸ However, these federal terrorism laws are analogous to the statute in *Bond* because they threaten to impinge on state authority to punish traditionally local crimes.²⁹ Most states have long-standing statutes that criminalize the threatened spread of diseases like HIV.³⁰ As a result, *Bond* counsels against interpreting federal statutes to apply to COVID-19 hoaxes absent a clear indication from Congress that it intended to displace local legal regimes.³¹

The *Hale* court rejected the defendant’s argument that § 1038 should not cover the purported mailing of hantavirus under *Bond*.³² It reasoned that hantavirus, an untreatable, classified “bioterrorism” agent with a fatality rate of fifty percent, was precisely the type of biological weapon Congress intended to regulate under federal terrorism law.³³ COVID-19, like hantavirus, is deadly and not directly treatable,³⁴ so a court might adopt the reasoning of *Hale* and find that § 1038, and similar laws, cover COVID-19 hoaxes.³⁵ However, a court might distinguish COVID-19 hoaxes from the *Hale* hantavirus hoax, as COVID-19 hoaxes are arguably more akin to local

25. *Bond*, 572 U.S. at 865 (“As we have explained, ‘Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.’” (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

26. *Id.*

27. *Cf. Rosen Memorandum*, *supra* note 5 (suggesting that these laws would apply to COVID-19 hoaxes).

28. 18 U.S.C. § 178(1); *see also id.* §§ 1038(a)(1), 2332a (incorporating the definition of a “biological agent”).

29. *Compare* *United States v. Wise*, 221 F.3d 140, 148–49 (5th Cir. 2000) (discussing how § 2332a was intended as a supplement to the Biological Weapons Conventions), *with Bond*, 572 U.S. at 861, 863 (explaining that a federal law passed to implement a chemical warfare treaty should not reach “purely local” crimes).

30. Chad Flanders, Courtney Federico, Eric Harmon & Lucas Klein, “*Terroristic Threats*” and *COVID-19: A Guide for the Perplexed*, 169 U. PA. L. REV. ONLINE 63, 65 (2020). *See, e.g.*, Mich. Comp. Laws § 750.200h(f) (defining a “harmful biological substance”); *People v. Odom*, 740 N.W.2d 557, 562 (Mich. Ct. App. 2007) (holding that HIV-infected blood is a harmful biological substance as defined by § 750.200h(f)).

31. *Bond v. United States*, 572 U.S. 844, 865 (2014).

32. *United States v. Hale*, 762 F.3d 1214, 1225 (10th Cir. 2014).

33. *Id.* at 1219, 1225–26 (distinguishing *Bond* as involving a less serious substance than hantavirus).

34. *See COVID-19 Overview*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/non-us-settings/overview/index.html>.

35. *Hale*, 762 F.3d at 1225. *See also Rosen Memorandum*, *supra* note 5 (describing other federal terrorism statutes that incorporate the biological agent definition at issue in *Hale*).

criminal activity like the spread of HIV,³⁶ which Congress generally leaves to the states to regulate.

III. POLICY CONSIDERATIONS INVOLVED IN PROSECUTIONS UNDER FEDERAL TERRORISM STATUTES

Even if such federal terrorism laws apply to COVID-19, the use of these laws raises policy concerns regarding whether such prosecutions are desirable.

The increased use of federal terrorism statutes to prosecute COVID-19 hoaxes is comparable to the criminalization of the spread of HIV in 1987.³⁷ Individuals have been convicted for threatening to bite a prison guard's hand to infect him with HIV³⁸ or scratching a police officer and telling him that he had been infected with HIV.³⁹ The broader trend of criminalizing these HIV hoaxes, facilitated in part by the use of terroristic threat statutes, has been found to disproportionately affect minority communities.⁴⁰ Furthermore, there is no evidence that applying criminal law to infectious diseases like HIV reduces its spread,⁴¹ and the use of punitive statutes has contributed to the marginalization of minority communities, where the disease was already prevalent, by allowing biases to infiltrate the prosecutorial process.⁴²

Furthermore, the use of the terrorism charges to penalize the false spread of COVID-19 is also difficult to square with the federal government's recent efforts to reduce the prison population during the ongoing COVID-19 pandemic. The Bureau of Prisons ("BOP"), for instance, recently released an action plan to mitigate the spread of the disease within the prison population.⁴³ Additionally, Attorney General William Barr sought to reduce the prison population by expanding the number of federal prisoners who were eligible for home confinement, with priority given to facilities where

36. *Bond*, 572 U.S. at 865. See also Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 373 n.73 (2013) (listing state statutes governing the spread of HIV).

37. See *HIV Criminalisation is Bad Policy Based on Bad Science*, THE LANCET (Sept. 1, 2018) [hereinafter *HIV Criminalisation is Bad Policy*], [https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018\(18\)30219-4/](https://www.thelancet.com/journals/lanhiv/article/PIIS2352-3018(18)30219-4/); Flanders et al., *supra* note 30, at 65–66.

38. *Commonwealth v. Walker*, 836 A.2d 999, 1000–01 (Pa. Super. Ct. 2003).

39. *State v. Smith*, 621 A.2d 493, 495, 516 (N.J. Super. Ct. App. Div. 1993).

40. *HIV Criminalization in California: What We Know*, WILLIAMS INST., UCLA SCH. OF L. (Apr. 2017), <https://www.hivlawandpolicy.org/resources/hiv-criminalization-what-we-know-williams-institute-ucla-school-law-2017>.

41. *HIV Criminalisation is Bad Policy*, *supra* note 37.

42. See Perone, *supra* note 36, at 379 (identifying broad language allowing for implicit bias as a flaw in the criminalization of HIV-related offenses).

43. Press Release, Bureau of Prisons, Fed. Bureau of Prisons COVID-19 Action Plan (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp. See also Press Release, Bureau of Prisons, BOP Modified Operations (Nov. 25, 2020), https://www.bop.gov/coronavirus/covid19_status.jsp (providing updated guidance).

there was a significant level of infection.⁴⁴ Shortly afterwards, Attorney General Barr released another memorandum directing federal prosecutors to consider the medical risks posed by COVID-19 when considering bail and pretrial detention.⁴⁵ In light of these efforts, using charges that carry such high prison penalties—such as a maximum of five years in prison for hoaxes prosecuted under § 1038⁴⁶ and potential life sentences for offenses involving weapons of mass destruction that implicate § 2332a⁴⁷—to prosecute Coronavirus hoaxes raises the question of whether successful federal convictions are even desirable. Rather, deference to state prosecutors, who may have more flexibility than federal prosecutors to recommend fines instead of jail time,⁴⁸ might prevent an increase of the prison population during a dangerous pandemic, in addition to lessening contact between charged individuals and law enforcement officers.⁴⁹

CONCLUSION

Given the limited effect of COVID-19 hoaxes, which do not actually infect anyone, prosecution under the federal terrorism statutes discussed in the memorandum from Deputy Attorney General Rosen is not advisable. First, using terrorism statutes to prosecute local COVID-19 crimes might be difficult given the narrow interpretation the Supreme Court gave to a similar terrorism statute. Second, the widespread use of federal terrorism laws for COVID-19 hoaxes might open the door to disproportionate punishment for minorities and increased crowding in prisons during a pandemic. As a result, the Department of Justice should release updated guidance for federal prosecutors advising them to defer to state prosecutors or use less-punitive statutes than terrorism laws, if they do intervene.

44. Memorandum from the Att’y Gen., Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), https://www.fd.org/sites/default/files/covid19/barr_memo_caresact_apr3_2020.pdf.

45. Memorandum from the Att’y Gen., Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic (Apr. 6, 2020), <https://www.justice.gov/file/1266901/download>.

46. 18 U.S.C. § 1038.

47. *Id.* § 2332a.

48. Manal Cheema & Ashley Deeks, *Prosecuting Purposeful Coronavirus Exposure as Terrorism*, LAWFARE (Mar. 31, 2020), <https://www.lawfareblog.com/prosecuting-purposeful-coronavirus-exposure-terrorism>.

49. *Id.*