

Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security

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INTRODUCTION

In February 1993, violent extremists detonated 1300 pounds of urea nitrate beneath the World Trade Center’s North Tower. Designed to destroy both towers and murder thousands, the blast claimed six lives, injured more than a thousand people, and introduced the United States to the specter of terrorism on its own shores. In the wake of that attack, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (VCCA).¹ Seeking to protect Americans, disrupt terrorist plans, and deter future attacks, the VCCA established a broad new offense for “material support to terrorists”² and directed the U.S. Sentencing Commission to adopt more severe sentencing for acts of terrorism.³ Pursuant to this legislation, the Sentencing Commission added a terrorism enhancement to the Federal Sentencing Guidelines in 1995, titled Section 3A1.4.⁴ This new section of the Guidelines dramatically increased sentences for felonies that “involved, or [were] intended to promote . . . federal crime[s] of terrorism” by automatically raising the offense level and criminal history category.⁵

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¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

² *See id.* § 120005 (stating law prior to 2001 amendment). Following September 11, 2001, the PATRIOT Act further imbued the material support statutes with an even more expansive sweep. *See* Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, §§ 803, 805, 115 Stat. 272, 376, 377 (2001).

³ Pub. L. No. 103-322, § 120004 (1994) (“The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.”).

⁴ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2018).

⁵ *Id.*

Over the next decade, amendments to the VCAA's "material support" statute and increased use of the terrorism enhancement reflected growing public fears amidst credible threats, thwarted attacks, and national catastrophes.⁶ National security demanded legislative action, and the terrorism enhancement's severity addressed vital sentencing goals, such as the need to incapacitate violent extremists, the desire to deter future terrorist acts, and the yearning to exact justice for heinous atrocities.⁷ Nevertheless, such an indiscriminate approach, which automatically increases an offender's criminal history to the highest level, seems to contradict the stated goals of the Sentencing Guidelines⁸ for individualized, tailored sentencing.⁹ Furthermore, the broad scope of the material support statute treats violent and nonviolent acts alike, resulting in similar sentences for dissimilar crimes and undermining the Guidelines' goals of uniformity and proportionality.¹⁰

⁶ See e.g., *World Trade Center Bombing: Terror Hits Home: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. at 1–2 (1993) (statement of Sen. Charles Schumer, Chairman, S. Comm. on the Judiciary) (noting that the "scourge of international terrorism does indeed have a domestic face" and calling upon Congress to "regard the terrorism at the World Trade Center as a wakeup call, as a shot across the bow, importuning us to act" and to pass new federal offenses for domestic terrorism and material support to terrorists).

⁷ See e.g., *Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the Comm. on the Judiciary*, 108th Cong. at 1–3, 153–74 (2004) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary) (discussing prosecutorial successes under the PATRIOT Act's expanded definition of material support and the Act's critical role in preventing terrorist attacks); H.R. REP. NO. 104-383, at 41 (1995) ("Terrorism potentially affects all Americans . . . It threatens our public safety, restricts the freedom to travel, and reduces our sense of personal security. Nothing is more potentially threatening or destructive. Innocents are annihilated. Families are destroyed."); THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 72 (2004) (observing that successful prosecutions after the 1994 World Trade Center bombing "created an impression that the law enforcement system was well-equipped to cope with terrorism" and failed to explore "whether the procedures . . . would really protect Americans against the new virus of which these individuals were just the first symptoms").

⁸ See e.g., James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 117 (2010) ("[The Guidelines'] treatment of defendants—especially first offenders—as undeterrable and incorrigible recidivists is inconsistent with sentencing policy. . .").

⁹ 18 U.S.C. § 3553(a)(1) (2018) (directing courts to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" when imposing a sentence); see also *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886, at *12 (D. Colo. July 18, 2018) ("The requirement to view any terrorist as every terrorist goes against the basic principles of sentencing and the factors set forth in 18 U.S.C. § 3553 . . . [and] would be cruel and unreasonable."); Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Apr. 12, 2012) (finding that the terrorism enhancement is not only "unuseful as a guide in a particular case but is actually . . . contrary to and subversive of the mission of the Guidelines . . .").

¹⁰ See U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A(1)(3) (U.S. SENTENCING COMM'N 2018) ("Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."); see

Some see the terrorism enhancement as a “draconian” measure that treats disparate crimes alike and is founded on a “monolithic perception of terrorism.”¹¹ Others declare terrorism a “modern-day . . . bubonic plague”¹² and note that the enhancement reflects Congress’s explicit legislative intent.¹³ From this perspective, the enhancement’s severity and sweep are justified because terrorists are “unique among criminals.”¹⁴ Driven by ideology, they are irredeemable, undeterrable, and refractive to rehabilitation. Following the Supreme Court’s decision in *United States v. Booker*—that the Guidelines are merely advisory in nature—federal courts have had to chart their own courses through these philosophic contradictions and competing objectives.¹⁵

The first three Parts of this Note explore the divergent ways federal courts have sought to reconcile this conflict and apply the terrorism enhancement to material support offenses. Part I examines how courts have interpreted Section 3A1.4’s requirements to create a framework in which a broad array of material support offenses can trigger the enhancement. In Parts II and III, this Note explores the split among federal courts over when the enhancement should apply. Some courts justify its broad application by reasoning that terrorists are distinct from other criminals and refractive to rehabilitation. These courts apply the terrorism enhancement even when first-time offenders are convicted of nonviolent, material support crimes. In Part III, however, this Note highlights several decisions in which courts distinguish defendants who directly facilitated violent attacks from those

also 18 U.S.C. § 3553(a)(6) (“The court . . . shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct[.]”).

¹¹ George D. Brown, *Notes on a Terrorism Trial—Preventive Prosecution, “Material Support” and the Role of the Judge After United States v. Mehanna*, 4 HARV. NAT’L SEC. J. 1, 48 (2012) [hereinafter Brown, *Notes*] (discussing criticism that the terrorism enhancement lacks nuance and “leads to disproportionate sentences by treating a wide range of crimes alike”).

¹² *United States v. Mehanna*, 735 F.3d 32, 40 (1st Cir. 2013) (“Terrorism is the modern-day equivalent of the bubonic plague: it is an existential threat.”).

¹³ See George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL’Y 517, 546 (2014) [hereinafter Brown, *Punishing Terrorists*] (“Congress has spoken. The enhancement represents a major national policy goal.”).

¹⁴ *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (“[E]ven terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.”); see Brown, *Punishing Terrorists*, *supra* note 13, at 546 (“Terrorism is different from other crimes. . . . If terrorists are to be tried in the regular criminal justice system, harsh sentences seem to be a fair trade-off.”); see generally Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 481 (2014) (“At the heart of [some] opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence.”).

¹⁵ See 543 U.S. 220, 226–27 (2005) (holding that the Guidelines are merely advisory in nature and that the mandatory provision violated the Sixth Amendment).

with more attenuated involvement. In these cases, judges have refused to apply the terrorism enhancement or justified a downward departure based on a defendant's unique history, the nature of the offense, and the potential for rehabilitation.

Part IV then examines whether research into the nature of violent extremism supports the assumption that terrorists and their supporters are truly distinct from other criminals. In reviewing the work of psychologists who have explored such issues, this Note finds that a categorical approach, which treats all terrorists and facilitators alike, does not align with current understandings of radicalization and ignores the potential for rehabilitation. After considering disengagement and rehabilitation efforts in the Netherlands and Italy, this Note finds that a more nuanced approach to terrorism sentencing could enable some nonviolent offenders to disengage from violent extremism and lead productive lives in society.

The final Part of this Note argues that the broad application of Section 3A1.4 to material support offenses is ultimately counterproductive because it may actually increase the chance of recidivism, facilitate further radicalization, and impede overarching U.S. counter-terrorism goals. This Note finds that the sweeping application of the terrorism enhancement to disparate crimes not only undermines the legislative intent of the Sentencing Guidelines but is also unsupported by empirical research and decreases U.S. national security. Ultimately, this Note recommends that Congress and the Sentencing Commission revise the terrorism enhancement to apply more narrowly and exclude material support offenses.

I. THE TERRORISM ENHANCEMENT AND MATERIAL SUPPORT STATUTES

The first section in this Part will examine the origins of the Sentencing Guidelines' terrorism enhancement and the evolution of the material support statute. Faced with increasing scale, severity, and scope of terrorist threats in the post-9/11 environment, Congress expanded the definition of material support offenses to disrupt and deter the flow of financial and material support to extremist groups, and the Department of Justice (DOJ) increasingly leveraged these tools to prosecute terrorists and their facilitators. The second section will then explore how courts have interpreted the enhancement's textual ambiguities and broadly framed its application to material-support offenses.

A. THE ORIGIN, EVOLUTION, AND USE OF THE TERRORISM ENHANCEMENT

The terrorism enhancement, Section 3A1.4 of the Federal Sentencing Guidelines, drastically increases the sentence for any "felony that involved, or was intended to promote, a federal crime of terrorism."¹⁶ In

¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (U.S. SENTENCING COMM'N 2018).

such cases, the sentencing judge shall increase the offense level by twelve or, if the resulting level is less than thirty-two, increase it to level thirty-two.¹⁷ Additionally, the enhancement requires that the defendant's "criminal history category" automatically be classified as Category VI, irrespective of that individual's previous criminal history.¹⁸ George Brown, a professor at Boston College Law School who has written extensively on the role of courts in the "War on Terror," notes that the "terrorism enhancement takes a wrecking ball to [the] carefully constructed edifice"¹⁹ of the Guidelines and "[i]n practical terms . . . is likely to mean life imprisonment."²⁰ Nevertheless, such severity met Congress's intent, as legislators correctly identified terrorism as a serious threat to U.S. security.

The enhancement explicitly relies on the terrorism definition set forth in 18 U.S.C. § 2332b(g)(5),²¹ but its reach has expanded in three ways. First, the year after the 9/11 attacks, an amendment to the Guidelines expanded its scope beyond § 2332b(g)(5)'s discrete definition.²² Amendment 637 added a comment stipulating that

an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.²³

¹⁷ *Id.* Under the Guidelines, sentencing ranges are determined by a defendant's Offense Level (the vertical axis of the Guidelines Sentencing Table) and Criminal History Category (the horizontal axis). To determine the Offense Level, Chapter Two of the Guidelines provides a base offense level (BOL) for specific offenses, and sentencing judges then consider whether any mitigating or aggravating specific offense characteristics (SOC) apply. The sum of BOL and SOC constitutes the Offense Level, which can range from 1 (0 to 6 months imprisonment) to 43 (life). Similarly, there are six Criminal History Categories, and the determination represents the sum of criminal history points based on the defendant's prior criminal record. *See id.* at ch. 5, pt. A.

¹⁸ *Id.* § 3A1.4(b). For instance, according to the Sentencing Table, a defendant with an Offense Level of 20 and Criminal History Category I would face a sentencing range of 33 to 41 months. However, if the terrorism enhancement applied, it would increase the Offense Level to 32 and Criminal History Category to VI, yielding a range of 210 to 262 months. *See id.* at ch. 5, pt. A.

¹⁹ *See Brown, Punishing Terrorists, supra* note 13, at 519–20.

²⁰ *See Brown, Notes, supra* note 11, at 48.

²¹ *See* 18 U.S.C. § 2332b(g)(5) (2018) (defining a federal crime of terrorism as an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and violates any of more than forty underlying offenses); U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. 1 (U.S. SENTENCING COMM'N 2018).

²² U.S. SENTENCING GUIDELINES MANUAL app. C (U.S. SENTENCING COMM'N 2018).

²³ *Id.* § 3A1.4 cmt. 2.

The explicit reference to the § 2339 material support statute exponentially increases the number of acts to which the terrorism enhancement can apply. For instance, § 2339A covers anyone knowingly attempting to, conspiring to, or actually providing “material support or resources . . . knowing or intending” that they will be used to prepare for, carry out, conceal an offense identified as a federal crime of terrorism.²⁴ Section 2339B covers the provision of material support or resources to a “designated foreign terrorist organization[.]” (FTO), with the additional requirement that a person knows that “the organization is a designated [FTO],” or that the organization “has engaged or engages in terrorist activity” or “terrorism.”²⁵

Second, Amendment 637 added an additional comment that further expanded the reach of Section 3A1.4.²⁶ Comment four establishes an upward departure provision for cases where § 2332b(g)(5)(B) does not include the underlying offense or where the terrorist sought to intimidate a civilian population rather than a government.²⁷ In such instances, a court may increase the sentence to the maximum length available had the terrorism enhancement been applied.²⁸

Third, two years after Amendment 637, the Intelligence Reform and Terrorism Prevention Act of 2004 transformed the meaning of “material support or resources” from a discrete list of specific actions to a broader definition covering “any property, tangible or intangible, or service.”²⁹ Such legislation and amendments effectively transformed the scope of the terrorism enhancement and enabled it to reach a much broader array of criminal behavior.³⁰

²⁴ 18 U.S.C. § 2339A.

²⁵ *Id.* at § 2339B; *see also* H.R. REP. NO. 104-383, at 81 (1995) (“This section [entitled ‘Prohibiting material support to terrorist organizations’] recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization’s treasury, helps defray the costs to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.”).

²⁶ U.S. SENTENCING GUIDELINES MANUAL app. C (U.S. SENTENCING COMM’N 2018).

²⁷ *Id.* at § 3A1.4 cmt. 4.

²⁸ *See id.*

²⁹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b)(1), 118 Stat. 3638, 3762; *see generally* CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. §2339A AND §2339B 1–6 (2016) (noting that courts have rejected claims that § 2339A’s broad list of offenses is unconstitutionally vague due to the statute’s *mens rea* requirement).

³⁰ *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010) (upholding constitutionality of § 2339B’s prohibition of humanitarian, conflict-resolution training to two designated FTOs); CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011 20 (2011) (“Actions that have been considered material support for terrorists or a terrorist group range from raising \$300 for Al Shabab to attempting to provide anti-aircraft missile for Al Qaeda.”),

Such a malleable definition empowers the government to charge disparate types of activity under the material support statute, and the DOJ has relied heavily on it since 2001.³¹ Indeed, while DOJ only used § 2339 to prosecute six cases during the six years following its enactment, the government prosecuted ninety-two cases under the material support statute between 2001 and 2004 alone.³² This trend continued, enabling prosecutors to press charges even without a direct causal link to specific terrorist acts.³³ As former Attorney General Alberto Gonzalez noted, “[P]revention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action.”³⁴ Since material support can activate the terrorism enhancement, a nonviolent, first-time offender who indirectly supports a terrorist act may receive the same criminal history category as a violent offender with a lengthy record.

B. THE “BROAD NET”: HOW COURTS APPLY THE TERRORISM ENHANCEMENT TO MATERIAL SUPPORT OFFENSES

Federal courts have often interpreted the terrorism enhancement broadly, enabling its application to a wide array of material-support offenses.³⁵ In *United States v. Awan*, the Second Circuit identified two separate analytic prongs within the text of Section 3A1.4, reasoned that each contained separate threshold requirements, and provided a broad template

<https://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf> [<https://perma.cc/WL2M-NQFW>]; see also Emily Goldberg Knox, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 298–99 (2014) (analyzing calls for Twitter to be charged under § 2339A when terrorist groups use accounts on its platform).

³¹ See generally Said, *supra* note 14, at 480 (observing that the government has employed the material support statute “as its main legal tool in the war on terrorism”); Adam Liptak, *The Year in Ideas; Material Support*, N.Y. TIMES MAG. (Dec. 15, 2002), <https://www.nytimes.com/2002/12/15/magazine/the-year-in-ideas-material-support.html> (noting that “prosecutors have realized that the provision is written so broadly that almost any kind of support can be defined as illegal”).

³² Nicole Hong, *‘Material Support’ Statute is Front and Center in Antiterror Push*, WALL ST. J. (May 27, 2015, 7:25 PM), <https://www.wsj.com/articles/material-support-statute-is-front-and-center-in-antiterror-push-1432719002>.

³³ See *id.*

³⁴ Brown, *Notes*, *supra* note 11, at 2–3.

³⁵ See *Holder v. Humanitarian Law Project* for a case in which the Supreme Court considered whether the First Amendment was violated where the prohibition under § 2339B was applied against two nonprofit organizations that sought to provide peaceful conflict resolution training to the Kurdistan Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated terrorist organizations. The Court held that if a defendant has “knowledge about the organization’s connection to terrorism,” the intent requirement of § 2339B is met, and the law does not violate the First Amendment. 561 U.S. 1, 16–17 (2010).

for other courts to follow.³⁶ Khalid Awan was charged with providing material support to the Khalistan Commando Force (KCF), a Sikh terrorist organization that sought to compel the Indian government to create an independent Sikh state.³⁷ Awan, a resident of New York and friend of the KCF's leader, solicited donations to support the KCF, laundered money on its behalf, and attempted to recruit trainees for its military training camps.³⁸ Awan was found guilty under § 2339A for providing material support in violation of both 18 U.S.C. § 956(a) (conspiracy to murder, kidnap, or maim persons abroad) and § 1956(a)(2)(A) (laundering of monetary assets).³⁹ However, while § 2332b(g)(5)(B) lists § 956 as one of its specific terrorism offenses, it does not include § 1956.⁴⁰

The trial judge reasoned that § 2322b requires “both the commission of one of the enumerated crimes *and* a finding that the required motivational element set forth in § 2332b(g)(5)(A) has been met.”⁴¹ He determined that there was insufficient evidence to demonstrate that Awan's actions were “calculated to influence or affect the conduct of [the] government”⁴² and concluded from the evidence that Awan merely sought to privately benefit from the “prestige or potential influence” of his association with the KCF.⁴³ As such, the judge concluded that the terrorism enhancement could not apply, and Awan received the minimum guidelines range sentence of 168 months, a stark contrast from the 540-month sentence that he would have received had the Section 3A1.4 terrorism enhancement applied.⁴⁴

On appeal, the Second Circuit identified two procedural flaws and vacated the sentence.⁴⁵ The court noted that Section 3A1.4 includes two distinct analytic prongs delineated by a disjunctive conjunction—“involved” *or* “intended to promote”—and found that the trial judge incorrectly analyzed the “involved prong” and failed to consider the “intended to promote” prong.⁴⁶

³⁶ 607 F.3d 306, 313–18 (2d Cir. 2010).

³⁷ *Id.* at 309–10.

³⁸ *Id.* at 310.

³⁹ *Id.* at 309–11.

⁴⁰ *Id.* at 311.

⁴¹ *Id.* at 312 (emphasis added).

⁴² *United States v. Awan*, No. CR-06-0154 (CPS), 2007 WL 2071748, at *4 (E.D.N.Y. July 17, 2007) (“[I]t is speculative to conclude that the defendant had any particular motive in mind and, in particular, that he was motivated by a desire to influence the policies of the Indian government or retaliate for some unspecified wrong.”).

⁴³ *Id.*

⁴⁴ *Awan*, 607 F.3d at 311 (rejecting the government's request for a 45-year sentence based on the terrorism enhancement); *Awan*, 2007 WL 2071748, at *7.

⁴⁵ *Awan*, 607 F.3d at 318.

⁴⁶ *Id.* at 312–15 (reasoning that the “intended to promote” prong must have a separate, discrete meaning for the statute to avoid a duplicative, absurd result); *see also* *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009) (“The criminal conduct at issue need not itself

Regarding the “involved” prong, the Second Circuit held that the trial judge misconstrued the meaning of “involved” in the terrorism enhancement by focusing on the word “motive” in § 2332b(g)(5)(A).⁴⁷ The court reasoned that “[c]alculation may often serve motive, but they are not . . . identical.”⁴⁸ Declaring that “Awan’s motive is simply not relevant,” the court stated that § 2332b(g)(5)(A) focuses not on the defendant but on the defendant’s offense and the underlying calculation.⁴⁹ Because there was “little doubt” Awan knew that the KCF would use the money to support terrorism, the court determined that his offenses were “calculated to influence” the Indian government, “even if he was not personally motivated by that object.”⁵⁰ The court further concluded that if a defendant commits a crime listed in § 2332b(G)(5) and is found to have done so with “specific intent,” the “involved” prong of Section 3A1.4 is satisfied and the terrorism enhancement applies.⁵¹

Separately, the Second Circuit found that the trial court erred when it failed to consider the enhancement’s “intended to promote” prong of Section 3A1.4 and its distinct analytic requirements.⁵² Unlike the “involved” prong, to qualify for Section 3A1.4 under the “intended to promote” prong, the defendant’s offense need only be intended “to encourage, further, or bring about a federal crime of terrorism.”⁵³ The court reasoned that any other interpretation of the terrorism enhancement would “defy common sense,” for it would mean that Section 3A1.4 would not cover defendants who “clearly ‘intend to promote’ federal crimes of terrorism committed by *other persons*.”⁵⁴ Ultimately, such a broad interpretation may deter some actors who do not share a terrorist organization’s goals and provide material support for profit alone.

meet the statutory definition of a federal crime of terrorism if ‘a goal or purpose [of the defendant’s act] was to bring or help bring into being a crime listed in 18 U.S.C. 2332b(g)(5)(B).’”); *United States v. Manhai*, 375 F.3d 1243, 1247–48 (11th Cir. 2004) (finding that the drafters “unambiguously cast a broader net” and therefore “the phrase ‘or intended to promote’ [in Section 3A1.4] . . . must have additional meaning”); *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2001) (noting that because the Guidelines typically employ the word “involved” to mean “included,” the “intended to promote” prong must have a broader meaning to avoid redundancy).

⁴⁷ *Awan*, 607 F.3d at 317.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 317–18 (“A hired assassin who kills a political leader at the behest of a terrorist organization can hardly disclaim that his crime was calculated to influence the conduct of government simply because he was motivated by greed rather than politics.”).

⁵¹ *Id.* at 317.

⁵² *Id.* at 313, 315, 318.

⁵³ *Id.* at 314.

⁵⁴ *Id.* at 315 (noting that “it would be absurd” if the terrorism enhancement did not apply to an arms dealer selling weapons to a terrorist group for profit solely because § 2332b(g)(5)(A) did not list the dealer’s offense).

Other circuits have adopted a similar two-pronged interpretation of the terrorism enhancement, finding that the “intended to promote” prong covers a wider array of offenses than § 2332b(g)(5)(B) does and that motive is not a required element for the “involved” prong.⁵⁵ Ultimately, this creates a “broad[] net” and enables a disparate array of criminal conduct to trigger the enhancement’s strict rubric.⁵⁶ As the next two Parts demonstrate, this means that any divergence among courts in applying Section 3A1.4 to such varied crimes creates the potential for acute variations in sentencing.

II. UNIQUE AMONG CRIMINALS: A JUSTIFICATION FOR THE BROAD APPLICATION OF THE TERRORISM ENHANCEMENT

In many instances, sentencing judges apply the terrorism enhancement to material-support offenses where defendants knowingly facilitated the preparation and planning of violent attacks. Such an approach aligns with congressional intent and addresses the logistic support on which complex terrorist attacks rely. However, judges frequently justify broad application of the enhancement with claims about the unique nature of terrorists and their supporters. In *United States v. Meskini*, the defendant was convicted for providing material support for a planned bombing of the Los Angeles International Airport.⁵⁷ At sentencing, the trial judge rejected the defendant’s plea for leniency and applied the terrorism enhancement’s mandatory increase to the criminal history category from I to VI.⁵⁸ On appeal, the Second Circuit upheld the application of the enhancement. Noting “the serious dangers posed by all forms of terrorism,” Chief Judge Walker found

⁵⁵ See *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005) (reasoning that Section 3A1.4 is triggered whenever a defendant’s actions “helps or encourages a federal crime of terrorism”); see also *United States v. Stewart*, 590 F.3d 93, 137 (2d Cir. 2009) (explaining that the conduct at issue need not meet the statutory definition of terrorism if the goal “was to bring or help bring into being a crime listed in 18 U.S.C. § 2332b(g)(5)(B)” (quoting *United States v. Manhai*, 375 F.3d 1243, 1248 (11th Cir. 2004))); *Manhai*, 375 F.3d at 1247 (11th Cir. 2004) (“Had the Guideline drafters intended that § 3A1.4 apply only where the defendant is convicted of a crime listed in 18 U.S.C. § 2332b(g)(5)(B), they would have included such limiting language. Instead, they unambiguously cast a broader net by applying the enhancement to any offense that ‘involved’ or was ‘intended to promote’ a terrorism crime.”); *United States v. Graham*, 275 F.3d 490, 516–17 (6th Cir. 2001) (finding that conviction under the general conspiracy statute can trigger the terrorism enhancement even though it is not listed under § 2332(b)(g)(5)(B)). This reasoning continues to influence sentencing decisions in trial courts. For example, see *United States v. Siddiqui*, No. 15-213 (SJ), 2019 WL 8113515, at *9 (E.D.N.Y. Dec. 24, 2019) (relying on the reasoning in *Awan* to find that a narrow reading of the “intended to promote” prong would “defy common sense”). *But see* *Brown*, *Notes, supra* note 11, at 48–50 (arguing that a “plain reading” of the Section 3A1.4 Application Note supports the position that the underlying offense must be listed within § 2332B(g)(5) for both prongs).

⁵⁶ *Manhai*, 375 F.3d at 1247.

⁵⁷ *United States v. Meskini*, 319 F.3d 88, 90 (2d Cir. 2003).

⁵⁸ *Id.* at 91.

that the “Guidelines are in no way irrational in setting the default for criminal history at a very high level.”⁵⁹ But the court’s reasoning went further and distinguished terrorists from other criminals by nature:

Congress and the Sentencing Commission had a rational basis for concluding that an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and *the difficulty of deterring and rehabilitating the criminal*, and thus that terrorists and their supporters should be incapacitated for a longer period of time. . . . [E]ven terrorists *with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation*, and the need for incapacitation.⁶⁰

If extremists and their facilitators cannot be rehabilitated and are “unique among criminals,” then a court need not hesitate to apply the terrorism enhancement to defendants with minimal criminal histories who are charged with nonviolent conduct. For instance, in *United States v. Hammoud*, the Fourth Circuit upheld a district court’s application of Section 3A1.4 for a defendant charged under § 2339B.⁶¹ The trial judge determined that the defendant had “knowingly” funneled the profits from contraband cigarettes to Hizballah, a FTO, in violation of § 2339B.⁶² This triggered Section 3A1.4, moving the defendant’s criminal history category from I to VI—as in *Meskini*—and increasing his sentence range from forty-six to fifty-seven months to 155 years.⁶³

Numerous district and appellate courts have echoed the language in *Meskini*. For instance, in *United States v. Ali*, the Eighth Circuit responded to the defendant’s claim that the application of Section 3A1.4 was “based solely on prejudice and fear” by quoting part of the above passage from *Meskini*.⁶⁴ Similarly, in *United States v. Jayyousi*, the Eleventh Circuit quoted the same part of the passage when rejecting a sentencing departure for an older defendant.⁶⁵ Acknowledging that the likelihood of recidivism

⁵⁹ *Id.* at 92.

⁶⁰ *Id.* (emphasis added); see *United States v. Ali*, 799 F.3d 1008, 1030–31 (8th Cir. 2015) (finding that Congress had a rational basis for terrorism enhancement due to unique qualities of violent extremists); cf. Pinky Wassenberg, *U.S. Circuit Courts & the Application of the Terrorism Enhancement Provision*, 42 S. ILL. U. L.J. 85, 97–98 (2017) (finding that appellate courts in material support cases post-Booker often defer to trial court sentencing decisions unless there are insufficient factual records to support or procedural errors).

⁶¹ *United States v. Hammoud*, 381 F.3d 316, 325–26, 357 (4th Cir. 2004), *cert. granted and vacated*, 543 U.S. 1097 (2005), *reinstated in part*, 405 F.3d 1034 (4th Cir. 2005).

⁶² See *id.* at 326–27.

⁶³ See *id.* at 327, 361 n.1.

⁶⁴ *Ali*, 799 F.3d at 1030–31 (“[W]e simply adopt the Second Circuit’s well-reasoned conclusion in *Meskini* that the § 3A1.4 enhancement is ‘in no way irrational’ and survives rational basis review.”).

⁶⁵ *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011).

typically diminishes with age, the court found that such reasoning does not apply to “certain classes of criminals,” such as sex offenders and terrorists.⁶⁶

Yet, as one district court judge noted in a recent terrorism case, “[r]epetition of that assertion might give it the ring of truth[] but does not make it true.”⁶⁷ Indeed, the court in *Meskini* cited no authority for its sweeping claim that terrorists are “unique among criminals” and refractive to rehabilitation.⁶⁸ Some observers fear that the enhancement “serves as a kind of statutory basis to embolden courts of appeals to overturn a sentence as too lenient.”⁶⁹ The data corroborates this claim. As of 2012, appellate courts had upheld the application of the enhancement on thirty-one occasions and reversed it in only three.⁷⁰ More noteworthy still, there are only two instances where appellate courts have upheld a district court’s decision *not* to apply the enhancement.⁷¹ Ultimately, as one commentator notes, “[a]t the heart of these opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence.”⁷² Yet courts cite no empirical evidence to support such an approach.

III. DOWNWARD DEPARTURES FROM THE TERRORISM ENHANCEMENT AND THE INDIVIDUALIZED APPROACH TO SENTENCING

Some observers have argued that the terrorism enhancement merely provides a justification for appellate courts to demonstrate their national security “bona fides” by remanding sentences deemed “too lenient.”⁷³ Regardless of whether such a charge is merited, the previous Part demonstrates that many trial judges do not hesitate to apply the terrorism enhancement broadly, while appellate courts typically uphold its application and

⁶⁶ See *id.* at 1117–19; see also *United States v. Ressay*, 679 F.3d 1069, 1091 (9th Cir. 2012) (“Terrorists, even those with no prior criminal behavior, are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.”) (quoting *Jayyousi*, 657 F.3d at 1117).

⁶⁷ *United States v. Alhaggagi*, 372 F. Supp. 3d 1005, 1015 (N.D. Cal. 2019).

⁶⁸ See *id.*

⁶⁹ See Said, *supra* note 14, at 481.

⁷⁰ *Id.* at 503.

⁷¹ See *United States v. Stewart*, 590 F.3d 93, 136–42 (2d Cir. 2009) (rejecting an expansive interpretation of the involved prong and upholding the district court’s decision that one defendant’s conduct did not trigger the terrorism enhancement); *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005); see generally Said, *supra* note 14, at 502–04 (reviewing Sentencing Commission statistics for the application of the enhancement between 1996 and 2012).

⁷² Said, *supra* note 31, at 481.

⁷³ Pinky Wassenberg, *U.S. Circuit Courts and the Application of the Terrorism Enhancement*, 42 S. Ill. U. L.J. 85, 88, 96 (2017) (quoting Said, *supra* note 14, at 481) (summarizing criticisms that some judges employ the enhancement to “establish their bona fides as aggressive participants in U.S. counterterrorism efforts at the expense of proper judicial conduct under the U.S. Constitution”).

have vacated unjustified downward departures. But this approach is far from universal. Indeed, between 2013 and 2017, ten of sixteen defendants charged with violating § 2339B received sentences below the guidelines range, producing an average departure of seventy-nine months.⁷⁴ Common themes run through such cases: a concern that the terrorism enhancement casts too broad a net; a belief that some offenders, especially those charged under § 2339, are not more refractive to rehabilitation than other criminals; and fear for the second-order effects of unnecessarily severe sentences.⁷⁵

In the past several years, multiple cases have questioned the enhancement's one-size-fits-all approach. George Brown sees this dynamic as “part of a larger, continuing controversy about the force of the Guidelines . . . and the extent of judicial discretion to depart from or ignore them” following the *Booker* line of cases.⁷⁶ Indeed, one trial judge declared the terrorism enhancement “too blunt an instrument,” found it “contrary to and subversive of the mission of the Guidelines,”⁷⁷ and chose not to apply it.⁷⁸ A 2018 case in the District of Colorado best exemplifies this discretionary approach. In *United States v. Jumaev*, a jury convicted Bakhtiyor Jumaev for violating § 2339B after he provided \$300 to an acquaintance in support of the Islamic Jihad Union (IJU), a designated terrorist organization.⁷⁹

Citing the Second Circuit's reasoning in *Awan*, Judge Kane analyzed Jumaev's conduct under both the “involves” and “intended to promote” prongs of the terrorism enhancement and found that Jumaev did not possess

⁷⁴ *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886, at *9 n.12 (D. Colo. July 18, 2018).

⁷⁵ *See, e.g., Stewart*, 590 F.3d at 139–42 (upholding trial court's decision to weigh individualized factors and determine that the enhancement was not needed to deter recidivist conduct); *Jumaev*, 2018 WL 3490886, at *9 (finding that “there is no indication [the defendant] is likely to recidivate or would be difficult to rehabilitate”); Transcript of Disposition, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Apr. 12, 2012); Brown, *Notes, supra* note 11, at 52–54 (discussing *Mehanna*).

⁷⁶ Brown, *Notes, supra* note 11, at 6.

⁷⁷ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Apr. 12, 2012), *quoted in* *United States v. Alhaggagi*, 372 F. Supp. 3d 1005, 1015–16 (N.D. Cal. 2019).

⁷⁸ Transcript of Disposition at 67–69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Apr. 12, 2012) (declining to apply the terrorism enhancement's automatic increase of criminal history to category VI because it conflicted with the Guidelines' requirement to consider individualized factors and would yield a disproportionate sentence); *see also* Brown, *Notes, supra* note 11, at 6 (“*Mehanna* presents a problem that will recur in preventive prosecutions. Congress and the United States Sentencing Commission apparently wanted a blunt instrument on the theory that all terrorism should be treated severely. However, judges, as was the case in *Mehanna*, may question whether some types of ‘terrorism’ are different in kind from others.”).

⁷⁹ *Jumaev*, 2018 WL 3490886, at *1.

the requisite intent and that his actions “were not calculated at all.”⁸⁰ Observing that Jumaev would not have sent the \$300 if he did not owe the recipient a debt, the court found “the facts of this case . . . [to be] unique” and held that the terrorism enhancement did not apply.⁸¹ Thus, Judge Kane employed a criminal history category I to calculate a guidelines range of seventy-eight to ninety-seven months, a significant departure from the fifteen-year sentence the government requested under Section 3A1.4.⁸² The judge ultimately sentenced Jumaev to time served at seventy-six months and three days in addition to ten years of supervised release.⁸³

In his opinion, Judge Kane identified three broad concerns with the terrorist enhancement. First, to apply the enhancement would result in a disproportionate sentence not aligned to the defendant’s conduct or criminal history.⁸⁴ The court noted that Jumaev wrote a single check, and the funds were solicited by someone to whom he owed a personal debt.⁸⁵ Moreover, the money never reached the IJU.⁸⁶ For these reasons, Judge Kane found that Jumaev’s “guilt rest[ed] on far less culpable conduct than that of all other defendants . . . convicted under [§ 2339B].”⁸⁷ Judge Kane cited the Probation Officer’s comments that “despite a significant range of conduct that can produce a conviction for material support, the sentencing guidelines result in a nearly identical guideline range in each case, regardless of the underlying conduct.”⁸⁸ Condemning the “implicit assumption that terrorism is different, and must be treated differently,” the judge declared that such reasoning defies the “congressionally sanctioned structure of sentencing.”⁸⁹

Second, Judge Kane explicitly rejected Section 3A1.4 because it did not address Jumaev’s unique circumstances or permit consideration of

⁸⁰ *Id.* at *6 (“If Mr. Jumaev’s offenses were truly calculated towards a political objective, Mr. Jumaev would have done more, e.g., contributed more money on more occasions via more reliable conduit to a more robust organization.”).

⁸¹ *Id.*

⁸² *See id.* at *4, *14.

⁸³ *Id.* at *21.

⁸⁴ *See id.* at *15–17.

⁸⁵ *See id.* at *6, *8.

⁸⁶ *Id.* at *1.

⁸⁷ *Id.* at *1, *10 (observing that the terrorism enhancement yields sentences that fail to distinguish between dissimilar conduct, such as a defendant who collected \$1,000 for al-Shabaab and had no contact with the terrorist organization and another defendant who “maintained direct and continuing contact” with al-Shabaab leadership and stored their weapons in his house).

⁸⁸ *Id.* at *10 n.17 (declaring that “[t]he difficulty is that under the guidelines, there is no distinction between less and more serious offenses, those in which actual harm occurred and those where it did not”) (citing Presentence Report Ex. A at 4, *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886 (D. Colo. July 18, 2018), ECF No. 1915-1).

⁸⁹ *Id.* at *12 n.20 (quoting *United States v. Ressay*, 679 F.3d 1069, 1106 (9th Cir. 2012) (Schroeder, J., dissenting)).

§ 3553(a) factors.⁹⁰ Noting Jumaev’s “prolonged absence from his family,” his experience of torture by Uzbek authorities, his work history, and the steady stream of remittances he sent to his family in Uzbekistan, the judge emphasized that Jumaev was fifty-one years old and that this was his first offense.⁹¹ As such, he concluded that the terrorism enhancement “overrepresented” his criminal history and therefore justified a downward departure under Section 4A1.3(b)(1).⁹²

Finally, after considering the nature of Jumaev’s offense and personal circumstances, Judge Kane deemed it unlikely that Jumaev would recidivate and declined to extend the sentence based on “an unfounded fear that he might do something.”⁹³ Noting Jumaev’s potential for rehabilitation, the judge lamented the lack of rehabilitation programs and training offered for Jumaev or his crimes.⁹⁴ He also highlighted the lack of Muslim chaplains in federal prisons and the potential for inmate-led services to engender greater radicalization.⁹⁵ As such, Judge Kane found “little hope that the negative influences resulting from a longer [sentence] will be balanced with a productive program.”⁹⁶

Judge Kane’s approach is neither an exception nor an outlier. In *United States v. Alhaggagi*, a 2019 case in the District Court for the Northern District of California, a twenty-three-year-old with no criminal record was charged under the material support statutes for operating social media accounts that promoted ISIS.⁹⁷ Judge Breyer noted that the terrorism enhancement “treats all terrorism defendants as if they are career criminals”

⁹⁰ *Id.* at *12 & n.20 (quoting *United States v. Ressam*, 679 F.3d 1069, 1106 (9th Cir. 2012) (Schroeder, J., dissenting)) (“The requirement to view any terrorist as every terrorist goes against the basic principles of sentencing and factors set forth in 18 U.S.C. § 3553.”).

⁹¹ *Id.* at *2, *9, *13.

⁹² *Id.* at *9. Compare *United States v. Benkhala*, 501 F. Supp. 2d 748, 758–59 (E.D. Va. 2007), *aff’d*, 530 F.3d 300 (4th Cir. 2008) (justifying a downward departure from the terrorism enhancement by downgrading criminal history category from VI to I under Section 4A1.3(b)(1)), with *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (recognizing that 4A1.3(b)(1) authorizes a downward departure from the terrorism enhancement but finding that the defendant’s criminal history did not support such a decision).

⁹³ *Jumaev*, 2018 WL 3490886, at *16 (citing *United States v. Ahmad*, No. 3:04-cr-00301-JCH (D. Conn. July 16, 2014) (“I must look at what he actually did and determine whether it is likely that he will do something similar or greater in the future. From the facts before me, I find it is not.”)).

⁹⁴ *See id.* at *16.

⁹⁵ *Id.* at nn.27–28 (“Without a sufficient number of Muslim chaplains on staff, inmates are . . . much more likely to lead their own religious services, distort Islam, advocate Prison Islam, and espouse extremist beliefs.”) (quoting OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF PRISONS’ SELECTION OF MUSLIM RELIGIOUS SERVICE PROVIDERS 6–7 (2004)).

⁹⁶ *Id.* at *16.

⁹⁷ *United States v. Alhaggagi*, 372 F. Supp. 3d 1005, 1007 (N.D. Cal. 2019).

and “flies in the face of fair, individualized sentencing.”⁹⁸ Finding that some data, albeit quite limited, indicates that “individuals convicted of terrorism offenses do *not* recidivate at higher rates than those convicted of other crimes,”⁹⁹ the judge concluded that to treat a first-time offender as if they were the most hardened of career criminals is “incompatible with 18 U.S.C. § 3553”¹⁰⁰ and “contrary to and subversive of” the Guidelines’ stated goals.¹⁰¹

To dwell on issues of rehabilitation, to consider a defendant’s circumstances holistically, and to assess a defendant’s potential for disengagement starkly contrast with the oft-cited reasoning in *Meskini*.¹⁰² This distinction is crucial. It underlies the sentencing disparities surrounding the application of Section 3A1.4 to material support offenses and highlights a foundational question underlying the enhancement: are all terrorists truly “unique among criminals,”¹⁰³ irredeemably violent, and undeterrable? Or do some offenders, especially those charged with material support crimes, possess the potential to disengage from radical activities? Current psychological research into radicalization and violent extremism provides support for the latter position.

IV. CURRENT UNDERSTANDINGS OF RADICALIZATION, RECIDIVISM, AND THE POTENTIAL FOR DISENGAGEMENT

Many citizens might instinctively support the broad application and severe sentences of the terrorism enhancement. As one commentator notes, “The case for the policy behind the enhancement is strong. Terrorism is different from other crimes. . . . If terrorists are to be tried in the regular criminal justice system, harsh sentences seem to be a fair trade-off.”¹⁰⁴ Indeed, incapacitation, deterrence, and retribution are valid and vital

⁹⁸ *Id.* at 1015–16.

⁹⁹ *See id.* at 1015 (construing U.S. SENTENCING COMM’N, RECIDIVISM AND THE ‘FIRST OFFENDER’ 26 (2004); *see also* Scott Shane, *Beyond Guantánamo, a Web of Prisons for Terrorism Inmates*, N.Y. TIMES (Dec. 10, 2011), <https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html> (finding that more than 300 prisoners completed their sentences for terrorism-related charges between 2001 and 2011, but only a “handful of cases” of recidivism existed, a rate far less than other federal crimes), *quoted in Alhaggagi*, 372 F. Supp. 3d at 1015.

¹⁰⁰ *Alhaggagi*, 372 F. Supp. 3d at 1015 (quoting McLoughlin, *supra* note 8, at 116).

¹⁰¹ *Id.* at 1015–16 (quoting Transcript of Disposition at 69–70, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. Apr. 12, 2012) (finding that the automatic assignment of criminal history category VI is “fundamentally at odds with the [Guidelines’] design” and “import[s] a fiction into the calculus” and that the Section 3A1.4 criminal history adjustment is “simply a way of ‘cooking the books’ to get to a score and a desired sentencing range”).

¹⁰² *Cf.* *United States v. Meskini*, 319 F.3d 88, 92 (2d. Cir. 2003) (reasoning that such considerations are irrelevant because terrorists are “unique among criminals”).

¹⁰³ *Id.*

¹⁰⁴ Brown, *Punishing Terrorists*, *supra* note 13, at 546.

sentencing goals.¹⁰⁵ However, as discussed previously, a belief that all terrorists and facilitators are irredeemably violent undergirds much of this reasoning. Empirical data about recidivism and current research into radicalization cast doubt on this assumption and suggests a greater emphasis on rehabilitation and proportionality.

John Horgan, one of the most prominent psychologists studying terrorism, radicalization, and disengagement, notes that academics spent decades seeking to identify an archetypal “terrorist personality.”¹⁰⁶ Indeed, by the early 1980s, many psychologists had concluded that “psychopathy was the feature most prominently associated with terrorists.”¹⁰⁷ If accurate, such analyses would lend credence to the notion that terrorists are “unique among criminals”¹⁰⁸ and refractive to rehabilitation. But Horgan argues that “less than rigorous empirical studies” supported the claims that terrorists should be considered psychopathic¹⁰⁹ and fears that the search for comprehensive terrorist profiles “tend[s] to encourage one-size-fits-all approaches to management and response.”¹¹⁰ Similarly, Max Taylor, a psychologist with the Centre for the Study of Terrorism and Political Violence at the University of St. Andrews, finds that such studies yield “simplistic explanations of terrorism that obscure its true complexity” and engender equally simplistic policy solutions.¹¹¹

Furthermore, over the past two decades, researchers have come to broadly accept that “terrorists are essentially normal individuals.”¹¹² Several studies analyzed members of the Quebec Liberation Front in Canada,

¹⁰⁵ See 18 U.S.C. § 3553(a)(2)(A)–(D) (requiring courts to impose sentences that “provide just punishment for the offense[,] afford adequate deterrence to criminal conduct[,] protect the public from further crimes of the defendant[, and] provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”); see also NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 3–4 (4th ed. 2018) (identifying deterrence, incapacitation, retribution, restitution, and rehabilitation as the five legitimate “societal purposes” of sentencing (quoting STANDARDS FOR CRIMINAL JUSTICE: SENTENCING § 18-2.1(a) (AM. BAR ASS’N 1994))).

¹⁰⁶ JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM 48 (2d ed. 2014) [hereinafter HORGAN, PSYCHOLOGY].

¹⁰⁷ *Id.* at 49 (emphasis omitted).

¹⁰⁸ *United States v. Meskini*, 319 F.3d 88, 92 (2d. Cir. 2003).

¹⁰⁹ See HORGAN, PSYCHOLOGY, *supra* note 106, at 48–49.

¹¹⁰ JOHN HORGAN, WALKING AWAY FROM TERRORISM: ACCOUNTS OF DISENGAGEMENT FROM RADICAL AND EXTREMIST MOVEMENTS 4 (2009) [hereinafter HORGAN, WALKING AWAY].

¹¹¹ *Id.* at 4; see *id.* at 5 (“[Terrorist profiling] is sustained by audiences desperate for practical solutions and seduced by the allure of a quick fix.”).

¹¹² HORGAN, PSYCHOLOGY, *supra* note 106, at 59 (quoting Andrew Silke, *Cheshire-Cat Logic: The Recurring Theme of Terrorist Abnormality in Psychological Research*, 4 *Psychol. Crime & L.* 51 (1998)).

the Baader-Meinhof Group in Germany, and the Red Brigades in Italy and compared rates of diagnosable pathology against control groups.¹¹³ Such research indicated that members did not suffer diagnosable pathologies at a significantly different rate from “ordinary criminals” of similar age and background.¹¹⁴ A robust empirical analysis of violent extremists in Northern Ireland corroborates these findings.¹¹⁵ In that study, two psychologists compared forty-seven “political murderers” with fifty-nine “non-political murderers” from matching socioeconomic backgrounds during the Irish Troubles.¹¹⁶ Their analysis revealed that the former group came from more stable developmental environments, attained higher levels of education, and exhibited fewer indicators of mental illness than the “ordinary criminals.”¹¹⁷ Ultimately, the researchers concluded that neither the Irish Republic Army nor the Ulster Loyalist paramilitary members were “psychiatrically abnormal.”¹¹⁸

Some research does emphasize the real differences between terrorists and other criminals. For instance, some criminals may disproportionately come from lower socioeconomic classes, while the middle class and intellectual elite often populate the ranks of terrorists and their supporters.¹¹⁹ Thus, certain factors, such as poverty or the perceived lack of opportunity, may influence the former but not the latter.¹²⁰ Indeed, terrorists and their supporters typically believe that they “represent a wider collective” and pursue “altruistic, politicized motives meant to benefit society.”¹²¹ Furthermore, research suggests that some extremists primarily motivated by religion may be more resistant to disengagement than those driven by secular causes.¹²² Unlike other criminals, when such individuals employ

¹¹³ *Id.* at 59–60.

¹¹⁴ *See id.*; ALISON JAMIESON, *THE HEART ATTACKED: TERRORISM AND CONFLICT IN THE ITALIAN STATE* 48 (1989) (“Those who have confronted Italian terrorism directly are the first to discredit the notion of the bloodthirsty desperado”), *quoted in* HORGAN, *PSYCHOLOGY*, *supra* note 106, at 60.

¹¹⁵ *See* H.A. Lyons & H.J. Harbinson, *A Comparison of Political and Non-Political Murderers in Northern Ireland, 1974–84*, 26 *MED. SCI. & L.* 193, 193–98 (1986), *cited in* HORGAN, *PSYCHOLOGY*, *supra* note 106, at 60–61.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 195–97; *see also* KEN HESKIN, *NORTHERN IRELAND: A PSYCHOLOGICAL ANALYSIS* 78 (1980), *cited in* HORGAN, *PSYCHOLOGY*, *supra* note 106, at 60.

¹¹⁸ *See* CHRIS RYDER, *INSIDE THE MAZE: THE UNTOLD STORY OF THE NORTHERN IRELAND PRISON SERVICE* xiii (2000), *quoted in* HORGAN, *PSYCHOLOGY*, *supra* note 106, at 60.

¹¹⁹ Mary Beth Altier, Christian N. Thoroughgood & John G. Horgan, *Turning Away from Terrorism: Lessons from Psychology, Sociology, and Criminology*, 51 *J. PEACE RES.* 647, 652–53 (2014).

¹²⁰ *See id.*

¹²¹ *Id.* at 652.

¹²² *See e.g.*, Dennis A. Pluchinsky, *Global Jihadist Recidivism: A Red Flag*, 31 *STUD. CONFLICT & TERRORISM* 182, 187 (2008) (“[T]errorists with a secular motivation and goal are more likely to be reformed in prison than terrorists who are driven by religious

violence for broader, ideological goals, they may be uniquely resistant to deterrence and rehabilitation.¹²³ But this does not mean that “any terrorist [is] every terrorist”¹²⁴ or that material support offenders are always “unique among criminals.”¹²⁵ It is, however, an important reminder that one cannot view violent extremism through a naïve or overly optimistic lens. The threats are real, and a deep-rooted ideology often motivates terrorists and their supporters. This Note merely argues that the terrorism enhancement’s one-size-fits-all approach is unsupported by data, unsubstantiated by current research, and represents “bad anti-terrorism policy.”¹²⁶

Ultimately, contemporary psychological research undermines earlier claims of a universal “terrorist personality”¹²⁷ and calls into question assumptions about the unique nature of terrorists among criminals. Indeed, several academics believe “our knowledge and understanding of [terrorist disengagement] . . . may well be informed by studying disengagement from youth gangs . . . and criminal lifestyles more generally.”¹²⁸ If such parallels hold merit, the comparison belies the notion that people sentenced under Section 3A1.4 are unique among criminals and uniformly refractive to rehabilitation. Current research does not attempt to explain terrorist behavior exclusively through an individual lens. Empirical data suggest that a comprehensive approach that considers the individual perspective within the context of the terrorist group and its ideology is most effective.¹²⁹ But with regard to sentencing and the application of the terrorism enhancement, it is sufficient to note that psychology does not recognize a monolithic terrorist profile and emphasizes the individualized factors that influence an offender’s behavior. As such, one should not presume that terrorists as a class are unique among criminals, more prone to recidivism and resistant to rehabilitation.

grievances . . .”). *But see* CHRIS BOSLEY, U.S. INSTIT. PEACE, VIOLENT EXTREMIST DISENGAGEMENT AND RECONCILIATION: A PEACEBUILDING APPROACH 6, 8 (2020) (highlighting that “ideology is only one component of a more complex system” and that violent extremists disengage for a myriad of reasons other than ideology or religion).

¹²³ See Pluchinsky, *supra* note 122, at 187.

¹²⁴ See *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886, at *12 (D. Colo. July 18, 2018).

¹²⁵ *United States v. Meskini*, 319 F.3d 88, 92 (2d. Cir. 2003).

¹²⁶ See McLoughlin, *supra* note 8, at 57.

¹²⁷ HORGAN, PSYCHOLOGY, *supra* note 106.

¹²⁸ HORGAN, WALKING AWAY, *supra* note 110, at 7–8, 162.

¹²⁹ *Id.* at 8 (“[W]e cannot explain terrorism at the level of the individual, nor can we reduce the terrorist mindset to a collection of presumed inherent qualities (or set of traits) that people bring with them to a movement. Rather, the mindset . . . is a reflection of repeated social and psychological interactions with an ideology . . .”).

A. DISENGAGEMENT AND REHABILITATION: A VIABLE PATH FOR MATERIAL SUPPORT OFFENDERS?

Before proceeding further, it is necessary to distinguish between deradicalization and disengagement. Either process can facilitate rehabilitation and reintegration with society, but the terms represent distinct concepts. Deradicalization seeks to change the ideology of violent extremists and their supporters, while disengagement merely seeks cessation of their involvement in violent, radical activities.¹³⁰ Since 2001, many academic studies have focused on deradicalization; however, it is a costly, often unrealistic process, and outcomes are inconsistent at best.¹³¹ On the other hand, no evidence indicates that deradicalization is a prerequisite for disengagement.¹³² Thus, disengagement may represent a feasible goal for some defendants convicted under the material support statute. Such offenders may maintain their ideology but still be deterred from further criminal activity. Indeed, recent research on terrorist recidivism indicates that there is only a 2.5% probability that first offenders with no prior arrests will have a second conviction.¹³³

The “investment model” of social psychology may explain why such low recidivism rates exist.¹³⁴ The model considers the complex web of “push” and “pull” factors that lure one away from violent extremism.¹³⁵ For

¹³⁰ See e.g., Altier, Thoroughgood & Horgan, *supra* note 119, at 647.

¹³¹ A full exploration of deradicalization efforts is beyond the scope of this Note. For examples of this type of literature, see Jessica Stern, *Mind over Martyr: How to Deradicalize Islamist Extremists*, 89 FOREIGN AFF. 95 (2010). See also DANIEL KOHLER, UNDERSTANDING DERADICALIZATION: METHODS, TOOLS AND PROGRAMS FOR COUNTERING VIOLENT EXTREMISM (2017), for a discussion on “significance quest theory” and “cognitive opening” and personal reflection that can foster deradicalization. Saudi Arabia’s deradicalization efforts provide an interesting case study of such efforts. Although much touted, the Kingdom’s deradicalization program has suffered numerous, devastating examples of recidivist behavior. Marisa L. Porges, *The Saudi Deradicalization Experiment*, COUNCIL ON FOREIGN REL. (Jan. 22, 2010), <https://www.cfr.org/expert-brief/saudi-deradicalization-experiment> [<https://perma.cc/GK54-HM28>]. Compare with Elena Souris & Spandana Singh, *Want to Deradicalize Terrorists? Treat them Like Everyone Else.*, FOREIGN POL’Y (Nov. 23, 2018, 7:00 AM), <https://foreignpolicy.com/2018/11/23/want-to-deradicalize-terrorists-treat-them-like-everyone-else-counterterrorism-deradicalization-france-sri-lanka-pontourny-cve/> [<https://perma.cc/CHZ3-ZBEZ>] for an analysis of a French deradicalization program that lasted only five months. The article finds fault with the program’s focus on ideology and clumsy efforts to promote a secular, Western identity in lieu of an Islamic worldview.

¹³² John Horgan, *Individual Disengagement: A Psychological Analysis*, in LEAVING TERRORISM BEHIND: INDIVIDUAL AND COLLECTIVE DISENGAGEMENT 17, 27 (Tore Bjørge & John Horgan eds., 2009) (“In fact, in the sample of former terrorists I interviewed from 2006 to 2008, while almost all of the interviewees could be described as disengaged, the vast majority of them could not be said to be ‘deradicalized.’”).

¹³³ McLoughlin, *supra* note 8, at 114.

¹³⁴ Altier, Thoroughgood & Horgan, *supra* note 119, at 650.

¹³⁵ *Id.* at 648–50.

instance, conversations with moderates, a change in family circumstances, career opportunities, the ability to channel skills toward nonviolent ends (for example, computer programming, website design, translation, finance, etc.), and social bonds external to the terrorist cause can pull an individual back from the brink of extremism.¹³⁶ Similarly, studies repeatedly show that unmet expectations, disillusionment, and a distaste for terrorism's violent effects can push someone away from engaging in radical behavior.¹³⁷ Here again, research reveals parallels to gang membership and suggests that terrorists are similar to gang members in their reasons for associating and disassociating with their respective criminal groups.¹³⁸ For instance, one study found that gang members often cite their "experience with violence" as the primary motivation for leaving the gang, and psychologists highlight how the disparity between "mythic" inter-gang violence and reality can foster disillusionment and facilitate disengagement.¹³⁹ Moreover, research indicates that the shorter a gang member's affiliation with the group, the more easily the individual reintegrates into society following disengagement.¹⁴⁰

Building on the investment model, John Horgan, Mary Beth Altier, and Christian Thoroughgood—scholars who research the psychology of disengagement—have developed a more comprehensive approach in which commitment to a terrorist cause is directly proportional to overall satisfaction (expected and actual), available alternatives, and investments.¹⁴¹ They describe a "turning point stage" in which "an event . . . mobilizes and focuses awareness that one's prior lines of action are disrupted and no longer satisfying."¹⁴² In a separate 2017 work, Altier assessed eighty-seven autobiographical accounts of disengagement and found that push factors like disillusionment, disagreements, and dissatisfaction often proved more

¹³⁶ *Id.* at 649–50.

¹³⁷ *See id.* at 648–49; *see also* HORGAN, WALKING AWAY, *supra* note 110.

¹³⁸ *See e.g.*, Bosley, *supra* note 122, at 13 (describing how "prosocial bonds" and interactions outside of a gang or cult can catalyze cognitive dissonance and lead to disengagement).

¹³⁹ HORGAN, WALKING AWAY, *supra* note 110, at 151; *see also* Kelly A. Berkell, *Off-Ramp Opportunities in Material Support Cases*, 8 HARV. NAT'L SECURITY J. 1 (2017) (discussing literature that examines the parallels between disengagement from gang violence and violent extremist movements).

¹⁴⁰ Tore Bjørge & John Horgan, *Introduction*, in LEAVING TERRORISM BEHIND, *supra* note 132, at 7–8 ("[T]he literature on criminal youth gangs provides a significant source of insight and comparison relevant to [terrorist disengagement]. . . . The shorter time they had stayed in the gang, the more easily they adapted to an ordinary, non-delinquent lifestyle.").

¹⁴¹ Altier, Thoroughgood & Horgan, *supra* note 119, at 650.

¹⁴² *Id.* at 651, 654 (describing HELEN R. FUCHS EBAUGH, BECOMING AN EX: THE PROCESS OF ROLE EXIT (1988) (postulating a "role exit theory" based on analysis of gang members' disengagement from violent activity)).

decisive than pull factors for individuals leaving violent extremism.¹⁴³ Similarly, another recent work built on Altier's recommendations analyzed extensive interviews with left- and right-wing extremists and found that high organizational distrust often catalyzed disengagement.¹⁴⁴

No matter the exact model employed, wide-ranging empirical studies consistently depict the existence of a "decisional no-man's land" in which some offenders may experience a "decisional crisis."¹⁴⁵ All of these analyses highlight myriad factors which could persuade a first-time offender charged with providing nonviolent material support to disengage from such activities. This research does not mean that *most* terrorists will eventually disengage or are open to rehabilitation. However, it belies the claim that *all* offenders are irredeemable. Nonviolent, first-time offenders convicted under the material support statutes could present such candidates, and these empirical studies support a less categorical, more nuanced approach to sentencing.¹⁴⁶

B. DISENGAGEMENT AND REHABILITATION: LESSONS FROM ABROAD

Best practices from abroad also support the notion that targeted rehabilitation and disengagement programs can mitigate the likelihood of recidivism. The Dutch approach to terrorism, sentencing, and rehabilitation is instructive. First, it would be difficult to paint Dutch leadership as soft on terrorism. Indeed, the Netherlands Nationality Act of 2010 empowers the government to rescind the citizenship of those who are convicted of an "offen[s]e against the safety of the Kingdom,"¹⁴⁷ and legislators have proposed amendments to revoke the nationality of those who participate in a terrorist organization or undertake activities to prepare a terrorist crime.¹⁴⁸

¹⁴³ See generally Mary Beth Altier, Emma Leonard Boyle, Neil D. Shortland & John G. Horgan, *Why They Leave: An Analysis of Terrorist Disengagement Events from Eighty-Seven Autobiographical Accounts*, 26 SECURITY STUD. 305 (2017).

¹⁴⁴ See generally Steven Windisch, Gina Scott Ligon & Pete Simi, *Organizational [Dis]trust: Comparing Disengagement Among Former Left-Wing and Right-Wing Violent Extremists*, 42 STUD. CONFLICT & TERRORISM 559 (2017).

¹⁴⁵ HORGAN, PSYCHOLOGY, *supra* note 106, at 143 ("The longing for the once-normal life, with social contacts, the ability to walk the streets or to simply engage in a romantic relationship are all normal personal factors which . . . [can] facilitate at least the beginning of psychological disengagement.").

¹⁴⁶ See *id.* at 150 (speculating that the likelihood of voluntary disengagement might vary according to organizational roles and functions within terrorist organizations—for example, perpetrators of direct violence as opposed to financiers, logisticians, or organizers).

¹⁴⁷ Olivier Vonk, *Netherlands Nationality Act of 2010*, https://www.legislationline.org/download/id/5937/file/Netherlands%20Nationality%20Act_2010_en.pdf [<https://perma.cc/V2WV-XLST>] (last visited Feb. 9, 2021) (translating Dutch statute from original format as was in force on Apr. 13, 2010).

¹⁴⁸ See Betty de Hart & Ashley Terlouw, *Born Here: Revocation and the Automatic Loss of Dutch Nationality in Case of Terrorist Activities*, in EQUALITY AND HUMAN RIGHTS:

Furthermore, once convicted, the Dutch government imprisons extremist offenders in *terroristen afdeling* (TA), separate terrorist wings of a prison in which they are screened from the general population.¹⁴⁹

The Dutch Custodial Institutions Agency (DJI) established the TA system to ensure extremist ideologies and networks did not spread through the prison system.¹⁵⁰ However, in 2016, the DJI justified the TA system with an additional rationale: the need for “speciali[z]ed and individuali[z]ed programs to rehabilitate and re-sociali[z]e the offenders.”¹⁵¹ To facilitate this goal, terrorist offenders are separated based on whether they were leaders and followers as well as by combat experience, criminal history, “susceptibility to influence,” “level of anger or frustration,” and other personalized factors.¹⁵² Upon an offender’s arrival at the TA, the staff conducts a ten-week analysis of the offender, generates a Violent Extremist Risk Assessment, and designs a tailored “Detention and Reintegration (D&R) plan.”¹⁵³ The D&R plan explicitly targets behavior, as opposed to beliefs and ideology, and its “essential goal” is disengagement.¹⁵⁴ These efforts remain nascent but preliminary results indicate the potential of such an individualized approach. The DJI processed 189 people through this program between 2012 and mid-2018.¹⁵⁵ At 4.4%, the Netherlands’ recidivism rate for extremist offenders falls well below its 50% rate for normal detainees.¹⁵⁶

Italy’s approach to domestic terrorism in the late 1970s and 1980s also demonstrates the benefits of a less categorical approach.¹⁵⁷ Faced with the rise of violent armed groups like the Red Brigades, Italy confronted “the most debilitating of all terrorist problems [in Europe].”¹⁵⁸ In response, Italy implemented a series of measures—known as “reward legislation”—to

NOTHING BUT TROUBLE? 305, 305–06 (Marjolein van den Brink, Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt eds., 2015).

¹⁴⁹ LIESBETH VAN DER HEIDE & OLIVIA KEARNEY, INTERNATIONAL CENTRE FOR COUNTER-TERRORISM, THE DUTCH APPROACH TO EXTREMISTS OFFENDERS 7 (2020).

¹⁵⁰ See *id.* (citing TINKA VELDHUIS, PRISONER RADICALIZATION AND TERRORISM DETENTION POLICY: INSTITUTIONALIZED FEAR OR EVIDENCE-BASED POLICY MAKING? (2016)).

¹⁵¹ *Id.* at 8.

¹⁵² *Id.* at 9.

¹⁵³ *Id.* at 9, 11.

¹⁵⁴ *Id.* at 11.

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Id.*

¹⁵⁷ For a concise summary of Italy’s counterterrorism efforts against the Red Brigades, see Victor H. Sundquist, *Political Terrorism: An Historical Case Study of the Italian Red Brigades*, 3 J. STRATEGIC SECURITY 53 (2010).

¹⁵⁸ SIMON CLARK, TERROR VANQUISHED: THE ITALIAN APPROACH TO DEFEATING TERRORISM 93 (2018) (quoting PETER JANKE, GUERRILLA AND TERRORIST ORGANIZATIONS: WORLD DIRECTORY AND BIBLIOGRAPHY 43 (1983) (noting that Italy recorded 2150 discrete terrorist incidents in 1979 alone).

incentivize disengagement and separate less committed members from the cause.¹⁵⁹ This policy represented a counterterrorism strategy that reduced sentences for those who renounced terrorism, expressed repentance, and cooperated with authorities.¹⁶⁰ These efforts implicitly recognized that terrorists are not necessarily “unique among criminals.” Some terrorists will readily accept disengagement, and Italy’s “award measures” effectively “reduc[ed] the psychological costs of leaving” the group.¹⁶¹ Italian sentencing distinguished violent extremists by role and function and offered substantial rewards for cooperation.¹⁶² For instance, the government would not charge passive members or those who committed minor crimes so long as they renounced the armed group.¹⁶³ Similarly, extensive cooperation with law enforcement could reduce life imprisonment to a sentence of ten to twelve years, and a confession without substantial cooperation could still reduce a sentence from fifteen to twenty-one years.¹⁶⁴ Most notably, Italy’s policies created “homogenous areas” in prisons, where prisoners who publicly renounced terrorist means could gather together and enjoy less severe detention conditions.¹⁶⁵ Subsequent analysis of Red Brigade membership revealed that many members acutely experienced the pull factors discussed above: a desire for a more settled existence, a growing aversion to violence, and dissatisfaction with leadership.¹⁶⁶

¹⁵⁹ For analysis of Italy’s use of reward legislation (*legislazione premiale*) to effect a “scissor strategy” (*strategia a forbice*) and isolate the most radicalized terrorists, see Enrico Cottu, *Further “Mild Inquisitions”: Extenuating Punishment as a Rewarding Paradigm in the Contemporary War on Terrorism*, 1 DIRITTO PENALE CONTEMPORANEO RIVISTA TRIMESTRALE 191, 192 (2017). See also CLARK, *supra* note 158, at 102–04 (noting that the Italian government’s support for the *pentiti*—convicted Red Brigades members who repented or distanced themselves from leadership—presented “multiple paths out of militancy” and mitigated the psychological barriers to disengagement).

¹⁶⁰ See CLARK, *supra* note 158, at 102–04 (describing a 1980 law providing sentencing reductions for convicted Red Brigades members that repented (*pentiti*), distanced themselves from the organization but did not actively cooperate with the government (*dissociati*), or actively supported government investigation (*collaboratori di giustizia*); see also COUNCIL OF EUR. COMM. OF EXPERTS ON TERRORISM, PROFILES ON COUNTER-TERRORIST CAPACITY: ITALY 4 (2008) (describing a 1982 law that provided sentencing reductions as a “reward measure” (*misura premiale*) when convicted members dissociated themselves from other offenders and provided investigative leads that led to an arrest).

¹⁶¹ Donatella della Porta, *Leaving Underground Organizations: A Sociological Analysis of the Italian Case*, in LEAVING TERRORISM BEHIND *supra* note 132, at 66, 69–70.

¹⁶² See *id.* at 70.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 71.

¹⁶⁶ See *id.* at 73; see also CLARK, *supra* note 158, at 104. (“[Italy’s] repentance laws which required convicted terrorists to renounce the use of violence in exchange for more lenient treatment helped to convince many terrorists to take the path away from terrorist violence and towards more socially acceptable means of protest and dissent.” (quoting RONALD CRELINSTEN, COUNTERTERRORISM 57 (2009))).

Thus, in contrast to the Dutch TA approach, Italy's homogenous areas insulated those who publicly renounced a group's goals from the pressure, continued influence, and threats of more "hardcore" members.¹⁶⁷ Yet despite this distinction, both countries' policies embody an approach premised upon the rehabilitative potential of terrorists that stands in marked contrast to the categorical sweep of the terrorism enhancement and material support statutes. Indeed, offenders sentenced under Section 3A1.4 often arrive in maximum-security prisons and may serve their time under an "extremely restrictive" regime of Special Administrative Measures (SAMs).¹⁶⁸ Although the incarceration of violent offenders and their most deeply committed supporters may necessitate the use of such measures, some have argued that the "indiscriminate imposition of SAMs, like an unreasonably long sentence," risks further radicalizing nonviolent, first-time offenders who may find disengagement an alluring option.¹⁶⁹ While easy to implement, a one-size-fits-all, categorical approach is unsupported by research, does not reflect best practices, and impedes effective efforts to counter violent extremism.

V. IMPLICATIONS FOR COUNTERTERRORISM POLICY

The categorical approach to sentencing violent extremists and material support offenders hinders counterterrorism goals for two reasons. First, as Tore Bjørgo and John Horgan note, prisons often serve as "breeding grounds for further radicalization and terrorism."¹⁷⁰ Because nonviolent facilitators and material support offenders will eventually return to society, a truly effective counterterrorism strategy should provide a pathway of reintegration that minimizes the risk of recidivism.¹⁷¹ To apply the terrorism enhancement to such varied classes of criminal activity places undue emphasis on retribution and deterrence. While valid, sentencing goals—

¹⁶⁷ Cf. HORGAN, WALKING AWAY, *supra* note 110, at 45 (discussing a right-wing Norwegian terrorist who stated, "Prison was the best thing that happened to me . . . I didn't meet people in the movement and was not around them anymore . . . but I did make some new friends in the prison . . . [with] [n]ormal people . . . [and] discovered that everything I had done, and everything that I was thinking about before, was completely wrong. . . . It was a different world.").

¹⁶⁸ See Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 309, 373 (2013).

¹⁶⁹ See, e.g., *id.*

¹⁷⁰ Tore Bjørgo & John Horgan, *Conclusions*, in LEAVING TERRORISM BEHIND *supra* note 132, at 247.

¹⁷¹ Official U.S. policy documents recognize the risk of radicalization in prison, the need to promote disengagement, and the importance of mentors for those reentering society. See *generally* NAT'L SEC. COUNCIL, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., STRATEGIC IMPLEMENTATION PLAN FOR EMPOWER LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES (2016), https://www.dhs.gov/sites/default/files/publications/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf [<https://perma.cc/6RYK-UZ5N>].

especially for crimes facilitating indiscriminate violence against the American public—are achieved at the expense of long-term efficacy and security.

Similar sentences for dissimilar crimes undermine the Guidelines' aims. One commentator has noted that disproportionate sentencing might deter families from reporting early indicators of radicalization to law enforcement,¹⁷² while others have noted that such sentences tarnishes U.S. public diplomacy and diminishes the appeal of U.S.-backed democratic norms.¹⁷³ But such disparities may also increase the likelihood of radicalization during incarceration. Recent research has highlighted the links between humiliation, radicalization, and terrorism.¹⁷⁴ Because the terrorism enhancement treats first-time offenders the same as the most hardened criminals and groups all material support crimes together, it seems plausible that such sentences might humiliate a defendant and impel him further along the path of radicalization. Nonviolent offenders convicted under the material support statute will one day rejoin society. Smart policy, therefore, requires sentencing that empowers judges to address the unique circumstance of each case and mitigate the recidivist risk to security.

Second, the broad application of Section 3A1.4 to varied criminal acts impedes U.S. counterterrorism goals because it deprives society of “credible opinion-builders” who could mitigate further radicalization.¹⁷⁵ Where countries claim some success with deradicalization programs, the efforts often rely on repentant offenders who can establish trust and credibility with extremists or recruits.¹⁷⁶ Indeed, one psychologist notes the vital importance of personal relationships in deradicalization and disengagement, observing that “[c]hange often hinges on a relationship with a mentor or

¹⁷² See Berkell, *supra* note 139, at 42–43.

¹⁷³ Skinner, *supra* note 168, at 376 (“Developing more robust sentencing guidelines for the War on Terror would, therefore, reflect America's traditional role at the forefront of advancing the laws and customs of war and serve as a testament to its continued global leadership . . . [and] demonstrate the United States' commitment to waging an effective, yet transparent and legitimate, War on Terror.”).

¹⁷⁴ See Clark McCauley, *Toward a Psychology of Humiliation in Asymmetric Conflict*, 72 AM. PSYCHOLOGIST 255, 256, 263 (2017).

¹⁷⁵ HORGAN, WALKING AWAY, *supra* note 110, at 155.

¹⁷⁶ See *id.* at 149 (“[A] critical factor influencing the potential impact and effectiveness of any communicator is in the identification of sources more credible for counter-message communication. . . . [I]t may be useful to encourage those who have disengaged from terrorist activity to become more vocal in dispelling the attractions and lures of involvement in movements.”); see also Richard Barret and Laila Bokhari, *Deradicalization and Rehabilitation Programmes Targeting Religious Terrorists and Extremists in the Muslim World: An Overview*, in LEAVING TERRORISM BEHIND, *supra* note 132, at 170, 173 (“[T]he best-developed program[s] . . . rely on a number of mechanisms, such as: 1[.] the role of a go-between who can influence the terrorist (often from family or peer group); . . . 3[.] repentant terrorists taking an active part; . . . 5[.] some form of continued/subsequent monitoring to avoid recidivism[.]”).

friend who supports and affirms peaceful behavior.”¹⁷⁷ Other research has noted that successful efforts to promote moderation “derive their persuasive power from the epistemic authority of their source.”¹⁷⁸ Moreover, such personal narratives may not only affect those in the nascent stages of engagement. Horgan argues that “powerful stories . . . about [prior supporters’] disillusionment with [a] movement and its methods, and how they were misled or exploited”¹⁷⁹ can sow doubt among more committed members “experiencing the seeds of psychological disengagement.”¹⁸⁰ Eschewing a categorical approach, Horgan distinguishes those who are “deeply engaged” through their role from those who are “deeply committed” in their ideology.¹⁸¹ He concludes that the former, at least, are not “impervious to counter-narrative.”¹⁸²

Such research supports the notion that even those well on the path to extremist activity may not always be refractive to intervention, disengagement, and even deradicalization. During the past two decades, efforts by former extremists around the world provide evidence of this claim.¹⁸³ Most importantly, without such interlocutors to mentor and guide, potential offenders may believe that “there is no possibility of exit” and persist in extremism despite disillusionment with an ideology, a group, or its leaders.¹⁸⁴ Thus, the broad application of the terrorism enhancement to varied material support offenses not only conflicts with the Guidelines’ principles but also potentially weakens overarching counterterrorism goals.

VI. RECOMMENDATIONS

The scourge of terrorism has plagued American security for four decades, and spectacular attacks have long since dispelled naïve notions that the U.S. homeland is safe from such indiscriminate violence. Following the

¹⁷⁷ RENEE GARFINKEL, U.S. INST. OF PEACE, *PERSONAL TRANSFORMATIONS: MOVING FROM VIOLENCE TO PEACE I* (2007). Garfinkel’s observation has been repeated. *See, e.g.*, John Horgan, *Individual Disengagement: A Psychological Analysis*, in *LEAVING TERRORISM BEHIND* *supra* note 132, at 21.

¹⁷⁸ *See* Arie W. Kruglanski, Katarzyna Jasko, Marina Chernikova, Michelle Dugas & David Webber, *To the Fringe and Back: Violent Extremism and the Psychology of Deviance*, 72 *AM. PSYCHOLOGIST* 217, 220 (2017); *see also* HORGAN, *WALKING AWAY*, *supra* note 110, at 149 (“[T]he effectiveness of any counter-narrative will rely heavily on the credibility and relevant expertise of the communicator.”).

¹⁷⁹ *See* Tore Bjørgo & John Horgan, *Conclusions*, in *LEAVING TERRORISM BEHIND* *supra* note 132, at 248.

¹⁸⁰ HORGAN, *WALKING AWAY*, *supra* note 110, at 150.

¹⁸¹ *See id.* at 149–50 (citing Kirsten Hundeide, *Becoming a Committed Insider*, 9 *CULTURE & PYSCH.* 107 (2003)).

¹⁸² *Id.* at 150.

¹⁸³ *See, e.g.*, Tore Bjørgo & John Horgan, *Conclusions*, in *LEAVING TERRORISM BEHIND* *supra* note 132, at 255 (discussing the Quilliam Foundation, a nonprofit “think tank devoted to counter violent radicalization among Muslims”).

¹⁸⁴ HORGAN, *WALKING AWAY*, *supra* note 110, at 155.

Oklahoma City bombing and first World Trade Center attack, Congress set out to “provide the necessary tools . . . to successfully deter terrorism . . . [and] to prosecute and punish such crimes.”¹⁸⁵ Section 3A1.4 of the Sentencing Guidelines provides one such tool. The terrorism enhancement guarantees that convicted, violent extremists remain behind bars, and lengthy sentences may deter others who contemplate such heinous acts. Nevertheless, due to the enhancement’s broad wording and the inclusion of material support as an underlying offense, it applies not only to the “deeply engaged” and “deeply committed,” but also to nonviolent, first-time offenders providing paltry, indirect, or attenuated material support. This sweeping scope creates inconsistent sentencing variations, undermines the goals of the Sentencing Guidelines, and denies first-time offenders the chance for disengagement and rehabilitation.

Some have argued that the broad sweep of Section 3A1.4 does not match Congress’s intent and that it should be removed from the Guidelines altogether.¹⁸⁶ Dissenting in *Graham*, Judge Cohn found that legislative history demonstrated congressional intent that “the ‘Federal crime of terrorism’ enhancement . . . be applied only in a narrow set of circumstances.”¹⁸⁷ Judge Cohn found that Congress feared that the word terrorism “carries far-reaching connotations that is not to be used indiscriminately and must be carefully defined.”¹⁸⁸ Similarly, in a persuasive 2010 article, James McLoughlin argued that “it is clear from the statutory scheme that Congress did not intend to punish a financial supporter [of an organization that commits a terrorist act] as severely as an individual who commits the act itself.”¹⁸⁹ Although the material support statute carries a maximum sentence of fifteen-years imprisonment (unless the offense results in a death),¹⁹⁰ statutes involving terrorist acts are more severe.¹⁹¹ According to McLoughlin, this disparity demonstrates that Congress considered some material support offenders less culpable and less dangerous than the terrorist actors they support.¹⁹² For these reasons, McLoughlin argued that the terrorism enhancement “represents the worst in U.S. sentencing policy . . . and should

¹⁸⁵ H.R. REP. NO. 104-383, at 42 (1995).

¹⁸⁶ See, e.g., *United States v. Graham*, 275 F.3d 490, 536–37 (6th Cir. 2001) (Cohn, J., dissenting) (explaining that the application of the Section 3A1.4 sentencing enhancement to the defendant was beyond Congress’s intent); McLoughlin, Jr., *supra* note 8, at 62–69, 117.

¹⁸⁷ *Graham*, 275 F.3d at 529.

¹⁸⁸ *Id.* at 534–37 (“[I]n order to keep a sentencing judge from assigning a terrorist label to crimes that are truly not terrorist, and to adequately punish the terrorist for his offense, it is appropriate to define the term.”).

¹⁸⁹ McLoughlin, *supra* note 8, at 68.

¹⁹⁰ 18 U.S.C. § 2339A(a) (2018).

¹⁹¹ See *id.* § 2332(a)–(b).

¹⁹² McLoughlin, *supra* note 8, at 68.

be abandoned.”¹⁹³ Unfortunately, few legislators would support such a controversial position, and so the recommendation is not practical.

Others have argued that Congress and the Sentencing Commission should promulgate more defined guidance and establish a uniform threshold for triggering the terrorism enhancement.¹⁹⁴ One commentator has suggested the adoption of sentencing criteria that consider the defendant’s “substantial steps toward a terrorism offense,” their role in the organization, and the extent of their participation.¹⁹⁵ Others find that “the answer to the problem is . . . to affirm the discretion of trial judges to modify the enhancement’s application in individual cases, while clarifying and limiting the grounds on which they may do so.”¹⁹⁶ But under *Booker*, the Guidelines are merely advisory, and Section 4A1.3 already empowers courts to weigh such factors and depart downward under exceptional circumstances. It is possible that clearer guidance would mitigate disparities, but it does not address the root cause.

Ultimately, a two-part legislative fix provides the most effective way to reestablish proportionality and uniformity in sentencing material support crimes. First, Congress should strike the “intended to promote” prong from the terrorism enhancement. In *Awan*, the Second Circuit found this phrase to mean any activity designed “to encourage, further, or bring about a federal crime of terrorism.”¹⁹⁷ However, such a meaning covers all material support activity and thereby renders § 2339 superfluous. By limiting the enhancement’s application to those crimes that directly “involve” terrorism, the government would still deter violent activity and ensure dangerous extremists serve lengthy sentences. But a streamlined Section 3A1.4 would cabin the enhancement’s scope, clarify the analysis for judges, and engender a more uniform sentencing construct.

Second, Congress should remove material support from the § 2232b(g)(5) list of underlying offenses (or exclude it for the purposes of the terrorism enhancement). This Note has shown that material support includes a dizzying array of activity and typically involves a wide range of criminal actors. By removing the § 2232b(g)(5) reference to material support offenses, the terrorism enhancement would not apply to this broad category and sentencing judges would be free to weigh the § 3553 factors

¹⁹³ *Id.* at 117.

¹⁹⁴ See generally Said, *supra* note 31 (calling on Congress, the Sentencing Commission, and federal courts to “establish standards to better help a court decide when a heightened punishment might be warranted, free from unsupported assumptions about the nature of terrorism or a particular defendant”).

¹⁹⁵ Skinner, *supra* note 168, at 371.

¹⁹⁶ Brown, *Punishing Terrorists*, *supra* note 13, at 521; see also Goldberg Knox, *supra* note 30, at 322–23 (recommending courts construe § 3993B narrowly so that it does not infringe on First Amendment rights).

¹⁹⁷ *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010).

as necessary. Many material support offenses—such as money laundering or fundraising—do provide vital resources for successful terrorist organizations and constitute grave threats to national security. In such instances, incapacitation, deterrence, and retribution justify lengthy periods of incarceration, and judges could sentence offenders to the maximum penalty (or life for crimes resulting in death). Moreover, if the current sentencing range for § 2339(a)–(c) is insufficient, Congress and the Commission can enhance the penalty for specific material support offenses in a way that ensures judicial discretion but also meets societal goals. Such an approach is preferable to a one-size-fits-all solution that engenders disparities, ignores the potential for disengagement, and increases the chances of recidivism.

This recommendation is not unprecedented. In a 2004 hearing before the Senate Committee on the Judiciary, Senator Patrick Leahy echoed concerns of an Assistant Attorney General who had urged Congress to “clarify the material support laws to avoid government overreaching” and “draw the lines very clearly” between “certain core activities that constitute material support for terrorists” and those that do not.¹⁹⁸ Unfortunately, few elected officials will be eager to direct the Sentencing Commission to narrow the enhancement’s scope. The United States has fought the “War on Terror” for two decades, and leniency for violent extremists and their supporters does not play well in polls and sound bites. Nonetheless, severe, indiscriminate sentencing has profound implications for U.S. national security.¹⁹⁹ This Note has attempted to show that contemporary psychology and international case studies suggest a more tailored approach to sentencing can support national security goals. Disproportionate sentences facilitate further radicalization, belie U.S. ideals, and undermine narratives to counter violent extremism abroad.²⁰⁰ Furthermore, treating nonviolent offenders the same as the most hardened criminals impedes their eventual return to society and deprives U.S. communities of potential emissaries who could address the

¹⁹⁸ *Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 158 (2004) (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (discussing PATRIOT Act, material support prosecutions, and post-9/11 concerns about preventing future attacks).

¹⁹⁹ See e.g., *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886, at *12 n.22 (D. Colo. July 18, 2018) (“I am . . . mindful of the fears that the . . . application of the Terrorism Enhancement . . . has unintended national security consequences.”); Skinner, *supra* note 168, at 371 (remarking that the length of Section 3A1.4 sentences harms national security by “contributing to the development or entrenchment of terrorist networks”); McLoughlin, *supra* note 8, at 76 (observing that “draconian anomalies” in the U.S. sentencing of foreign nationals can engender heightened anger about perceived bias in the U.S. system).

²⁰⁰ See Skinner, *supra* note 173, at 376 (arguing that a more proportional sentencing framework would “reflect America’s traditional role at the forefront of advancing the laws and customs of war[,] serve as a testament to its continued global leadership[, and] would demonstrate the United States’ commitment to waging an effective, yet transparent and legitimate, War on Terror”).

root causes of radicalization. The terrorism enhancement's broad application to material support offenses presents a deceptively easy solution, but it compounds the challenges of a complex problem. By casting proposed reforms to the terrorism enhancement's scope in this national security context, legislators may prove more amenable to approaching the topic.

CONCLUSION

The late Paul Wilkinson, founder of the Centre for the Study of Terrorism and Political Violence at St. Andrews, was known to quip that "terrorism is too important a problem to leave to politicians."²⁰¹ Similarly, this Note contends that terrorist sentencing is too nuanced a problem to leave to impersonal, rigid formulae. Horgan notes that the United States and its allies have always gravitated toward automated counterterrorism solutions, like biometric scans, imagery identification, and other technological panaceas.²⁰² The automatic application of the terrorism enhancement to nonviolent offenders with no criminal history represents the sentencing equivalent of this phenomenon. Simple solutions always entice but rarely succeed. A narrower application of Section 3A1.4 would enable judges to consider an offender's unique characteristics and history in line with the Guidelines' overarching goals. Such judicial flexibility does not represent a "soft on terrorism" approach. Rather, tailored sentencing diminishes the chance that nonviolent, first-time offenders are further radicalized during an unnecessarily lengthy sentence, incentivizes sustained disengagement, and creates a pool of credible emissaries to counter radical narratives before violence occurs. Far from undermining U.S. national security, tailored sentencing for material support offenses can serve an integral role in a holistic counterterrorism strategy.

²⁰¹ See HORGAN, *PSYCHOLOGY*, *supra* note 106, at 168.

²⁰² HORGAN, *WALKING AWAY*, *supra* note 110, at 140 ("[T]here appears to be a natural attraction to automated solutions, whether it is automatic image identification, bio-sensor detection, or some other effort.").