

# Charity of the Heart and Sword: The Material Support Offense and Personal Guilt

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## I. INTRODUCTION

The prevention of terrorist attacks is a paramount concern for the United States government.<sup>1</sup> An invaluable part of the effort is aimed at cutting the economic legs of international terrorism by proscribing Americans from providing financial resources to any foreign terrorist organization (FTO).<sup>2</sup> Although the statutory scheme for banning such support, 18 U.S.C. § 2339B, has existed since 1996,<sup>3</sup> the government only began aggressively prosecuting the crime after September 11, 2001.<sup>4</sup> Since then, much debate has revolved around the appropriate interpretation of the mens rea element of § 2339B.<sup>5</sup> Currently, if a donor of material support knows that the recipient has been designated as an FTO or has engaged in terrorism or terrorist activity, the donor is criminally liable, even if the donor intended the aid to be used lawfully.<sup>6</sup> Congress has taken the position that all support—even humanitarian and non-violent aid—strengthens terrorist organizations and their ability to

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1. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996) (placed at the end of 18 U.S.C. § 2339B but not codified) [hereinafter AEDPA].

2. *Id.*

3. *Id.* § 303.

4. Accurate statistics on the charging decisions of federal prosecutors are not easily attained, but the numbers do show an apparent dramatic increase. See Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 20 n.124 (2005) (“As of December 2001, the government had prosecuted only three cases involving material support to terrorist organizations.”); DAVID COLE & JAMES DEMPSEY, *TERRORISM AND THE CONSTITUTION* 127 (2d ed. 2002). However, within three years after September 11, 2001, the government had charged fifty-six individuals with violating § 2339B. See Chesney, *supra*, at 20.

5. Randolph N. Jonakait, *The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization*, 56 BAYLOR L. REV. 861, 862 (2004).

6. 18 U.S.C. § 2339B(a)(1) (2004).

execute terrorist attacks.<sup>7</sup> Thus, even support aimed at influencing FTOs to pursue solely peaceful objectives or efforts to aid non-affiliated civilians who live in areas controlled by FTOs can currently be prohibited by § 2339B.

However, this statutory “knowledge standard” raises distressing substantive due process issues in light of the Fifth Amendment’s requirement that criminal statutes punish those with personal guilt. “The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom and due process of law.”<sup>8</sup> The doctrine provides that guilt is personal, and it “ought not lightly be imputed to a citizen who . . . has no evil intentions or consciousness of wrongdoing.”<sup>9</sup> In the seminal case addressing the intersection of personal guilt and criminal organizations, *Scales v. United States*,<sup>10</sup> the Supreme Court announced a test to determine whether personal guilt is satisfied: when a punishment is imposed on a person because of that person’s relationship with a criminal organization, the Due Process Clause of the Fifth Amendment<sup>11</sup> requires that the relationship between the individual’s conduct and the criminal activity of the organization be substantial.<sup>12</sup>

Section 2339B may run afoul of the *Scales* test because there are many situations where a donation from a donor with an innocent intent may have no relationship to international terrorism, yet personal guilt is nonetheless imputed to the donor. One district court determined that in order to cure § 2339B of this constitutional pitfall, a specific intent standard should be read into the statute, which would render a donor liable only if the donation was specifically intended to support the illegal aims of an FTO.<sup>13</sup>

This Comment contends that, while the knowledge standard is constitutionally infirm, the specific intent standard, under *Scales*, is constitutionally unnecessary. The specific intent standard is also unduly burdensome for the government, as it permits skillful terrorist sympathizers to evade detection and slip through the prosecutorial net. However, another intent level exists that can cast a net equipped with a far finer mesh: recklessness. Section 2339B should be amended to require that a donor of

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7. See AEDPA, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996).

8. *Bridges v. Wixon*, 326 U.S. 135, 163 (1945).

9. *United States v. Dotterweich*, 320 U.S. 277, 286 (1943).

10. 367 U.S. 203 (1961).

11. The Due Process Clause of the Fifth Amendment provides that “No person shall . . . be deprived of life, liberty or property, without due process of law.” U.S. CONST. amend. V.

12. *Scales*, 367 U.S. at 224–25.

13. *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004), *reconsideration denied*, 329 F. Supp. 2d 1294 (M.D. Fla. 2004).

material support have a reckless intent. A recklessness standard passes constitutional muster under *Scales*, and simultaneously preserves the government's ability to deter support for terrorism.

In Part II, this Comment details the designation process of FTOs and examines the wide array of purposes and activities in which FTOs engage. Part III chronicles how § 2339B has evolved through amendments and judicial interpretation. Part IV establishes that *Scales* controls the personal guilt analysis and identifies due process concerns implicated by *Scales* that have been overlooked by the courts. Finally, Part V argues a recklessness standard is the most appropriate fix to § 2339B and proposes a model amendment to that end.

## II. THE DESIGNATION AND SPECTRUM OF FOREIGN TERRORIST ORGANIZATIONS

Section 2339B acts as a uniform prohibition on the provision of material support to FTOs. But not all FTOs operate in a uniform manner, which can create serious due process implications. The following Part explains how and why organizations are designated as FTOs. And, in order to appreciate how a recklessness standard would apply to a spectrum of FTOs, this Part also analyzes and attempts to categorize FTOs through three distinctions that highlight their important differences.

Discretion to designate an organization as an FTO is afforded to the U.S. Secretary of State under 8 U.S.C. § 1189.<sup>14</sup> The Secretary must determine that (1) "the organization is a foreign organization;" (2) "the organization engages in terrorist activity;"<sup>15</sup> and (3) "the terrorist activity of the organization threatens the security of the United States."<sup>16</sup> Then Congress must approve the Secretary's designation for the organization to be registered.<sup>17</sup> An organization being considered for designation need not be notified and has no right to be involved in the designation

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14. 8 U.S.C. § 1189 (2004).

15. "Terrorist activity," as used by § 2339B, is defined by a list of specific acts that are "unlawful under the laws of the place where [they are] committed." *Id.* § 1182(a)(3)(B)(iii). Terrorist activity includes the following: high-jacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; a violent attack upon an internationally protected person or upon the liberty of such a person; an assassination; the use of any biological agent, chemical agent, or nuclear weapon or device; the use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain) with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; or a threat, attempt, or conspiracy to do any of the foregoing. *Id.*

16. *Id.* § 1189(a)(1).

17. *Id.* § 1189(a)(2)(A)(i).

process.<sup>18</sup> However, once designated, an FTO has the right to challenge the designation in the Court of Appeals for the District of Columbia Circuit.<sup>19</sup> There are several ramifications for an organization so designated,<sup>20</sup> including the applicability of the material support statute.<sup>21</sup>

Forty-two organizations have been designated as FTOs as of October 2005.<sup>22</sup> From the Basque Fatherland and Liberty group in Spain, to the Aum Shinrikyo of Japan, to the Revolutionary Armed Forces of Colombia, to al-Qaeda, the designated organizations span the globe and the ideological spectrum.<sup>23</sup>

Three distinctions help illustrate the fundamental differences among FTOs. First, some have peaceful political goals—like securing rights or freedoms through self-determination—while others have seemingly unrealistic or patently iniquitous goals—like changing the global structure and killing large segments of human society. Representing the former group are such FTOs as the Kurdistan Workers Party (PKK)<sup>24</sup> and the Liberation Tigers of Tamil Eelam (LTTE). In particular, the PKK, a designated FTO since 1997,<sup>25</sup> exists to “establish an independent, democratic Kurdish state in the Middle East.”<sup>26</sup> The Kurds, who number between 15 and 20 million, speak their own language, have their own culture, and live in a region of the Middle East known as Kurdistan, which spans contiguous parts of Turkey, Iran, Iraq, and Syria.<sup>27</sup> Efforts to create an independent Kurdistan began after the dissolution of the Ottoman Empire, but the results have often been disastrous.<sup>28</sup> The Kurds have faced bans on their language and traditional clothing, forced migration and dilution, and sometimes outright annihilation.<sup>29</sup> Similarly, the LTTE

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18. *Id.* § 1189(a)(2)(A)(i), (3)(A).

19. *Id.* § 1189(b)(1).

20. In addition to the applicability of § 2339B, once designated, the organization’s members cannot enter the United States and, if they are found in U.S. territory, can be removed; any U.S. financial institution that becomes aware that it has possession of funds in which an FTO has an interest must retain possession of the funds and report it to the Office of Foreign Assets Control of the U.S. Department of the Treasury. U.S. DEP’T OF STATE, FOREIGN TERRORIST ORGANIZATIONS FACT SHEET, <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited Feb. 18, 2007).

21. *Id.*

22. *Id.*

23. *Id.*

24. The PKK also uses the name Kongra-Gel. *Id.*

25. *Id.*

26. FED’N OF AM. SCIENTISTS, INTELLIGENCE RES. PROGRAM, KURDISTAN WORKERS’ PARTY INFORMATION, <http://www.fas.org/irp/world/para/pkk.htm> (last visited Feb. 18, 2007).

27. *Who are the Kurds?*, THE WASH. POST, <http://www.washingtonpost.com/wp-srv/inatl/daily/feb99/kurdprofile.htm> (last visited Feb. 18, 2007).

28. *Id.*

29. *Id.* In Halabja, Iraq, five thousand Kurds were killed by a poison gas attack in 1988 by the Iraqi government. *Id.*

“seeks to protect the human rights of Tamils in Sri Lanka” and to create an autonomous Tamil homeland in northeastern Sri Lanka.<sup>30</sup>

In contrast to FTOs created for the sole purpose of acquiring autonomy, some FTOs are not satisfied with merely establishing an independent state or sparking political change; instead, these FTOs harbor additional, politically unimaginable or intrinsically violent objectives. For example, the Palestine Islamic Jihad is committed to the “destruction of Israel through holy war.”<sup>31</sup> Another example is al-Qaeda, which exists to “establish a pan-Islamic Caliphate throughout the world.”<sup>32</sup> These organizations, in contrast to the PKK or LTTE, necessarily need violence to accomplish their objectives. However, organizations are not designated as FTOs because of their choice of ends; rather, it is the organization’s choice of means that causes it to be so designated.

The second distinction looks at the FTO’s means. Some FTOs are categorized as “dual method”<sup>33</sup> organizations because they engage in both violent methods and legitimate political or humanitarian efforts. Other FTOs are categorized as “single method” organizations because they primarily use terrorism to further their objectives.<sup>34</sup>

For example, with varying consistency,<sup>35</sup> the PKK has engaged in sporadic “rural-based insurgency activities,”<sup>36</sup> but the organization has also “sponsor[ed] international political forums, peace conferences, and [Kurdish] cultural festivals.”<sup>37</sup> Thus, because of the breadth of sponsored activities, members of dual method organizations could conceivably support only peaceful projects and need not necessarily endorse their organization’s use of violence.<sup>38</sup> At the other end of the spectrum are single method organizations, like al-Qaeda, which admittedly have little interest in peacefully obtaining their goals and instead commit themselves to executing catastrophic terrorist attacks aimed at coercing their enemies

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30. Humanitarian Law Project v. U.S. Dep’t of Justice, 352 F.3d 382, 390 (9th Cir. 2003) [hereinafter *HLP II*], vacated by Humanitarian Law Project v. U.S. Dep’t of State, 393 F.3d 902 (9th Cir. 2004).

31. U.S. DEP’T OF STATE, BACKGROUND INFORMATION ON DESIGNATED TERRORIST ORGANIZATIONS 103, available at <http://www.state.gov/documents/organization/10300.pdf> [hereinafter BACKGROUND].

32. *Id.* at 105.

33. Some courts have also described dual method organizations as “bifarious.” See, e.g., United States v. Marzook, 383 F. Supp. 2d 1056, 1067 (N.D. Ill. 2005).

34. Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 465 (2005).

35. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS AND PRACTICES: TURKEY (2001), <http://www.state.gov/g/drl/rls/hrrpt/2000/eur/844.htm>.

36. *Id.*

37. *HLP II*, 352 F.3d 382, 389 (9th Cir. 2003).

38. Stacy, *supra* note 34, at 465.

into submitting to their demands.<sup>39</sup> For example, an al-Qaeda Training Manual, discovered and seized by British police in Manchester, states that “Islamic governments have never and will never be established through peaceful solutions and cooperative councils.”<sup>40</sup>

A third important characteristic to take into account when analyzing FTOs is that some retain de facto control over certain territory or non-FTO affiliated civilians, while others operate in the midst of functional states. For example, the LTTE, in order to “protect the human rights of Tamils in Sri Lanka and achieve self-determination,”<sup>41</sup> has maintained de facto control over northeastern Sri Lanka and established a governmental structure for over 500,000 Tamils.<sup>42</sup> Under this structure, the LTTE provides social services, education, a civilian police force, and even manages the economy.<sup>43</sup> The PKK has also established a quasi-governmental structure in parts of Turkey.<sup>44</sup> Thus, donors desiring to support these non-FTO affiliated civilians must necessarily act with the acquiescence or support of these designated terrorist organizations. Most FTOs, however, operate covertly inside of functioning states and retain no territorial sovereignty or control over non-FTO affiliated civilians.<sup>45</sup>

The above three distinctions are not intended to serve as a critique of the decision to designate organizations as FTOs; but they do illustrate that not all FTOs desire the same ends, employ the same means, or operate under similar circumstances—differences that can have significant due process implications under *Scales*. The one element FTOs have in common is that they are all subject to § 2339B.

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39. See, e.g., U.S. Dep’t of Justice, *Al-Qaeda Training Manual* 3, [http://www.usdoj.gov/og/manualpart1\\_1.pdf](http://www.usdoj.gov/og/manualpart1_1.pdf).

40. *Id.*

41. *HLP II*, 352 F.3d at 390.

42. See *Oversight Hearing on Amendments to the Material Support for Terrorism Laws – Section 805 of the USA PATRIOT Act at Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004* (2005), <http://www.tamilnation.org/intframe/us/terrorism/05aclu.htm> (last visited Feb. 17, 2007) (testimony of Ahilan T. Arulanantham, Staff Attorney for the American Civil Liberties Union of Southern California) [hereinafter *Oversight Hearing*].

43. *HLP II*, 352 F.3d at 391.

44. *Id.* at 389 (quoting *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205, 1208 (C.D. Cal. 1998)).

45. See, e.g., BACKGROUND, *supra* note 31. Another FTO with significant territorial control is Hamas, which now is in majority control of Palestine after its victory at the polls on January 26, 2006. *Hamas Invited to Form Government*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/4654220.stm](http://news.bbc.co.uk/2/hi/middle_east/4654220.stm) (last visited Feb. 17, 2007). Unlike the PKK or LTTE, Hamas does not operate in the midst of a functional state. Instead, Hamas effectively *is* the functional state. As of publication, however, Hamas has entered into a power-sharing agreement with the rival, and often considered more peaceful, Fatah faction. Scott Wilson, *Palestinian Legislators Approve Unity Cabinet*, WASH. POST, Mar. 18, 2007, at A20.

## III. 18 U.S.C. § 2339B AS IT STANDS

The current mens rea requirement of § 2339B is the product of Congress's responses to terrorist attacks and courts' responses to constitutional attacks. This Part describes how Congress has clearly expressed its preference for the knowledge standard through the birth and evolution of § 2339B. It also briefly discusses the three interpretations of § 2339B's mens rea requirement. It ends by examining the multiple constitutional challenges to § 2339B based on the due process requirement of personal guilt.

*A. The Development of § 2339B and Congressional Preference for the Knowledge Standard*

Congress reacted to the terrorist bombing of the World Trade Center in 1993 by passing a series of bills aimed at cutting off economic support to terrorist organizations.<sup>46</sup> Included in these bills was the first material support statute, codified as 18 U.S.C. § 2339A. Section 2339A criminalized the provision of "material support" to any recipient when the donor either "kn[ew] or intend[ed] that [the support would] be used in preparation for, or in carrying out, a violation" of any one of several offenses, not necessarily terrorist-related.<sup>47</sup> But § 2339A did not foreclose the possibility of donors supporting criminals: a donor would not be liable for supporting a criminal so long as he or she did not know or specifically intend the aid to do so. Critics of § 2339A cited this "specific intent standard" as creating a dangerous loophole in the economic fight against terrorism.<sup>48</sup> Essentially, all forms of support short of weaponry could be supplied to terrorist organizations provided that the donor expected the aid to be used lawfully. Section 2339A also created prosecutorial hardship by requiring that the donor's support be traced to a specific act of terrorism, which the 9/11 Commission in 2004 noted was "a practical impossibility."<sup>49</sup>

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46. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of U.S. Code).

47. 18 U.S.C. § 2339A(a) (2002).

48. Chesney, *supra* note 4, at 13 (citing Todd J. Gillman, *FBI Looks Into Islamic Fund Raising: Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A).

49. *Id.* (quoting NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 31-32 (2004), available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf)).

Congress addressed this loophole<sup>50</sup> by passing the Anti-Terrorism and Effective Death Penalty Act (AEDPA) following the terrorist bombing of the Alfred P. Murrah building in Oklahoma City in 1995.<sup>51</sup> AEDPA created a second material support law—codified as 18 U.S.C. § 2339B—designed to better equip the government to fight terrorism by omitting a specific intent standard when the recipient of the aid is a designated FTO.<sup>52</sup> Thus, in 1996, a person violated § 2339B(a)(1) by “knowingly” providing “material support or resources” to an FTO.<sup>53</sup> The term “material support or resources” was borrowed from § 2339A and broadly defined as follows:

The term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>54</sup>

Congress later amended § 2339B with the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) in October 2001; the potential prison term was increased from a 10- to a 15-year limit, and, if death results from a violation, the penalty can be up to life in prison.<sup>55</sup>

Although the term “knowingly” indicated that Congress intended to require some type of mens rea in order for an individual to violate § 2339B,<sup>56</sup> just exactly what level of knowledge, and what the knowledge applied to, remained unclear.<sup>57</sup> Three predominant constructions of the mens rea requirement for the statute subsequently developed: (1) knowledge that a person is providing something (that happens to be

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50. A House Judiciary Committee report “explained that § 2339B would go even further than § 2339A by criminalizing for the first time even donations that are intended only for humanitarian purposes.” James P. Fantetti, *John Walker Lindh, Terrorist? Or Merely a Citizen Exercising his Constitutional Freedom: The Limits of the Freedom of Association in the Aftermath of September Eleventh*, 71 U. CIN. L. REV. 1373, 1382 (2003).

51. See AEDPA, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996).

52. Stacy, *supra* note 34, at 462.

53. 18 U.S.C. § 2339B(a)(1) (2004).

54. *Id.* § 2339A(b)(1).

55. *Id.* § 2339B. With life imprisonment on the line if death results from a violation, Congress likely intended to convey the seriousness with which it considers the provision of material support. But it is also worth noting that the tracking required to determine if a death results from a violation would present many of the same evidentiary problems as § 2339A.

56. *HLP II*, 352 F.3d 382, 400 (9th Cir. 2003).

57. Jonakait, *supra* note 5, at 862.



material support) to someone (who happens to be a member of an FTO)—a “strict liability standard;”<sup>58</sup> (2) knowledge that the recipient is a designated FTO or knowledge of the activities that would cause the recipient to be so designated—a “knowledge standard;”<sup>59</sup> and (3) knowledge or desire that the recipient would use the support to further the illegal activities of the FTO—a “specific intent standard.”<sup>60</sup>

After reviewing the varying judicial interpretations of § 2339B’s scienter requirement (discussed *infra*), Congress again amended § 2339B(a)(1) in December 2004 to articulate exactly which mens rea requirement it intended: “To violate [§ 2339B], a person must have knowledge that the organization is a designated terrorist organization, that the organization has engaged or engages in terrorist activity, or that the organization has engaged or engages in terrorism.”<sup>61</sup> This latest amendment expressly adopts the knowledge standard.<sup>62</sup> Because a donor need not desire his donation be used illicitly, the result is that no humanitarian aid can be supplied to any FTO through the hands of even well-intentioned Americans. Indeed, Congress intended as much. The findings of Congress in enacting AEDPA state that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>63</sup>

The only evidence of a contrary intent from the Congressional Record stems from a single statement ascribed to Senator Orrin Hatch, a co-sponsor of AEDPA, made in 1996:

This bill . . . includes provisions making it a crime to knowingly provide material support *to the terrorist functions of* foreign groups designated by a Presidential finding to be engaged in terrorist activities . . . . [N]othing in the Constitution provides the right to engage in violence against fellow citizens or foreign nations. Aiding and financing foreign *terrorist bombings* is not constitutionally protected

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58. A strict liability standard requires no intent, except the desire to provide something to someone. A donor can be liable even if he or she did not know the recipient had any relationship to a terrorist organization.

59. This knowledge standard, or “guilty knowledge,” while a form of mens rea, does not take into account actual intent; thus, a donor can be convicted under the knowledge standard so long as he or she knew the recipient was an FTO, but whatever the donor actually intended to happen to the donation (for example, intended it to feed children or purchase explosives) is irrelevant.

60. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1298 (M.D. Fla. 2004). Although the specific intent standard was irreconcilable with congressional intent, its proponents argued it was necessary for § 2339B to be constitutional. *Id.*

61. 18 U.S.C. § 2339B(a)(1) (2004).

62. The 2004 amendment also further defined the provision of personnel and provided an exception to the statute where a person may not be criminally liable for providing “personnel,” “training,” or “expert advice or assistance” if the person had the permission of the Secretary of State with the concurrence of the Attorney General. *Id.* § 2339B(j).

63. AEDPA, Pub. L. No. 104-32, § 303, 110 Stat. 1214 (1996).

activity . . . . I am convinced we have crafted a narrow but effective designation provision which meets these obligations while safeguarding the freedom to associate, which none of us would willingly give up.<sup>64</sup>

Senator Hatch did not declare it would be a crime to knowingly provide support to an FTO; he instead stated it will be a crime to knowingly provide support to an FTO's terrorist functions, such as bombings. This is equivalent to the specific intent standard. However, it is likely that Senator Hatch misspoke because he made no other similar statements on record, and he co-sponsored and voted for § 2339B even though the bill lacked a specific intent requirement.<sup>65</sup>

Regardless, the language of § 2339B and its subsequent development strongly suggest that Congress intended the knowledge standard and thereby intended to prevent any American from supplying any aid to any FTO. Such clear intent from Congress can only be overridden if the statute's link between punishment and culpability is unconstitutional.<sup>66</sup>

### *B. Judicial Interpretation of the Mens Rea Requirement for § 2339B*

There have been multiple constitutional challenges targeting the mens rea requirement of § 2339B, including arguments based on freedom of association, vagueness, overbreadth, and the due process requirement of personal guilt. Although most of the challenges have not been successful,<sup>67</sup> a few courts have held that some terms of "material support" are impermissibly vague.<sup>68</sup> This Comment focuses on

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64. 142 CONG. REC. S3352-01 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

65. Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1147 (C.D. Cal. 2005) [hereinafter *HLP III*].

66. Stacy, *supra* note 34, at 468.

67. See, e.g., *HLP III*, 380 F. Supp. 2d at 1134; United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (*en banc*); Boim v. Quranic Literacy Inst., 291 F.3d 1000 (7th Cir. 2002); United States v. Sattar, 272 F. Supp. 2d 348, 363 (S.D.N.Y. 2003); United States v. Lindh, 212 F. Supp. 2d 541, 572 (E.D. Va. 2002).

68. See, e.g., *Hammoud*, 381 F.3d at 329; *Boim*, 291 F.3d at 1026; Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133-34 (9th Cir. 2000) [hereinafter *HLP I*], *cert. denied*, Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001). Although the numerous challenges based on the vagueness doctrine have encountered some success, it appears that courts may be applying the wrong doctrine, and possibly even substituting their personal guilt concerns for a vagueness deficiency. In order to withstand a vagueness challenge, a law must be "sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Ninth Circuit in *HLP I* held that the terms "personnel" and "training" were impermissibly vague because the court could construe situations where simply advocating the cause of an FTO could be considered providing "personnel" and where teaching international law to members of an FTO could be considered providing "training." 205 F.3d at 1137-38. Finding that such a result was unacceptable, the *HLP I* court held that these terms provided insufficient guidance as to what type of behavior is proscribed and consequently were unconstitutional and unenforceable. *Id.* at 1138. However, these courts may be

challenges based on the Fifth Amendment's substantive due process requirement of personal guilt,<sup>69</sup> and concentrates primarily on three decisions that have solidified the debate as between the knowledge and specific intent standards.

### 1. Humanitarian Law Project v. United States Department of Justice

The Ninth Circuit first addressed a due process personal guilt challenge to § 2339B in 2003 with its decision in *Humanitarian Law Project v. United States Department of Justice* (HLP II<sup>70</sup>).<sup>71</sup> In *HLP II*, the plaintiffs sought to provide aid to the nonviolent humanitarian and political efforts of the LTTE and PKK.<sup>72</sup> Fearing their donations would be considered material support, the plaintiffs challenged § 2339B on the grounds that the statute did not require any form of personal guilt.<sup>73</sup> The government—this being prior to the 2004 amendment that clarified congressional intent—had adopted a strict liability interpretation of § 2339B and argued personal guilt was unnecessary under the plain language of the statute.<sup>74</sup>

The Ninth Circuit began its analysis with the personal guilt test from the Supreme Court's 1961 decision in *United States v. Scates*:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the *relationship* of that status or conduct to other concededly criminal activity . . . that relationship must be *sufficiently substan-*

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incorrectly applying the vagueness doctrine. See Stacy, *supra* note 34, at 468; see also Chesney, *supra* note 4, at 56–58. The vagueness doctrine merely requires that a law be understandable to a reasonable person. It is unlikely that a reasonable person would not consider it “training” when he or she teaches members of an FTO how to use international law to peacefully advocate for their goals. In this circumstance, it is not the clarity of the statutory language that is problematic; it is the fact that the teacher can face fifteen years in prison while lacking any devious intent. Stacy, *supra* note 34, at 468. In other words, it is not that the “material support” terms are too vague, but rather that donors can be punished while lacking culpability.

69. Although Fifth Amendment due process challenges generally implicate related First Amendment association and Fifth Amendment vagueness arguments, this author believes it is possible, and even helpful, to separate the arguments and focus solely on personal guilt.

70. Most commentators and courts, including the Ninth Circuit, refer to the series of Humanitarian Law Project cases using Roman numerals. In the first Ninth Circuit decision, *HLP I*, 205 F.3d at 1130, the same plaintiffs as in *HLP II* challenged § 2339B on First Amendment and vagueness grounds.

71. *HLP II*, 352 F.3d 382 (9th Cir. 2003).

72. *Id.* at 385.

73. *Id.*

74. *Id.* at 397.

tial to satisfy the *concept of personal guilt* in order to withstand attack under the Due Process Clause.<sup>75</sup>

Accordingly, *Scales* required the Ninth Circuit to examine the substantiality of the relationship between an individual providing support to an FTO and the concededly criminal activity of the FTO.<sup>76</sup> The government asserted that it could convict a person of donating support to an FTO under § 2339B “even if he or she does not know the organization is so designated.”<sup>77</sup> Unsatisfied with the government’s interpretation, the Ninth Circuit determined that “to attribute the intent to commit unlawful acts punishable by life imprisonment to persons who acted with innocent intent—in this context, without critical information about the relevant organization—contravenes the Fifth Amendment’s requirement of ‘personal guilt.’”<sup>78</sup> Thus, the court found that the strict liability standard violates the *Scales* requirement of personal guilt.<sup>79</sup>

Having concluded that § 2339B raised severe due process concerns, the court looked to a long line of jurisprudence, beginning with *Scales*, that construed statutes lacking scienter to include mens rea requirements to avoid sticky constitutional issues.<sup>80</sup> Following such precedent, the Ninth Circuit in *HLP II* read a knowledge standard into § 2339B,<sup>81</sup> dispelling any notions that the statute was a strict liability offense.<sup>82</sup> The court said it “believe[d] that when Congress included the term ‘knowingly’ in § 2339B, it meant that proof that a defendant knew of the organization’s designation as a terrorist organization or proof that a de-

75. *Id.* at 394 (quoting *Scales*, 367 U.S. 203, 224–25 (1961)) (emphasis added by the *HLP II* court).

76. *Id.* at 394–97.

77. *Id.* at 397.

78. *Id.*

79. The *HLP II* court determined that § 2339B did not fall into the category of offenses—known as strict liability “public welfare” offenses—that are exceptions to the personal guilt requirement. These offenses generally regulate items such as “firearms, corrosive liquids, and drugs” that are so innately hazardous as to put the individual on notice of a probable regulation. *Id.* at 401. In contrast, the court noted that “charitable contributions are not ‘inherently dangerous’” and their “prohibited uses may be seemingly permissible.” *Id.* at 402 (quoting *United States v. Freed*, 401 U.S. 601, 609 (1971)). Moreover, the court noted that the basic nature of the crime (that is, not a mere regulatory offense), the harshness of the penalties (that is, potential sentence of up to life in prison), and the lack of any indication Congress intended § 2339B to function without a scienter requirement all suggested that § 2339B was not a public welfare offense and instead required some level of mens rea. *Id.* at 400–02.

80. *Id.* at 395–96. The court stated that it was mindful of the principle that “a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.” *Id.* at 397 (quoting *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994)).

81. *Id.* at 400.

82. In the next case where the mens rea requirement of § 2339B was in dispute, the government abandoned the strict liability argument and adopted the knowledge standard. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1296 (M.D. Fla. 2004).

fendant knew of the unlawful activities that caused it to be so designated was required to convict a defendant under the statute.”<sup>83</sup>

## 2. United States v. Al-Arian

In *United States v. Al-Arian*, the district court for the Middle District of Florida went a step further than the Ninth Circuit in *HLP II* and read a specific intent standard into § 2339B.<sup>84</sup> In *Al-Arian*, alleged members of the Palestinian Islamic Jihad, a registered FTO, were charged with violating § 2339B by directing fundraising and other activities in the United States.<sup>85</sup> At the outset, the *Al-Arian* court noted that in passing the AEDPA, Congress intended to prosecute the crime of providing “material support to foreign organizations engaged in terrorist activities ‘to the fullest possible basis, consistent with the Constitution.’”<sup>86</sup> To determine § 2339B’s consistency with the Constitution, the *Al-Arian* court tested several hypotheticals against the knowledge standard:

Under [*HLP II*]’s construction [of § 2339B’s mens rea requirement], a cab driver could be guilty for giving a ride to a FTO member to the UN, if he knows that the person is a member of a FTO or the member or his organization at sometime conducted an unlawful activity in a foreign country. Similarly, a hotel clerk in New York could be committing a crime by providing lodging to that same FTO member under similar circumstances as the cab driver. Because the [*HLP II*]’s construction fails to avoid potential Fifth Amendment concerns, this Court rejects its construction of Section 2339B.<sup>87</sup>

In support of its conclusion that there were constitutional issues with the knowledge standard, the *Al-Arian* court relied on both the vagueness doctrine<sup>88</sup> and the due process requirement of personal guilt.<sup>89</sup> For its

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83. *HLP II*, 352 F.3d at 400.

84. 329 F. Supp. 2d at 1302–03.

85. *Id.* at 1295.

86. 308 F. Supp. 2d 1322, 1329 (M.D. Fla. 2004) (quoting AEDPA, Pub. L. No. 104-32, § 301(b), 110 Stat. 1214 (1996)).

87. 308 F. Supp. 2d at 1337–38.

88. *Id.* at 1338. By substituting personal guilt concerns for vagueness concerns, the *Al-Arian* court may have misapplied the vagueness doctrine as well. See *supra* note 68. The *Al-Arian* court claimed that a “substantial portion” of § 2339B’s material support components were unconstitutionally vague because they could be violated by “innocent conduct.” 308 F. Supp. 2d at 1338. But the hypotheticals employed by *Al-Arian* are “troubling not because of the First Amendment or undue vagueness but rather because the cab driver and the hotel clerk lack the culpability the criminal law traditionally requires.” Stacy, *supra* note 34, at 468. In other words, the problem with § 2339B is not vagueness or clarity: it would be clear to the cab driver he was providing “transportation,” and it would be equally clear to the hotel clerk that he is providing “lodging.” The real problem with § 2339B is that there is a disconnect between culpability and liability—the statute does not require personal guilt (discussed *infra*).

89. *Al-Arian*, 329 F. Supp. 2d at 1299.

personal guilt analysis, the court began with *Scales*.<sup>90</sup> The government took the position that *Scales* only applied to statutes that prohibit a status or membership in an organization, so-called “membership statutes.”<sup>91</sup> But the *Al-Arian* court stated that *Scales* “is not so narrowly worded.”<sup>92</sup> In fact, as the *Al-Arian* court pointed out, the Supreme Court in *Scales* stated:

In our jurisprudence guilt is personal, and when imposition of punishment on a status *or on conduct* can only be justified by reference to the relationship of that status *or conduct* to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause.<sup>93</sup>

The *Al-Arian* court claimed that if *Scales* was intended to only apply to membership statutes, then the Supreme Court would not have used the words “or conduct” in its test.<sup>94</sup>

The *Al-Arian* court then reasoned that *Scales* implicates personal guilt concerns for § 2339B because a person’s liability is determined by the criminal activity of an FTO, and not by the individual.<sup>95</sup> For illustration, the court discussed another hypothetical:

A and B are members of a FTO. The FTO exists to oppose and remove (by violent and non-violent means) a foreign government. A opposes the FTO’s use of violent means to accomplish its goals. B has no problem with the groups [sic] use of violence and wants to raise funds for weapons to further that interest. B travels to where A lives to raise money. A does not know that B is coming to fundraise on behalf of the FTO. A picks B up at the airport. A allows B to stay in his home, use his telephone, and use his house to entertain other FTO members while A is at work. B fundraises while A is gone. Under the government’s construction of Section 2339B(a)(1), A is criminally liable for providing transportation, lodging, communications equipment, and facilities, and, if the money raised results in the death of any person, he will face life in prison. A’s criminal liability is inextricably connected to his association with B and the FTO.<sup>96</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Scales*, 367 U.S. 203, 224–25 (1961)) (emphasis added by the *Al-Arian* court).

94. *Id.* at 1300.

95. *Id.*

96. *Id.*

Implying that *A* lacks sufficient personal guilt to justify liability, the *Al-Arian* court stated that a “Fifth Amendment due process personal guilt concern is suggested, because criminal liability and punishment is being justified and tied to the criminal activities of others.”<sup>97</sup> Accordingly, in order to alleviate this concern while not striking down significant portions of § 2339B as unconstitutional, the *Al-Arian* court construed the statute as requiring the government to prove a defendant had a specific intent to further the illegal goals of the organization.<sup>98</sup> The *Al-Arian* court posited that in the typical case the government’s burden of proving specific intent would not be that great because it could be “easily inferred” from circumstantial evidence.<sup>99</sup>

The *Al-Arian* court’s position on *Scales*, while not adopted by any subsequent courts, is consistent with one prior civil case and has since been approved by the dissent in a criminal case. In the civil case of *Boim v. Quranic Literacy Institute and Holy Land Foundation for Relief and Development*,<sup>100</sup> the Seventh Circuit analyzed whether § 2339B could serve as the basis for civil liability under 18 U.S.C. § 2333.<sup>101</sup> The court was troubled over the fact that donors of material support “might be held liable for involvement in terrorist activity when all they intended was to supply money to fund the legitimate, humanitarian mission” of an FTO.<sup>102</sup> Citing *Scales* and other Supreme Court precedent, the *Boim* court held that a defendant is therefore not civilly liable under § 2333 unless the plaintiff can prove the defendant intended to aid the illicit activities of the FTO.<sup>103</sup> Also, in *United States v. Hammoud*,<sup>104</sup> a majority of the Fourth Circuit *en banc* panel dismissed arguments that § 2339B did not satisfy the Fifth Amendment right to personal guilt.<sup>105</sup>

But dissenting Judges Michael and Gregory expressly agreed with the analysis in *Al-Arian*, arguing that § 2339B needs a specific intent

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97. *Id.*

98. *Id.*

99. 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

100. 291 F.3d 1000 (7th Cir. 2002).

101. *Id.* at 1007. 18 U.S.C. § 2333(a) provides as follows:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover three-fold the damages he or she sustains and the cost of the suit, including attorney’s fees.

102. *Id.* at 1022.

103. *Id.* at 1022–23. The *Al-Arian* court itself noted that its conclusions were consistent with *Boim*. 308 F. Supp. 2d at 1339 n.33.

104. 381 F.3d 316 (4th Cir. 2004).

105. In its brief discussion of personal guilt, the majority tapered the holding of *Scales* to the First Amendment right of association arguments, and then declared that § 2339B concerns more than just association, it covers the provision of material support (this method, discussed *infra* Part IV(b), is commonly used by courts to limit *Scales* application). *Id.* at 328–39.

standard in order to withstand a Fifth Amendment personal guilt attack.<sup>106</sup> However, since *Hammoud* and *Boim*, *Al-Arian* has not received much judicial support; instead, courts have been lining up to support *HLP II*.<sup>107</sup>

### 3. Humanitarian Law Project v. Gonzales<sup>108</sup>

After the ruling in 2003 of the Ninth Circuit three-judge panel in *HLP II* construed § 2339B to require the knowledge standard, the Ninth Circuit voted to rehear the mens rea arguments *en banc*.<sup>109</sup> But on December 17, 2004, only three days after oral argument, Congress amended § 2339B's mens rea requirement to include the knowledge standard.<sup>110</sup> In response, on December 21, the Ninth Circuit *en banc* declined to re-decide *HLP II* and vacated its order regarding the mens rea requirement.<sup>111</sup> The Ninth Circuit then remanded the case, now called *Humanitarian Law Project v. Gonzales* (*HLP III*), to the Central District Court in California, Western Division.<sup>112</sup>

On remand, the plaintiffs urged the court to follow the reasoning of *Al-Arian* and adopt a specific intent standard based on *Scales*.<sup>113</sup> But the *HLP III* court declined, asserting that *Scales* is "inapposite" to § 2339B.<sup>114</sup> The court concluded that the *Scales* test applies only to membership in an organization, and not to conduct in support of an organization: "While *Scales* discussed the concept of personal guilt in relation to 'status or conduct,' a close reading of *Scales* reveals that at heart it was concerned with criminalizing associational membership in violation of the First Amendment."<sup>115</sup> Having narrowed *Scales* to protecting only association, the *HLP III* court noted that § 2339B covers much more than mere association; it also covers the actual provision of material support.<sup>116</sup> For additional support, the *HLP III* court claimed that it was "significant" to its analysis that the "Ninth Circuit in *HLP II* did not

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106. *Id.* at 376–80.

107. *See infra* notes 117–19.

108. *HLP III*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005).

109. *Humanitarian Law Project v. U.S. Dep't of Justice*, 382 F.3d 1154 (9th Cir. 2004).

110. *See* 18 U.S.C. § 2339B (2004). The amendment also made changes to the definition of "material support" by amending the terms "training," "personnel," "expert advice or assistance" and adding the term "service." *Id.*

111. *HLP III*, 380 F. Supp. 2d at 1138–39.

112. *Id.* at 1139.

113. *Id.* at 1142.

114. *Id.* at 1142–43.

115. *Id.* at 1143.

116. *Id.*



extend its Fifth Amendment analysis of *Scales* to require that the government prove specific intent to further terrorist activities.”<sup>117</sup>

As of publication, all the most recent cases considering the personal guilt issue—*United States v. Assi*,<sup>118</sup> *United States v. Paracha*,<sup>119</sup> and *United States v. Marzook*<sup>120</sup>—have rejected *Al-Arian*, have expressly agreed with the reasoning of *HLP III*, and have concluded that *Scales* does not apply to § 2339B, insofar as the material support statute does not apply to associational membership.<sup>121</sup>

#### IV. FATAL CONSTITUTIONAL ISSUES FOR § 2339B UNDER *SCALES*

This Part illustrates how § 2339B fails under *Scales*. It begins with the facts of *Scales* and a description of the personal guilt test. It then argues that, contrary to the conclusion in *HLP III*, the Supreme Court’s decision in *Scales* controls the Fifth Amendment due process analysis. Next, it describes the fundamental errors committed by the *Al-Arian* and *HLP II* courts in applying *Scales*. Finally, underscoring the need for a stricter mens rea requirement, this Part applies *Scales* to the current form of § 2339B and determines that severe constitutional issues still exist under the knowledge standard.

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117. *Id.* at 1148.

118. *United States v. Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2006).

119. *United States v. Paracha*, No. 03-cr-1197(SHS), 2006 WL 12768 (S.D.N.Y. Jan. 03, 2006).

120. *United States v. Marzook*, 383 F. Supp. 2d 1056 (N.D. Ill. 2005).

121. *See Assi*, 414 F. Supp. 2d at 721–22; *Paracha*, 2006 WL 12768, at \*25–29; *Marzook*, 383 F. Supp. 2d at 1067. With respect to the *Scales* personal guilt requirement, only two other arguments raised by these courts are worth briefly addressing here. In *Assi*, because Congress explicitly found that all donations to an FTO facilitate terrorism, the district court judge found that a personal guilt requirement is satisfied if the defendant knew the recipient was an FTO. 414 F. Supp. 2d at 721. In other words, because Congress declared that the relationship between the provision of all donations to an FTO and the terrorist activity of an FTO is strong, personal guilt is satisfied. But simply because Congress declares the constitutional requirement of personal guilt is satisfied, does not necessarily make it so. When considering a statute’s consistency with the Constitution, courts are to make determinations independent of the desires of Congress. *See Marbury v. Madison*, 1 Cranch 137, 176–77, 2 L. Ed. 60 (1803). Similarly, both *Assi* and *Marzook* emphasize the importance of Congress intending only the knowledge standard. *See Assi*, 414 F. Supp. 2d at 721–24; *Marzook*, 383 F. Supp. 2d at 1070–71. But this observation is only relevant to the courts’ power to rewrite § 2339B in order to alter the mens rea requirement. For example, in *Marzook*, after detailing Congress’s preference for the knowledge standard, the court stated that “Reading in this additional [specific intent] requirement . . . would contravene the fundamental concepts of statutory construction.” *Marzook*, 383 F. Supp. 2d at 1070. However, whether § 2339B passes the Fifth Amendment requirement of personal guilt, not whether courts have the ability to rewrite a clear statute, is the central question of this article. Thus, under both arguments, a fresh look at the constitutionality of the statute is still necessary.

*A. United States v. Scales*

Junius Irving Scales was a member of the Communist Party, a “dual method” organization that advocated both peaceful and non-peaceful methods in pursuit of its goals, the latter including the “violent overthrow of the U.S. Government.”<sup>122</sup> Scales was convicted under the Smith Act,<sup>123</sup> which made it a felony to knowingly hold “membership in any organization which advocates the overthrow of the Government of the United States by force or violence.”<sup>124</sup> Scales argued the Act violated the Due Process Clause of the Fifth Amendment “in that it impermissibly impute[ed] guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct.”<sup>125</sup>

In response, the Supreme Court provided a test to determine what types of relationships with criminal organizations can serve as the basis for criminal liability.<sup>126</sup> The test requires a court to analyze the substantiality of the relationship between a person’s status or conduct and an organization’s concededly criminal activity.<sup>127</sup> Where that relationship is tenuous, personal guilt is required in order to convict someone on the basis of that relationship; however, if the relationship between the accused’s involvement and the underlying substantive illegal conduct is

122. *Scales v. United States*, 367 U.S. 203, 220 (1961).

123. The Smith Act, 18 U.S.C. § 2385 (1956), reads as follows:

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined not more than \$20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

124. *Scales*, 367 U.S. at 205.

125. *Id.* at 220.

126. *Id.* at 224–25.

127. *Id.*

strong, personal guilt is not required.<sup>128</sup> Determining that the Smith Act could impose guilt where the relationship was weak, the *Scales* Court interpreted the statute to require personal guilt.<sup>129</sup> The Court concluded that this personal guilt deficit would be “certainly cured, so far as any particular defendant is concerned, by the requirement of proof that he knew the organization engages in criminal activity, and that it was his purpose to further that criminal activity.”<sup>130</sup> Otherwise, the Court feared a person could be convicted by what “might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.”<sup>131</sup> In other words, spotting a potential gap between culpability and liability, the Court read a specific intent standard into the Smith Act to save it from constitutional attack.

### B. *Scales Controls the Personal Guilt Analysis*

The *HLP III* court took the position that *Scales* does not apply to § 2339B because the statute under scrutiny in *Scales* was concerned with membership in an organization instead of conduct in support of an organization.<sup>132</sup> Although the *Scales* Court applied its test to a membership statute, this argument nonetheless fails for three reasons. First, the principle behind *Scales* applies with equal force to § 2339B. The *Scales* test covers circumstances where a person’s guilt is determined by his relationship to a criminal enterprise, not by his intent. Such situations certainly occur where the connection to the organization is membership or “status.” However, situations also occur—as the plaintiffs in the *Humanitarian Law Project* cases demonstrate—where the connection to the organization is actual “conduct.”

Second, the unambiguous words of the *Scales* test itself apply to “status or conduct.”<sup>133</sup> This language was crucial to the *Al-Arian* court’s adoption of a specific intent standard: “If *Scales* only applied to membership statutes, the Supreme Court would not have needed to use the phrases ‘or on conduct’ or ‘or conduct’ because ‘status’ would have been sufficient to cover membership statutes.”<sup>134</sup> Despite this recognition,<sup>135</sup>

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128. *Id.*

129. *Id.* at 224–28.

130. *Id.* at 226 n.18.

131. *Id.* at 228.

132. *HLP III*, 380 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005). Insofar as § 2339B covers more than associational relationships, this position has some support in academia. See, e.g., Chesney, *supra* note 4, at 68–70.

133. *Scales*, 367 U.S. at 224–25 (emphasis added).

134. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004).

135. *HLP III*, 380 F. Supp. 2d at 1143.

the *HLP III* court maintained that *Scales* was “inapposite [because] the holding there turned on specific facts not present here.”<sup>136</sup> The *HLP III* court is correct in that the “specific facts” of *Scales* were not present in its case; nonetheless, tests are designed to apply to more than one fact pattern.<sup>137</sup>

The third reason why *Scales* applies to § 2339B is that courts have already applied *Scales* to conduct in the past. Besides the *HLP II* court’s application of *Scales* to § 2339B,<sup>138</sup> the *HLP II* court recognized other cases where the Ninth Circuit has applied *Scales* to conduct.<sup>139</sup> For example, in *Hellman v. United States*, the Ninth Circuit overturned a conviction under the Smith Act where “the defendant had engaged in a variety of activities to support the Communist Party including organizing new members, teaching Communist principles to students and members, and ‘soliciting contributions for the Communist Party.’”<sup>140</sup> These activities go beyond mere membership and indeed closely resemble elements of “material support” under § 2339A, including the furnishing of personnel, training, and services. Moreover, in *Rucker v. Davis* the Ninth Circuit recently applied *Scales* to conduct that did not involve a membership statute.<sup>141</sup> In *Rucker*, the court considered whether the Anti-Drug Abuse Act permitted the Oakland Housing Authority to evict tenants for illegal drug-related activity that occurred in the household without the tenant’s knowledge.<sup>142</sup> Citing *Scales*, the court held that the evictions could not

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136. *Id.* at 1142–43. The *HLP III* court also stated that “a close reading of *Scales* reveals that at heart, it was concerned with criminalizing associational membership in violation of the First Amendment.” *Id.* at 1143. Interestingly, a close reading of *Scales* also reveals that, even though claims under the Fifth Amendment’s right to personal guilt and the First Amendment’s right to the freedom of association can intertwine, the Fifth Amendment “claim stands . . . independently of the claim made under the First Amendment.” *Scales*, 367 U.S. at 225. And it was under this Fifth Amendment claim that the *Scales* Court developed the personal guilt test. *Id.*

137. The *Scales* test applies to this particular fact pattern because, as discussed *infra* Part IV(d), the words of the test and the policies behind it apply with equal force to conduct and status.

138. *HLP II*, 352 F.3d 382, 393–97 (9th Cir. 2003). Curiously, the *HLP III* court seemed to recognize as much, stating: “Significantly, the Ninth Circuit in *HLP II* did not extend its *Fifth Amendment analysis of Scales* to require that the government prove specific intent to further terrorist activities.” *HLP III*, 380 F. Supp. 2d at 1148 (emphasis added). Thus, while acknowledging that *HLP II* applied its *Scales* personal guilt analysis to § 2339B, the *HLP III* court nonetheless simultaneously maintained that the *Scales* personal guilt test does not apply to § 2339B.

139. *HLP II*, 353 F.3d at 395. The court was referring to *Hellman v. United States*, 298 F.2d 810 (9th Cir. 1961) and *Brown v. United States*, 334 F.2d 488 (9th Cir. 1964) (*en banc*), *aff’d on other grounds*, 381 U.S. 437 (1965).

140. *HLP II*, 352 F.3d at 395 (quoting *Hellman*, 298 F.2d at 813).

141. *Rucker v. Davis*, 237 F.3d 1113, 1124–25 (2001), *rev’d on other grounds*, 535 U.S. 125 (2002).

142. *Rucker*, 237 F.3d at 1117.

stand because “penalizing *conduct* that involves no intentional wrongdoing can run afoul of the Due Process Clause.”<sup>143</sup>

Thus, under previous Ninth Circuit analysis, *Scales* applies to any statute where guilt is imputed based on a status *or conduct* that creates a relationship with a criminal enterprise. Therefore, *Scales* applies to § 2339B. This conclusion is illustrated by the principle behind *Scales*, the explicit language of the test, and its subsequent judicial interpretation.

### C. Two Courts, Two Fundamental Errors

#### 1. The *Al-Arian* Court Did Not Apply Actual Test

While the *Scales* test may apply to the material support statute, it does not necessarily compel the *Al-Arian* result. The *Al-Arian* court concluded that the *Scales* test requires specific intent because “criminal liability is being justified and tied to the criminal activities of others.”<sup>144</sup> But the *Al-Arian* court missed the most essential step in the analysis: application of the *Scales* test. The *Al-Arian* court did not *apply* the test, it merely determined the test *should be applied* and then adopted the conclusion of *Scales*. In other words, because liability is tied to the criminal activity of others, the *Scales* test applies. However, the Supreme Court in *Scales* did not hold that any time *A*’s liability is tied to *B*’s illegal activities, *A* can be held liable only if he had the specific intent to further *B*’s illicit goals. Rather, *Scales* requires a court to analyze the substantiality of the relationship between *A*’s apparently innocuous conduct and *B*’s concededly illegal activities. The *Al-Arian* court did not examine this relationship; instead, the court skipped the required analysis. Thus, the *Al-Arian* result of specific intent is not necessarily required without first properly analyzing § 2339B under the *Scales* test.

#### 2. The *HLP II* Court Did Not Test *Scales* Against the Knowledge Standard

If the *Al-Arian* court took *Scales* too far, the Ninth Circuit in *HLP II* may not have taken *Scales* far enough. The Ninth Circuit focused its inquiry on the strict liability standard, and having found “serious due process concerns,”<sup>145</sup> the court read the knowledge standard into the statute.<sup>146</sup> That is, the court held that a person could not be convicted under

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143. *Id.* at 1124 (emphasis added) (citing *United States v. Scales*, 367 U.S. 203, 224–25 (1961)).

144. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004).

145. *HLP II*, 352 F.3d at 397.

146. *Id.* at 400.

§ 2339B unless he or she had knowledge that the recipient of the donation was an FTO or had engaged in terrorist activities.<sup>147</sup> However, there is no indication that the court then tested how this knowledge standard fares against *Scales*. In fact, at the close of the Ninth Circuit's analysis of the *Scales* test, the court implies that it only considered the due process concerns in the strict liability context: “[W]e believe that to attribute the intent to commit unlawful acts punishable by life imprisonment to persons who acted with innocent intent—in this context, without critical information about the relevant organization—contravenes the Fifth Amendment’s requirement of ‘personal guilt.’”<sup>148</sup> Unlike *HLP II*, the following analysis will test *Scales* against the knowledge standard to determine if any “serious due process concerns” remain.

*D. Why Mere Knowledge Is Insufficient: How the Scales Test Implicates Constitutional Issues for § 2339B*

The *Scales* test determines what types of relationships with criminal organizations can serve as the basis for criminal liability. Where guilt is imputed to an individual based on his or her conduct, the test requires that a court determine if the conduct has a substantial relationship to the “concededly criminal activity” of the organization.<sup>149</sup> If there is a substantial connection, then no more culpability is required; if the connection is weak, then the statute must be interpreted to require culpability or be struck down by the court.<sup>150</sup> Thus, with regards to § 2339B, it is essential to a *Scales* analysis to establish (1) what the conduct is, (2) what is Congress’s concern or what is “the concededly illegal activity,” and (3) whether the relationship between the two is sufficiently substantial to justify imposing liability without requiring culpability.

First, the “conduct” involved here is undoubtedly satisfied by the provision of “material support” as it is defined by § 2339A.<sup>151</sup> Such conduct is wide ranging. It can appear harmless, like the *Al-Arian* court’s example of the taxi cab driver providing “transportation” by giving a ride to a member of an FTO. Or the conduct can be clearly offensive, like providing “training” by teaching a member of an FTO how to build an explosive device.

Second, it is necessary to ascertain what the concededly illegal activity is. In *Scales*, the concededly illegal activity, or “underlying

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147. *Id.*

148. *Id.* at 397 (emphasis added).

149. *Scales v. United States*, 367 U.S. 203, 224–25 (1961).

150. *HLP II*, 352 F.3d at 396.

151. For a list of material support, see *supra* Part III(a).

substantive illegal conduct,”<sup>152</sup> was not the existence of membership or the support of the Communist Party, but rather the “advocacy” of violently overthrowing the government.<sup>153</sup> This violent advocacy was—as the Ninth Circuit in *Brown v. United States* put it—the “gist of the crime,” or “the sole basis of federal concern” of the Smith Act.<sup>154</sup> Referring to congressional findings, the Ninth Circuit in *HLP II* determined the “sole basis of federal concern” of § 2339B to be “international terrorism.”<sup>155</sup> It follows that the concededly criminal activity of § 2339B is not merely providing something to an FTO, but instead is international terrorism.<sup>156</sup>

Finally, having defined the “conduct” and the “concededly criminal activity,” *Scales* requires a court to analyze the relationship between the provision of “material support” (both humanitarian and illicit support) and the promotion of international terrorism “in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability.”<sup>157</sup> When support is inherently violent, there is irrefutably a substantial relationship because there is a direct causal relationship between the conduct and the crime. For example, the provision of weapons or the facilitation of a terrorist attack is inherently violent and thus substantially related to the crime of international terrorism. Consequently, so far as § 2339B is a prohibition on the provision of such violent support, a culpable intent, although easily inferred from such support, is not required by *Scales*. As Senator Hatch correctly stated when discussing § 2339B, the Constitution does not protect the facilitation of terrorist bombings and other violent behavior.<sup>158</sup> Similarly, when a donation is readily fungible, like money, members of an FTO can easily use the support to further the illegal goals of the organization. As a result, the relationship between such conduct and international terrorism can be strong. Accordingly, this form of support is also unacceptable, and a showing of personal guilt would not likely be required under *Scales*. Congress was particularly concerned with the danger of this type of donation when it passed § 2339B.<sup>159</sup>

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152. *Scales*, 357 U.S. at 226.

153. *Id.* at 225.

154. *Brown v. United States*, 334 F.2d 488, 496 (9th Cir. 1964) (en banc), *aff'd on other grounds*, 381 U.S. 437 (1965).

155. *HLP II*, 352 F.3d at 396 (citing AEDPA, Pub. L. No. 104-32, § 301(a)(1), 110 Stat. 1214 (1996)).

156. This article defines “international terrorism” as a foreign organization that engages in “terrorist activity” as it is defined by 8 U.S.C. § 1182(a)(3)(B)(iii) (2005). For the list of activities that constitute “terrorist activity,” see *supra* note 15.

157. *Scales*, 367 U.S. at 226 (emphasis added).

158. 142 CONG. REC. S3352-01 (daily ed. Apr. 16, 1996) (statement of Sen. Hatch).

159. AEDPA, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996).

The more difficult question concerns donations that are neither inherently violent nor readily fungible but are instead intended to support the humanitarian efforts or peaceful goals of a designated organization. This question is not merely based in abstract theory; courts in the Ninth Circuit have been presented with this issue.<sup>160</sup> Before Congress enacted the AEDPA, some of the plaintiffs in the *Humanitarian Law Project* cases participated in numerous activities fitting this description on behalf of the PKK, including the following: conducting fact-finding missions to investigate the mistreatment of Kurds in Turkey; publishing reports detailing the Turkish government's practice of detaining and torturing Kurds who speak out for equal rights; advocating to Congress and the U.N. Commission on Human Rights; training members of the PKK on how to use international human rights law to obtain recognition as a minority group and seek a peaceful resolution to the dispute; producing educational literature supporting the PKK; and providing lodging to members of the PKK in connection to the above activities.<sup>161</sup> But fearing prosecution under § 2339B, the *Humanitarian Law Project* plaintiffs ceased assisting Kurds living in Turkey since the PKK was designated as an FTO.<sup>162</sup>

Similarly, other plaintiffs in the *Humanitarian Law Project* cases had previously engaged in peaceful activities on behalf of the LTTE that now may be considered "material support."<sup>163</sup> For example, Dr. Nagalingam Jeyalingam, both a Tamil refugee and a naturalized U.S. citizen and surgeon, along with several Tamil organizations, provided "clothing, baby food, educational materials, and toys to the LTTE-run orphanages" in LTTE-controlled Sri Lanka.<sup>164</sup> The plaintiffs also desired to provide legal fees so the LTTE could challenge its designation as an FTO to the D.C. Circuit Court.<sup>165</sup> Additionally, after the tsunami in December 2004 devastated the LTTE-controlled coast of northeastern Sri Lanka,<sup>166</sup> the plaintiffs wished to "provide training in the presentation of claims to mediators and international bodies for tsunami-related aid [and] offer legal expertise in negotiating peace agreements between the LTTE and the Sri Lankan government."<sup>167</sup> Other humanitarian groups not

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160. See, e.g., the *Humanitarian Law Project* cases.

161. *HLP II*, 352 F.3d 382, 389–90 (9th Cir. 2003).

162. *Id.* at 390.

163. *Id.* at 390–92.

164. *Id.* at 391–92.

165. *Id.* at 392.

166. Over 40,000 Sri Lankans were killed in the tsunami and the northeastern coast, controlled by the LTTE, was one of the hardest hit regions of the island. See, e.g., *Oversight Hearing*, *supra* note 42 (testimony of Ahilan T. Arulanantham, Staff Attorney for the American Civil Liberties Union of Southern California).

167. *HLP III*, 380 F. Supp. 2d 1134, 1137 (C.D. Cal. 2005).



associated with the *Humanitarian Law Project* litigation desired to furnish medical supplies and personnel<sup>168</sup> to the LTTE-controlled coast to provide much needed public health assistance and to help rebuild the coast.<sup>169</sup>

All of the above donations could qualify as “material support” under § 2339A,<sup>170</sup> and would consequently be prohibited by § 2339B, but it is difficult to envisage how such conduct strengthens international terrorism. Much of the aid—such as training in the use of international law—is geared toward permanently steering these organizations away from violence and into the mainstream political arena. Still more of the support—such as sending volunteers to help reconstruct a shattered coastline—is aimed at assisting civilians involuntarily under the control of an FTO. Interestingly, Congress has already provided tacit approval for the proposition that not *all* aid emboldens terrorists or furthers their ability to carry out attacks. Congress specifically exempted medicine and religious materials from “material support” under § 2339A, presumably because the potential benefits from such provisions outweigh the threat posed to national interests. Nonetheless, this type of aid would do little to help any organization’s ability to carry out terrorist attacks.

But it is possible that even seemingly harmless aid could have the effect of bolstering the organization’s reputation, which could thereby indirectly strengthen its ability to carry out terrorist attacks. However, by permitting membership, comparable reputational benefits could have accrued to the Communist Party through increasing the number of its official supporters. But the *Scales* Court determined that this “sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing”<sup>171</sup> was still too tenuous a relationship with the underlying substantive illegal conduct to justify imposing guilt without individual culpability.<sup>172</sup> Similarly, any moral encouragement an FTO obtains from receiving training in international law, from knowing that the children under its control are being educated and fed, or from rejoicing that the wrongs its ethnic group has suffered at the hands of its government are being publicized internationally, is not

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168. Although medicine is exempted from “material support or resources,” medical supplies and personnel are not. See 18 U.S.C. § 2339A(b)(1).

169. See *Oversight Hearing*, *supra* note 42.

170. The above support could be categorized under § 2339A as providing tangible property, currency, training, expert advice or assistance, and personnel. See 18 U.S.C. § 2339A(b)(1) (2004).

171. *Scales v. United States*, 367 U.S. 203, 227 (1961).

172. *Id.* at 227–28. Moreover, Congress already permits individuals to vigorously promote the beliefs and goals of an FTO, so long as they do so independently of the FTO’s operations. 18 U.S.C. § 2339B(h).

sufficiently related to the promotion of international terrorism to justify imposing personal guilt on those who provided such support.

This type of humanitarian conduct has neither the intent nor the substantive effect of strengthening international terrorism. Even if the donor knows the recipient is a designated FTO, a donation of this sort falls far short of some “significant action” in support of the “criminal enterprise.”<sup>173</sup> In fact, unlike the defendant’s membership in *Scales*, which was held to be constitutionally protected, this type of humanitarian conduct may even fall short of a “mere . . . expression of sympathy with the alleged criminal enterprise.”<sup>174</sup> With this form of support, the donor may actually intend that the organization renounce its illegal objectives and pursue strictly nonviolent goals. Or the donor may want nothing to do with the objectives of the FTO, but merely intend to assist people who live under the FTO’s control in a time of need. Thus, the causal connection between the conduct and the crime, if existent, is weak.

As a result, because § 2339B currently exists with the knowledge standard, the relationship between this particular conduct—providing donations that are not readily fungible and that solely support the peaceful efforts of the organization—and the conceded criminal conduct of FTOs—international terrorism—is not sufficiently substantial to meet the requirements of the Due Process Clause and personal guilt. Criminal liability cannot constitutionally be imputed to a donor of such support. Therefore, if Congress does not amend the statute to require more than the knowledge standard, it risks § 2339B being struck down by a court. But § 2339B undoubtedly addresses a legitimate and compelling government interest, and in the majority of circumstances the statute does not offend the Due Process Clause. Consequently, in order to avoid endangering national security and unnecessarily weakening § 2339B, any amendment to the statute must be drafted very carefully.

#### V. RELIEVING THE DUE PROCESS CONCERNS: A RECKLESSNESS STANDARD

This Part analyzes some options available to Congress if it were to amend § 2339B. It begins by making an important distinction between knowledge and intent. It then highlights some of the prosecutorial burdens a specific intent standard would create and emphasizes that the lowest intent standard that can satisfy *Scales* is preferable. This Part concludes by arguing that a reckless intent standard would both satisfy

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173. *Id.* at 228.

174. *Id.*

*Scales* and not hinder the government's ability to combat international terrorism.

*A. Potential Mens Rea Tools: Knowledge and Intent*

The current version of § 2339B requires that a donor have a guilty knowledge, but not a guilty intent. In other words, the donor must *know* the recipient is an FTO, but the donor need not *intend* for the donation to be used illicitly.<sup>175</sup> Thus, the difference between knowledge and intent is that under the knowledge standard, the actual intent of the donor is irrelevant. However, as demonstrated above, the knowledge standard is inadequate; therefore, the next step is to determine what level of a culpable intent can save § 2339B from offending *Scales*.

*B. Lowest Constitutional Standard Preferable*

As the *Al-Arian* court properly concluded, the specific intent standard satisfies the requirement of personal guilt.<sup>176</sup> However, specific intent is merely one end of the culpability spectrum.<sup>177</sup> In order to comply with Congress's intention of prosecuting § 2339B "to the *fullest possible basis, consistent with the Constitution*,"<sup>178</sup> it is necessary to ascertain the lowest level of culpability that is consistent with the Due Process Clause. Otherwise, the government could be unduly and unnecessarily burdened in its prosecution efforts, and donors secretly harboring violent intentions could exploit the feeble statute effortlessly. The challenge of modifying § 2339B is to allow for a very specific type of donation to comply with the Due Process Clause while not creating a mile-wide loophole in the process.

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175. By requiring that only a guilty knowledge be read into § 2339B, the Ninth Circuit must have believed that *any* form of mens rea—guilty knowledge or guilty intent—can be employed under *Scales* to relieve a statute of its personal guilt requirement. However, this position finds little support in *Scales*; although *Scales* does not suggest that only a specific intent standard could cure a statute of due process concerns, it also does not suggest that merely a guilty knowledge would suffice. Indeed, the *Scales* Court stated that the Smith Act's due process concerns were "duly met when the statute [was] found to reach only 'active' members having also a *guilty knowledge and intent*." *Scales*, 367 U.S. at 228 (emphasis added). Thus, even before *HLP II* insufficiently applied the *Scales* test, it may have already imputed a deficient mens rea requirement into § 2339B.

176. *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004).

177. There are four levels of intent. MODEL PENAL CODE § 2.02 (2002). Under § 2.02, an individual can act: (1) *purposefully*, intending to harm (i.e., specific intent); (2) *knowingly*, knowing the harm is likely to occur even if he does not consciously seek to cause the harm (this level of intent differs fundamentally from the knowledge standard because it requires the donor to "know" he is creating the harm—i.e., furthering international terrorism—while the knowledge standard merely requires that the donor know the recipient is an FTO and how the donor intends the donation be used is irrelevant); (3) *recklessly*, knowing the risk of harm, but making a conscious decision to ignore it; or (4) *negligently*, not aware of risk but should have been. *Id.*

178. AEDPA, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996).

### C. Specific Intent Standard Unnecessarily Opens Loopholes

Under the specific intent standard promulgated by the *Al-Arian* court, a donor would be liable only if he or she intends to aid the terrorist functions of an FTO. An often-used example illustrates the security flaws of this standard: if a person writes a check to Hamas for \$10,000 and writes on the “memo” line of the check “for educational purposes only,” the donor would not be liable under the specific intent standard so long as there was not other evidence showing an intention to aid terrorism. But, whether the donor intended to aid terrorism or not, the check could be used for many other projects, including illicit ones. The *Al-Arian* court anticipated this hypothetical and suggested that “a jury could infer a specific intent . . . if the money [donated] is fungible” and the defendant knows the organization continues to sponsor illegal acts.<sup>179</sup> But such a standard nonetheless opens a wide door to creative terrorist sympathizers and creates a serious evidentiary burden for law enforcement. Many donations of goods and services that do not consist of fungible money can still easily be converted to help further an FTO’s illegal activities. And those who convincingly plead ignorance while secretly desiring to support the terrorist functions of FTOs can escape prosecution. However, these escapees can be exposed through a lower intent level: recklessness.

### D. The Recklessness Standard

A person acts “recklessly” if he or she is aware of the risk of harm but makes a conscious decision to act anyway.<sup>180</sup> Because § 2339B already requires a guilty knowledge—the donor must know the recipient is a potentially dangerous organization<sup>181</sup>—any donor prosecuted under § 2339B could already be said to have been “aware” of the risk of harm.<sup>182</sup> Under a recklessness standard, a donor could decide to provide some specific support despite knowing the risk, but he or she would have to proceed with extreme caution or risk criminal liability.

The following is a proposed amendment to § 2339B, which attempts to comply with *Scales* and navigate the treacherous evidentiary waters to ensure that no loophole would be exploited by donors who seek to further terrorists’ violent objectives:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall

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179. *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

180. MODEL PENAL CODE § 2.02.

181. 18 U.S.C. § 2339B(a)(1) (2004).

182. This is what technically makes a recklessness standard more appropriate than a negligence standard; a person who acts negligently is by definition unaware of the risk of harm. MODEL PENAL CODE § 2.02.

be fined under this title or imprisoned not more than 15 years, or both, and if the death of any person results, shall be imprisoned for any term of years or for life. *To violate this paragraph, a person must (1) specifically intend to support the illegal aims of the FTO, or (2) not specifically intend to support the illegal aims of the FTO but nonetheless recklessly support the terrorist functions of the FTO by either (a) supplying readily fungible items or (b) not ensuring sufficient oversight over the supplied resources to make certain they are not utilized illegally.*

This Comment does not contend that § 2339B should be construed in such a fashion as to permit the provision of risky donations. A recklessness standard would satisfy this objective by effectively prohibiting any donation that is facially or potentially dangerous, regardless of the donor's apparent noble intentions.

A recklessness standard would place a major burden on the donor. The government would not be required to prove any direct linkage between the donation and a violent act; instead, to avoid liability the defendant would have to show that his or her donation was not readily fungible and there was proper oversight over the donation to ensure it was used lawfully. In this sense, a recklessness standard would create a narrow statutory safe-harbor for well-intentioned, careful donors. If a donor cannot show that the support did not aid the terrorist functions of an FTO—thereby falling under the protection of the safe-harbor provision—then he or she acted recklessly and is culpable. Significantly, the above rule would also not leave room for any donations whatsoever to so-called “single-method” organizations, like al-Qaeda, because all donations to such organizations support their illegal objectives. More fundamentally, however, the recklessness standard would impute personal guilt into § 2339B and would relieve that statute of its due process concerns.

While ostensibly not leaving much room for donations, this revised standard would permit some charitable aid in limited circumstances. For example, the statute would not be violated by any non-reckless efforts to influence an FTO to employ legal avenues to obtain its goals. Thus, the *Humanitarian Law Project* plaintiffs could once again train members of the PKK how to use international law to advocate their peaceful political goals with international bodies.

Nor would the statute be violated by any non-reckless efforts to aid the humanitarian goals of an FTO. For example, medical personnel and other volunteers could be deployed to the LTTE-controlled northeastern coast of Sri Lanka to directly help with the tsunami reconstruction efforts. Further, Dr. Jeyalingam could once again provide children's clothing, baby food, non-controversial educational materials, and toys to the

LTTE-run orphanages. While the vast majority of even well-intentioned humanitarian aid would still be prohibited by a recklessness standard, these are a few examples of the types of limited aid that would be permissible.

An examination of some of the hypothetical situations courts have used to illustrate troubles with § 2339B also sheds light on how the recklessness standard would function. For example, a cab driver who knowingly transports a member of an FTO to the U.N. building is not inherently reckless in doing so; but he would be reckless by not exercising sufficient oversight if, for example, he witnessed the known terrorist building a bomb in the back of the cab and did nothing. And if a person wrote a check to an FTO to build a school, that person would have recklessly provided a readily fungible item and would be liable. Another interesting example is the *Al-Arian* hypothetical in which *A*, a member of an FTO who only supports its peaceful activities, lets *B*, a known terrorist in the FTO, use his home, phone, and car.<sup>183</sup> Then, unbeknownst to *A*, *B* uses all three for illicit fundraising.<sup>184</sup> According to the *Al-Arian* court, *A* would be unfairly liable under § 2339B for providing lodging, communications equipment, and transportation to an FTO.<sup>185</sup> However, under the recklessness standard, *A* would still be liable because he does not lack culpability—*A* let a known terrorist use his home, phone, and car without monitoring him at all. And *A*'s support of the terrorist directly resulted in money being raised for the FTO. In other words, *A* failed to ensure sufficient oversight when he provided the above mentioned resources and was consequently reckless.

A recklessness standard could also alleviate the concern that an FTO could raise money “under the cloak of a humanitarian or charitable exercise”<sup>186</sup> because such a standard places a heavy burden on donors to ensure the aid provided *is* appropriate and *is used* appropriately. Most likely, few donors have the resources or capacity to ensure their non-fungible aid is not used to support the terrorist functions of an FTO. As a result, a recklessness standard would permit only a very small amount of aid to flow into the hands of a very small number of FTOs, and only in circumstances where the prospect of furthering international terrorism is very, very low, or may not even exist at all. But for the first time, the standard would tie a culpable intent to the statute, relieving § 2339B of its requirement of personal guilt.

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183. *Al-Arian*, 329 F. Supp. 2d at 1300.

184. *Id.*

185. *Id.*

186. AEDPA, Pub. L. No. 104-32, § 301, 110 Stat. 1214 (1996).

## VI. CONCLUSION

With the language of § 2339B, the statute's 2004 amendment, and the congressional record, Congress has patently indicated its intent to incorporate the knowledge standard into § 2339B. In doing so, Congress was aware that such a statute would prevent well-intentioned donors from providing aid to the legal and legitimate aims of FTOs. All but one court considering the mens rea issue of § 2339B has agreed with Congress that the Constitution requires nothing more than a guilty knowledge. But the most serious constitutional challenge to § 2339B remains insufficiently addressed: personal guilt. As demonstrated in the preceding Parts, the relationship between a donor's conduct and the concededly criminal activity of an FTO can lack sufficient substantiality to justify imposing a guilty intent on the donor. The several courts that have considered this challenge all failed to properly apply the personal guilt test supplied by the Supreme Court in *United States v. Scales*. The results of this test demonstrate the need for Congress to amend the statute to ensure constitutional application in all situations. With an amendment to § 2339B to include a recklessness standard, the statute would satisfy the due process requirement of personal guilt and would not hamper the government's ability to cut the economic legs of international terrorism.

The dangers posed by FTOs are real. As a result, one of the most important jobs of our government is to prevent terrorists from wreaking havoc on American soil and elsewhere in the world. The necessary cost of such vital protection is often our freedoms and liberties. But the line between order and liberty is not drawn by the degree to which the government can prosecute potential sympathizers with ease; the line is drawn by the Constitution. Congress cannot infringe on our constitutionally protected rights. To satisfy the right in jeopardy here—the due process right to proof of personal guilt—thankfully does not require any major prosecutorial hurdles that could endanger our national security. Instead of impeding the government's War on Terrorism, amending § 2339B to include a recklessness standard may actually help save it. Carefully targeted humanitarian aid may actually help steer FTOs away from violence, as well as diminish popular support for an FTO's violent activities by facilitating economic development, while concomitantly improving access to health care and education. In other words, the cautious charitable hand of the American citizen may help ameliorate intolerable conditions in the most desperate corners of the world and could consequently be an invaluable tool in the War on Terrorism. Above all, this guarded generosity should not be sacrificed at the expense of our constitutionally protected rights.