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A CONSTITUTIONAL MINIMUM THRESHOLD FOR THE ACTUS REUS OF CRIME? MPC ATTEMPTS AND MATERIAL SUPPORT OFFENSES

BY

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DISTINGUISHED PROFESSOR LAW EMERITUS

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A CONSTITUTIONAL MINIMUM THRESHOLD FOR THE ACTUS REUS OF CRIME? MPC ATTEMPTS AND MATERIAL SUPPORT OFFENSES

*Norman Abrams**

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I. INTRODUCTION

The modern law of attempts combined with the material support crimes¹ has expanded the ability of the government to prosecute inchoate criminal activity in terrorism cases. Examination of both the inchoate features of attempts liability since its reform more than a half century ago by the Model Penal Code (MPC),² and the inchoate nature of the material support offenses helps us to understand how this potent combination of different bases for criminal liability is being utilized today in terrorism prosecutions.

This examination also lays the foundation for addressing a basic question of constitutional law and theory: whether this combination of inchoateness may breach constitutional norms. Stated another way, is there a minimum constitutional threshold of *actus reus* conduct for an inchoate crime? Does the fact that the crimes at issue here involve terrorism also need to be taken into account in applying a constitutional calculus? Would it be a matter of concern if the law extended a similar basis for criminal liability to ordinary crime—that is, outside the arena of terrorism or other special crime categories?

To understand how far prosecutors can generally extend criminal liability when the MPC's attempts liability is combined with the material support offenses, the specific requirements of both sets of provisions as applied by the courts are reviewed in this article. Part II examines the MPC's attempts provisions, their background, and their relevant implications. Part III addresses the material support offenses, sections 2339A and 2339B of title 18 of the U.S. Code, and their use as inchoate offenses. Part III also compares with the material support offenses other categories of inchoate conduct that lawmakers have turned into substantive offenses. There are numerous such offenses in the federal criminal system; however, the material support offenses are, arguably, a unique version.

¹ See 18 U.S.C. §§ 2339A–2339B (2012) (criminalizing the providing of material support).

² MODEL PENAL CODE § 5.01(1)(a)–(c) (AM. LAW INST. 1985); see also Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 325–237, 336–37 (2007) (discussing generally the history of the Model Penal Code and its efforts to reform attempts liability in the 1960s).

Part IV examines how criminal liability for attempts (and/or conspiracy) combined with the material support offenses is currently being prosecuted with frequency in early-in-the-chronology-leading-to-terrorist-offenses contexts. With the foregoing as background, Part V then develops a line of analysis for mounting a constitutional challenge to this kind of combination of inchoate bases for criminal liability. This Part also addresses the need to recognize exceptions to a constitutional rule on this subject. Finally, Part VI examines whether there are any signs that this legally-lethal cocktail of combined inchoate bases for criminal liability—attempts and material support—has begun to spread to ordinary crimes in the federal or state systems.

II. THE MPC APPROACH TO ATTEMPT TO COMMIT A CRIME

A. *A Brief History*

In a majority of state jurisdictions in the United States today, legislatures have generally modeled the criminal law on the provisions of the MPC, including the law of attempts and other inchoate offenses.³ While not required to do so by statute, most federal courts today also look to the MPC attempts provisions when an attempted offense issue arises.⁴ The MPC law of attempts differs from the common law approach, which had earlier predominated in the United States.⁵ To appreciate the changes made by the Model Penal Code in this regard and how they bear on our subject, it is helpful to review the background of that development. A convenient place to begin is Oliver Wendell Holmes, Junior's description of the relevant legal doctrine in his landmark work, *The Common Law*. As Holmes stated in a familiar and insightful quotation:

The law does not punish every act which is done with the intent to bring about a crime. If a man starts out from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion

³ See Robinson & Dubber, *supra* note 2, at 320 (noting that “the Model Penal Code is the closest thing to being an American criminal code”). While most states have adopted the MPC’s elements for inchoate offenses, a majority have rejected the MPC’s prescription of “the same punishment for inchoate offenses, such as attempt, and consummated offenses.” *Id.*

⁴ See *id.* at 327 (describing the MPC’s persuasive influence in courts).

⁵ See *id.* at 336–37 (explaining that the MPC abandoned the common law distinction between inchoate and consummated offenses).

Eminent judges have been puzzled where to draw the line or even to state the principle on which it should be drawn, between the two sets of cases. But the principle is believed to be similar to that on which all other lines are drawn by the law [T]he considerations being, in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt. When a man buys matches to fire a haystack, or starts on a journey meaning to murder at the end of it, there is still a considerable chance that he will change his mind before he comes to the point. But when he has struck the match, or cocked and aimed the pistol, there is very little chance that he will not persist to the end, and the danger become so great that the law steps in.⁶

Holmes thus set forth a theory of criminal liability for attempts that focused mainly on the danger that the crime would be committed — that is, the nearness of the danger and the magnitude of the harm, basing his theory mainly on asserted differences in the likelihood of desistance and whether the crime is likely to be committed.⁷

As is familiar to criminal law scholars, almost seventy years ago, Professor Herbert Wechsler, as the Chief Reporter for the Model Penal Code, upended this historic philosophic underpinning for attempts de-

⁶ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 68–69 (1881). Insofar as Holmes includes the “greatness of the harm” as an element to be considered, his approach could be construed as having a variable proximity test for different crimes. In another early classic paper, Thurman Arnold made more explicit the idea that the test for an attempt should differ depending on the crime being attempted:

Various tests have been laid down. The courts, while usually admitting that each case must be decided on its particular facts, continue to confuse their opinions by citing long lists of cases of quite different kinds of crimes. Here also, to discuss whether acts done in an attempted robbery are comparable to acts done in an attempted incestuous marriage, as they relate to the general principle of proximate-ness, is as valuable as discussing whether Milton is more poetical than a pig is fat. Yet this is constantly being done, again with occasional absurd results.

Thurman W. Arnold, *Criminal Attempt — The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 72 (1930).

⁷ See HOLMES, *supra* note 6, at 68–69. The particular example Holmes used seems almost prescient in light of the recent large number of prosecutions of individuals charged with an attempt crime based on beginning to travel to a particular destination, which are described later in this article. See *infra* Part IV(A). Holmes uses the example of a person who set out on a journey at the end of which he intends to commit a crime and only gets partly there, concluding that the person is not guilty of any crime. HOLMES, *supra* note 6, at 68. Indeed, he treats it as no different from punishing a person for his thoughts—for resolving to commit a crime and then changing his mind. *Id.* These observations provide a nice platform for the discussion of the constitutional issues raised by attempted violations of section 2339A that this paper addresses in Part V(B).

scribed by Holmes.⁸ Rejecting the common law emphasis on the danger that the crime would be committed, Wechsler instead adopted an approach that, while retaining the idea of danger and, implicitly, of harm, focused on the perpetrator—specifically, the danger that he or she posed as evidenced by the mens rea and the conduct engaged in on the way toward completion of the offense.⁹ Innovatively at the time, the MPC defined the basis for attempts liability as having a purpose to engage in conduct constituting a crime plus engaging in a substantial step toward committing that crime where that step strongly corroborates the criminal purpose.¹⁰

One effect of this change in the approach to the law of attempts was, at least as a matter of theory, to move the needle of possible criminal liability further back in the chronology of events leading up to the intended crime.¹¹ One could incur criminal liability for an attempt somewhat earlier and more remotely from the actual completion of the intended offense than under the prior law, but it was not clear how far back in the chronology of the relevant conduct liability might be imposed.¹² An effect of the change was also to switch emphasis to the subjective element (i.e., the mental state or mens rea element of the offense) instead of what might be termed the objective features of an attempts situation (i.e., the conduct or actus reus component).¹³

This emphasis on the subjective rather than the objective, on the mental element rather than the conduct component of offenses, and on the dangerous offender rather than the danger of the crime being committed, tends to make earlier police intervention possible based on the

⁸ See Robinson & Dubber, *supra* note 2, at 323 (observing that “[f]rom the beginning, [the Model Penal Code] bore the imprint of the Chief Reporter, Herbert Wechsler, a law professor at Columbia University”).

⁹ Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 587 (1961). While rejecting the emphasis on the danger that the crime would be committed, Wechsler and his colleagues wrote: “[n]onetheless, the dangerousness of the actor’s conduct has some relation to the dangerousness of the actor’s personality, and to the need for preventative arrest, and, therefore, [Holmes’s] test, although unacceptable as a working rationale, is not entirely irrelevant.” *Id.*

¹⁰ MODEL PENAL CODE § 5.01(1)–(2) (AM. LAW INST. 1985).

¹¹ Wechsler, *supra* note 9, at 572–73 (describing one result of the draft MPC as “drawing the line between attempt and noncriminal preparation further away from the final act”).

¹² See *id.* at 572–73.

¹³ See *id.* at 593–94 (noting that the Model Penal Code’s formulation imposes liability where “some firmness of criminal purpose is shown” and the fact that “further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial”).

incurring of criminal liability at an earlier point than under the prior law.¹⁴ The MPC approach to attempts liability also has other significant impacts and implications. It is consistent with the philosophy of punishment espoused by the MPC more broadly,¹⁵ as well as sentencing under the MPC, more specifically.¹⁶ Beyond the MPC, the change may also have fostered the development of new kinds of offenses¹⁷ and may have even influenced new applications of some principles of constitutional criminal procedure.¹⁸

The described change in criminal law philosophy, *inter alia*, was aimed at cases like *People v. Rizzo*.¹⁹ In *Rizzo*, four men, while driving around, searched for a particular individual carrying a payroll, but they were unable to find him.²⁰ Based on this conduct, they were convicted of attempted robbery in the first degree, but, on appeal, New York's highest court overturned the conviction because the defendants had not come

¹⁴ *Id.* at 595.

¹⁵ See MODEL PENAL CODE § 1.02(1)(b) (AM. LAW INST. 1985) (describing one purpose of the Model Penal Code as “to subject to public control persons whose conduct indicates that they are disposed to commit crimes”).

¹⁶ See *id.* § 1.02(2)(a) (describing one goal of the sentencing provisions under the Model Penal Code as “to prevent the commission of offenses”).

¹⁷ Not very long after the Model Penal Code appeared, new substantive crimes were enacted that reflected a criminal rather than a crime emphasis. It was not without reason that the title of a leading article on the then-innovative RICO statute (enacted in 1970) characterized the RICO offense as “The Crime of Being a Criminal.” See generally Gerard E. Lynch, *RICO: The Crime of Being a Criminal Parts I and II*, 87 COLUM. L. REV. 661 (1987). The change in the foundation of liability effected by the Model Penal Code approach to attempts likely made it easier to legislate the RICO statute as well as anti-terrorism crimes like the two material support offenses (enacted in the 1990s), which are a focus of this article.

¹⁸ The MPC's adoption of a dangerous person approach in the law of attempts arguably laid the intellectual foundation for the enactment in 1978 of the Foreign Intelligence Surveillance Act, which established new standards for judicial authorization of electronic surveillance in foreign intelligence and terrorism matters. See generally Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C. and 18 U.S.C.). Probable cause under that Act centers attention on the criminal person, the “agent of a foreign power,” and not so much on specific crimes. See e.g., 50 U.S.C. § 1805(a) (2012) (authorizing the issuance of an order approving electronic surveillance upon a finding that there is probable cause to believe that the party to be surveilled is “an agent of a foreign power”); 50 U.S.C. § 1801(b) (2012) (defining “agent of a foreign power”). The MPC's dangerous person approach, by then well-established and familiar, arguably made it easier for the drafters of the FISA statute to incorporate such an emphasis into an extension of Fourth Amendment principles. See *United States v. U.S. Dist. Ct. E. Dist. Mich.*, 407 U.S. 297, 322–23 (1972) (suggesting that Congress could adopt different standards under the Fourth Amendment with regard to intelligence surveillance in cases involving domestic national security, but not specifying what those standards might be).

¹⁹ *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927).

²⁰ *Id.* at 888–89.

close enough to commission of the offense.²¹ Under pre-MPC law, different courts had applied a variety of tests for determining when an attempt was committed.²² Some of the tests were too indeterminate to provide helpful guidance.²³ Others were relatively easy to apply but did not draw the liability line so as to accurately capture the cases that merited prosecution.²⁴ Wechsler, Jones, and Korn described the new MPC approach as follows:

Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards criminal activity, not alone on this occasion but on others.²⁵ There is a need, therefore, subject again to proper safeguards, for a legal basis upon which law enforcement agencies may assess and deal with the special danger that such individuals present, thus making them amenable to the corrective process that the law provides.²⁶

The authors summarily continued:

We should, therefore, begin by inquiring when conduct designed to effect or to advance towards the attainment of the criminal objective ought not to be regarded as a crime, either because it does not adequately manifest the dangerousness of the actor or on other overriding grounds of social policy.²⁷

²¹ *Id.* at 888, 889–890. Professor Wechsler included the Rizzo case in the classic Michael and Wechsler Criminal Law casebook and used it to illustrate the limitation of the existing attempts doctrine. See JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES 597–602 (1940). The defendants in the Rizzo case probably could have been convicted of conspiracy to rob, but they appear to have been charged only with attempt, and, at the time, most conspiracy charges in New York were misdemeanors. See MICHAEL & WECHSLER, *supra*, at 637 n.4 (noting that conspiracy at common law and under N.Y. PENAL LAW section 580 was a misdemeanor at the time).

²² See Wechsler et al., *supra* note 9, at 586–92 (describing the various tests).

²³ See, e.g., *id.* at 586–87, 589 (criticizing the physical proximity test and the probable desistance test for failing to provide adequate guidance).

²⁴ See, e.g., *id.* at 587–90, 593–94 (criticizing the dangerous proximity approach, the indispensable element approach, the abnormal step approach, and the *res ipsa loquitur* approach for inadequately addressing the scope of possible cases).

²⁵ This is a telling statement. Indeed, does the fact that a person intends to commit a crime on a single occasion “obviously” indicate that the individual is inclined to commit crimes on other occasions? If so, it is a weak indication. Consider, for example, the RICO statute, codified at 18 U.S.C. § 1962(b)–(c) (2012), which requires the commission of at least two offenses to justify such an inference. Wechsler’s statement suggests that the dangerous actor philosophy advanced by the MPC may ultimately have been based on an “obvious” empirical inference that may not be so obvious.

²⁶ Wechsler et al., *supra* note 9, at 572.

²⁷ *Id.* at 574.

B. *The MPC Provisions*

The MPC attempt provisions are set forth in section 5.01.²⁸ According to the Code, the basic requirements for an attempt call for “culpability otherwise required for commission of the crime” and “purposefully [doing] anything that . . . is an act or omission constituting a substantial step in a course of conduct planned to culminate in [the]. . . commission of the crime.”²⁹ Further, the substantial step must be “strongly corroborative of the actor’s criminal purpose.”³⁰ Without further defining the notion of a substantial step, the MPC sets forth a series of examples to il-

²⁸ MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985).

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

...

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor’s criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
- (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
- (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
- (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

Id.

²⁹ *Id.* § 5.01(1).

³⁰ *Id.* § 5.01(2).

lustrate what it means by the phrase.³¹

The dangerous person/early intervention approach reflected in this substantial step/strongly corroborative standard avoids the inflexibility of some of the dangerous proximity tests and seems to err on the side of *finding* rather than *excluding* liability, which had not been the case under the dangerous proximity approach.³² While the MPC's formulation arguably provides more consistent guidance, it still has elements of indeterminacy (i.e., "substantial" and "strongly corroborative").³³

To give some idea of how different jurisdictions apply the MPC approach, a number of federal cases applying the MPC provisions are reviewed here. This body of case law suggests that the MPC approach may have moved the needle of liability a bit further away from the intended offense, but, typically, not to very remote acts. It may well be that courts would support moving the needle back somewhat more than

³¹ *Id.* The Code lists examples including (but not limited to) "lying in wait . . . enticing or seeking to entice a victim of the crime to go to the place" of its commission, and "unlawful entry of a structure . . . in which it is contemplated that the crime will be committed." *Id.* § 5.01(2)(a)–(g).

³² See Wechsler et al., *supra* note 9, at 595 (noting that the Code approach to attempts "broaden[s] liability" and makes it easier for law enforcement officials to apprehend dangerous individuals).

³³ *Id.* at 593–94. Wechsler, Jones, and Korn described the substantial step test as follows:

Whether a particular act is a substantial step is obviously a matter of degree. To this extent the present section retains the element of imprecision found in most of the other approaches to the preparation-attempt problem . . .

[A]lthough it is intended that the requirement of a substantial step will result in the imposition of attempt liability only in those instances in which some firmness of criminal purpose is shown, no finding is required as to whether the actor would probably have desisted prior to completing the crime. Potentially the probable desistance test could reach very early steps toward crime, depending on how one assesses the probabilities of desistance; but since in practice this test follows closely the proximity approaches, rejection of probable desistance will not narrow the scope of attempt liability.

. . . [T]he requirement of proving a substantial step generally will prove less of a hurdle for the prosecution than the *res ipsa loquitur* approach, which requires that the actor's conduct itself have manifested the criminal purpose. . . .

In addition to assuring firmness of purpose, the requirement of a substantial step will remove very remote preparatory acts from the ambit of attempt liability and the relatively stringent sanctions imposed for attempts. On the other hand, by broadening liability to the extent suggested, apprehension of dangerous persons will be facilitated and law enforcement officials and others will be able to stop the criminal effort at an earlier stage, thereby minimizing the risk of substantive harm, but without providing immunity for the offender.

Id. at 595. For commentary from Professor Wechsler on the "strongly corroborative" requirement, see *infra* note 39 and accompanying text.

is reflected in the cases, but interestingly, police and prosecutors do not appear to be trying to push the envelope very often.³⁴ Sometimes, how early in the chronology the police intervene is a matter of happenstance, but often, especially when the police have an undercover agent or a cooperating co-conspirator involved in the plot, the police can choose the moment to intervene, often choosing somewhat later rather than earlier.³⁵

For example, in *United States v. Stallworth*, where the police had a cooperating participant in a prospective bank robbery and the suspects engaged in a series of distinctive acts preparing to commit the robbery, the police waited until the robbers were about to enter the bank before intervening, although it seems likely that the court might have held some earlier points of intervention to involve a substantial step.³⁶ In such cases,

³⁴ See, e.g., *United States v. Smith*, 264 F.3d 1012, 1016 (10th Cir. 2001) (holding that assembling some but not all of the necessary ingredients and equipment to manufacture methamphetamine supported a finding of a substantial step on a charge of attempting to manufacture methamphetamine); *Erkins v. State*, 13 N.E.3d 400, 410–411 (Ind. 2014) (holding that the acts of identifying the target victim and following that victim from the casino to a highway exit while carrying a Glock handgun were substantial steps on a charge of attempted robbery).

³⁵ See *United States v. Stallworth*, 543 F.2d 1038, 1040–41 (2d Cir. 1976) (discussing the nature of police intervention in the context of attempt cases).

³⁶ See, for example, the extensive factual chronology described in the following excerpt by the court in *United States v. Stallworth*:

Since an understanding of the facts is critical to any consideration of inchoate crimes, we summarize the pertinent events culminating in the arrest. Rodney Campbell, a convicted bank robber, agreed to cooperate with the F.B.I. on January 12, 1976 in return for a grant of immunity from prosecution for four armed bank robberies in which he admittedly participated between June and September, 1975. Arrangements were made for Campbell to use an undercover Government vehicle, provided with a tape recorder and monitoring equipment, to assist the authorities in apprehending some of his former accomplices. Campbell consented to the tape recording of all conversations taking place in his car.

After reestablishing contact with individuals named Larry Peterson, Willie Young, and appellant Johnny Sellers, Campbell transported the men in his specially equipped vehicle as they reconnoitered several banks in Queens, New York. The group began actual preparations for a robbery on Wednesday, January 21, by stealing ski masks from a department store. Later that day Peterson and Young appropriated surgical gloves from a hospital while Sellers, a recent patient, engaged several nurses in conversation. Finally, Peterson purchased a hacksaw and roofing nails which, he told Campbell, he needed to “fix” a shot-gun.

On January 22, Sellers, Peterson, Young and Campbell perfected their plan to rob a branch of the First National City Bank in Whitestone, Queens. Peterson, formerly a factory worker in the neighborhood, advised the group that on Fridays (in this instance, January 23) large amounts of money would be on hand to accommodate industrial employees in cashing their salary checks. Young entered the bank on Thursday afternoon to examine its internal physical structure and reported to his colleagues that the tellers’ counters were of average height and security was thin. The participants agreed to recruit appellant Clarence Stallworth to drive the geta-

both the circumstances and the extent to which the police are able to control those circumstances undoubtedly condition the judgment of when to intervene. With an occasional exception,³⁷ the existing federal case law does not tell us how far back in the chronology of the crime the courts are willing to go when applying the substantial step formula.³⁸

Nor does the strongly corroborative formula necessarily help to set clear parameters for the application of the MPC attempt standards. Looking to that language in the MPC attempts provisions, it, on the surface, appears to suggest a version of the *res ipsa loquitur* test that was

way car.

On Friday morning Stallworth joined Young and Sellers, to whom he handed a .38 calibre revolver, and assumed the role of driver. Peterson met his comrades, gave them a sawed-off shotgun and distributed other paraphernalia required for the crime. En route to the bank in Whitestone the occupants of the Government-owned automobile covered their fingers with band-aids, their hands with surgical gloves and donned the ski masks. They prepared to destroy the vehicle after the robbery by stuffing gasoline-soaked newspapers under the seats.

The target bank was located in a small shopping center. As the car entered the parking lot, Sellers alighted and strolled past the bank several times, peering inside at each opportunity, as his accomplices circled the shopping center. At approximately 11 A.M., Stallworth stopped the vehicle directly in front of the bank. Sellers, who had stationed himself at an adjacent liquor store, started to approach the bank. Simultaneously, Campbell said, "let's go," and the occupants of the car reached for the doors. At this point, F.B.I. agents and New York City policemen, who had saturated the area as a result of intelligence acquired through the would-be robbers' monitored conversations, arrested the men without incident.

Id. at 1039.

³⁷ See *infra* Part III(D)(4) for a discussion of *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008).

³⁸ One can also gain some insight regarding the interpretation of the substantial step and strongly corroborative requirements from the examples inserted in the MPC attempts provisions. MODEL PENAL CODE § 5.01(2) (AM. LAW INST. 1985). All of the examples have two characteristics in common. First, they all can be described as involving substantial and fairly definitive conduct in relation to the object crime—i.e., reconnoitering, lying in wait, etc. *Id.* Second, while none of these are very remote preparatory acts, they are not necessarily very proximate to completing the crime either. Would-be bank robbers would not need to be inside the bank that is to be robbed. Nor even must the act be performed on the day on which the robbery is to take place. There does not seem to be a need for serious *proximity* to completion of the offense so long as there is a strong showing of *commitment* to do the deed. See *e.g.*, *id.* § 5.01(2)(e) ("[P]ossession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances," can serve as the basis for attempts liability). Of course, these are only examples that, as a matter of law, can meet the statutory requirements. *Id.* § 5.01(2) ("[T]he following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law."). One should not necessarily assume from these hypotheticals that somewhat more remote conduct cannot be deemed a substantial step or that somewhat more ambiguous conduct cannot be deemed strongly corroborative of the criminal purpose.

applied by some courts under the pre-MPC common law approach. Professor Wechsler and his co-authors, however, made the following comments about the strongly corroborative requirement:

The basic rationale of the requirement that the actor's conduct shall strongly corroborate his purpose to commit a crime is, of course, the same as that underlying the *res ipsa loquitur* view. But framed in terms of corroboration, the present formulation does not so narrowly circumscribe the scope of attempt liability. Rigorously applied, the *res ipsa loquitur* doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose. . . .

Despite their weaknesses, confessions play an important role in the apprehension and conviction of criminals. The *res ipsa loquitur* test unduly restricts their value in an attempt case. The objectives of the *res ipsa loquitur* test will be met if it is required that the actor's conduct, considered in the light of all the circumstances, add significant evidential force to any proof of criminal purpose based solely on the actor's statements. The actor's conduct would then be "strongly corroborative" of his purpose to commit the crime.³⁹

The authors appear to be saying that under the MPC approach, the criminal purpose can be shown by the actor's statements, and if the acts engaged in adequately corroborate the actor's statement of purpose, they meet the required standard.⁴⁰ Arguably, that is different from interpreting the strongly corroborative requirement to require that the acts themselves evince the criminal purpose, as the *res ipsa* test does, albeit that the requirement should be more flexibly applied. This Wechslerian interpretation of the strongly corroborative requirement is consistent with the shift by the MPC to a stronger focus on the mens rea of the actor.⁴¹

³⁹ Wechsler et al., *supra* note 9, at 594.

⁴⁰ *Id.*

⁴¹ While New York State has not adopted the MPC attempts provision, the federal courts in New York look to the MPC attempts provisions in federal cases arising in the Second Circuit, as do many of the other circuits, although, as mentioned earlier in the text, they are not required by statute to do so. *See, e.g.,* *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003) (finding that there was a sufficiently substantial step to support the charge of attempt, but failing to mention the strongly corroborative requirement); *accord* *United States v. Kaziu*, 559 F. App'x 32, 37 (2d Cir. 2014). In *United States v. Manley*, 632 F.2d 978 (2d Cir. 1980), the court did not expressly refer to the strongly corroborative requirement by name but did state regarding the substantial step: "[A] reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken with a design to violate the statute." *Id.* at 987–88. Other cases have also expressly applied the strongly corroborative requirement. *See, e.g.,* *Stallworth*, 543 F.2d at 1040; *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir. 1977); *United States v. Mandujano*, 499 F.2d 370, 379 (5th Cir. 1974). Two cases which held that the substantial step test had not been met also did not mention the strongly

This view may also open the door to reliance on strongly corroborative evidence which is consistent with the criminal purpose but nevertheless, in the particular evidentiary context, ambiguous with regard to that purpose.⁴²

III. THE MATERIAL SUPPORT OFFENSES—SPECIAL RULES IN TERRORISM CASES

A. Sections 2339A and 2339B—Introduction

Investigations and prosecutions of terrorism cases in the federal courts and before military commissions use many special rules and approaches; many of these relate to process and procedure, including such matters as interrogation methods,⁴³ electronic surveillance,⁴⁴ search authority,⁴⁵ and detention rules,⁴⁶ as well as trial procedures in military

corroborative requirement, but in the context of those cases, it was not necessary for the courts to reach the strongly corroborative question because there was no substantial step. *See* *United States v. Rosa*, 11 F.3d 315, 340 (2d Cir. 1993) (holding that there was no substantial step toward possessing heroin for resale where the defendant never “entered into an agreement with a supplier or made inquiry of a supplier to obtain heroin”); *United States v. Delvecchio*, 816 F.2d 859, 862 (2d Cir. 1987) (finding no substantial step toward an attempt to possess heroin because the government failed to establish “that appellants performed any overt act to carry out the agreed upon purchase”).

⁴² *See infra* note 134 and accompanying text, regarding the obtaining of a visa, purchasing an air ticket to Jordan and going through security at the airport in connection with a possible purpose either to travel to Syria to join ISIS or to travel to Jordan to visit family.

⁴³ *See* Norman Abrams, *Terrorism Prosecutions in U.S. Federal Court: Exceptions to Constitutional Evidence Rules and the Development of a Cabined Exception for Coerced Confessions*, 4 HARV. NAT. SEC. J. 58, 86–88 (2012) [hereinafter Abrams, *Terrorism Prosecutions*] (summarizing exceptions to otherwise accepted rules for interrogation and the admissibility of interrogations in the context of terrorism investigations and prosecutions).

⁴⁴ *Id.* at 62 (citing *United States v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297 (1972) for the proposition that search and seizure requirements for electronic surveillance may be relaxed when the government is seeking to prevent terrorism); *see also* Foreign Intelligence Surveillance Act § 102, 50 U.S.C. § 1802(a)(2) (2012) (giving the President authority to authorize electronic surveillance without a court order to acquire foreign intelligence under specified circumstances).

⁴⁵ *See* Foreign Intelligence Surveillance Act § 301–305 (giving the President authority to authorize physical searches without a court order to acquire foreign intelligence under specified circumstances).

⁴⁶ *See generally* Norman Abrams, *Addressing the Guantanamo “Legacy Problem”*: *Bringing Law-of-War Prolonged Military Detention and Criminal Prosecution into Closer Alignment*, 7 J. NAT’L SEC. L. & POL’Y 527 (2014) [hereinafter Abrams, *Guantanamo Legacy Problem*] (discussing detention policies); *see also* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1100 (2008) (discussing the use of status-based detentions, which are

commission proceedings.⁴⁷

The use of special approaches in terrorism prosecutions also includes the the types of crimes charged. Among the many substantive offenses used in such prosecutions, a number of them can also be described as reflecting a special approach currently utilized only in terrorism cases. Two offenses, sections 2339A and 2339B of Title 18 of the United States Code, are examples of such a special approach; these are innovative crimes, enacted twenty to twenty-five years ago, namely to criminalize the providing of material support for a terrorism offense or to a foreign terrorist organization.⁴⁸ Ever since the tragic attacks on

typically associated with military detentions, in terrorism-related cases).

⁴⁷ See Abrams, *Guantanamo Legacy Problem*, *supra* note 46, at 538–40 (explaining the Peer Review Board Process used to determine whether detainees should remain at Guantanamo); Chesney & Goldsmith, *supra* note 46, at 1117–20 (describing the military commission system and the procedures that it employs); NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* (5th ed. 2018) (analyzing the Military Commissions Acts of 2006 and 2009).

⁴⁸ Antiterrorism and Effective Death Penalty Act of 1996 § 323, 18 U.S.C. § 2339A (2012); Antiterrorism and Effective Death Penalty Act of 1996 § 303, 18 U.S.C. § 2339B (2012). Section 2339A provides:

(a) OFFENSE.—Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, 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. . . .

(b) DEFINITIONS.—As used in this section—

(1) 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 (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials. . . .

18 U.S.C. § 2339A.

Section 2339B provides.

(a) PROHIBITED ACTIVITIES.—

(1) UNLAWFUL CONDUCT.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To vio-

September 11, 2001, federal prosecutors have increasingly charged these two offenses in terrorism cases.⁴⁹ They have been used in an unusually wide variety of factual contexts, often with other accompanying charges, but also alone.⁵⁰ Recently, for example, they have been used repeatedly and, often by themselves, in a significant cohort of filed criminal cases involving a recurring fact pattern. During the period from 2013–2018, several dozen prosecutions were initiated, using one or both of these provisions and always (in this particular cohort of cases) involving liability only for attempt and/or conspiracy, and only directed against individuals planning, and then taking steps, to fly to the Middle East, to travel to Syria, to participate in fighting a jihad war abroad and, more specifically, to join with ISIS, a designated Foreign Terrorist Organization.⁵¹

These two offenses have added doctrinal innovation to the Federal

late this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

...

(g) DEFINITIONS.—As used in this section—

...

(4) the term “material support or resources” has the same meaning given that term in section 2339A . . .

(6) the term “terrorist organization” means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

(h) PROVISION OF PERSONNEL.—No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.

18 U.S.C. § 2339B.

⁴⁹ CTR. ON LAW & SEC., N.Y.U. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2011 18–19 (2011), <https://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>; Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 20 (2005) [hereinafter Chesney, *The Sleeper Scenario*].

⁵⁰ While section 2339A “makes it illegal to give material support to terrorists,” section 2339B operates as a prohibition on the provision of “material support or resources to designated foreign terrorist organizations.” CTR. ON LAW & SEC., *supra* note 49, at 18 n.11.

⁵¹ See cases cited *infra* note 134.

Criminal Code in a number of different ways. By creating, inter alia, a substantive offense out of complicity-type but inchoate conduct (as will be explained in the following pages) when combined with attempt and/or conspiracy, such prosecutions serve to open the door to an especially inchoate form of liability. In an earlier paper, I mainly examined the complicity and mens rea features of the two material support crimes.⁵² Here, the inchoate aspects of these two offenses and the doctrinal implications of the combination of attempt liability and a material support offense will be the primary focus.⁵³

B. Specific Features

Part of the actus reus conduct component of both the section 2339A and the section 2339B offenses is “providing material support.”⁵⁴ In the case of section 2339A, the criminalized act is the provision of material support “to be used in preparation for, or in carrying out,” a violation of specified crimes;⁵⁵ in the case of section 2339B, the criminalized act is the provision of material support “to a Foreign Terrorist Organization” (“FTO”).⁵⁶ The same definition of “material support” applies to both offenses.⁵⁷

Most of the categories of material support listed in the statute, such

⁵² See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 10–11 (2005) [hereinafter Abrams, *Material Support Terrorism Offenses*].

⁵³ Professors Chesney and Brown, for example, have each delved into the use of these offenses as preventative tools against terrorism. See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007) [hereinafter Chesney, *Anticipatory Prosecution*]; Chesney, *The Sleeper Scenario*, *supra* note 49, at 21–34; Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1410–11 (2003); George D. Brown, *Notes on a Terrorism Trial—Preventative Prosecution, “Material Support” and the Role of the Judge after United States v. Mehanna*, 4 HARV. NAT. SEC. J. 1, 3 (2012); see also Gabriel Hallevy, *Incapacitating Terrorism through Legal Fight – The Need to Redefine Inchoate Offenses Under the Liberal Concept of Criminal Law*, 3 ALA. C.R. & C.L. L. REV. 87, 98–116 (2012). While that aspect will not be ignored, the emphasis here is on the doctrinal innovation in combining these offenses with attempts liability, how it compares with other substantive inchoate offenses and the implications of these developments for the general criminal law. While the focus here is mainly on attempt, rather than conspiracy, combined with the material support offenses, account must also be taken of the implications of liability for conspiracy and material support. See *infra* Part V(D).

⁵⁴ 18 U.S.C. §§ 2339A–2339B.

⁵⁵ *Id.* § 2339A(a).

⁵⁶ *Id.* § 2339B(a).

⁵⁷ *Id.* § 2339A(b)(1) (defining material support); 18 U.S.C. § 2339B(g)(4) (“the term ‘material support or resources’ has the same meaning given that term in section 2339A. . .”).

as property, service, currency, communications equipment, and transportation, are in themselves non-harmful, non-dangerous, facially innocent and mundane materials or services.⁵⁸ A few of the items are intrinsically associated with danger or risk of harm—namely, weapons, lethal substances and explosives—while other items in the list—namely, safehouses and false identity papers—do not have a quality of lethality but cannot fairly be termed innocent.⁵⁹ Of course, even the mundane and innocent items become dangerous by virtue of the intent or knowledge that they are being provided to potential users to utilize for criminal purposes. While the conduct involved—providing material support—has been made a crime, the basis for imposing criminal liability is not that engagement in this conduct will itself cause harm, but rather that such engagement adds to the risk that a future harm involving a crime will be committed.⁶⁰ “The material support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.”⁶¹

Thus, section 2339A is an offense that makes specific categories of aiding/abetting-type conduct a substantive offense that is separate from the crime that is the object of the aiding/abetting type conduct. The long

⁵⁸ See 18 U.S.C. § 2339A(b)(1).

⁵⁹ *Id.*

⁶⁰ The familiar and basic idea of a crime is that it consists of an *actus reus* that includes harmful conduct or conduct resulting in harm plus a criminal *mens rea*. *United States v. Ab-felbaum*, 445 U.S. 115, 131 (1980) (“In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.”). A set of exceptions to that description are the traditional inchoate offenses, attempt, conspiracy and solicitation. They involve a criminal *mens rea* and a conduct component but do not involve *harmful* conduct. See Wechsler et al., *supra* note 9, at 571 (noting that attempt, solicitation, and conspiracy are defined “so that their commission does not rest on the occurrence of the evil that it is the object of the law to prevent”). There are, of course, different notions of harm, but the inchoate offenses do not require harm under the ordinary meaning of that term. The basis for these long-established exceptions to the idea that a crime must involve harmful conduct is that the inchoate conduct involved in an attempt, conspiracy or solicitation creates a direct risk that intended harmful conduct will ensue; treating the direct creation of a risk that a crime involving harm will be committed as also warranting punishment is reasonable. Compare Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003) (arguing that “risk of harm is in and of itself a harm”), with Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1340–1388 (2003) (arguing that whether risk is a harm itself depends on the circumstances at hand, specifically that while Bayesian risk of harm may itself be harmful, frequentist risk of harm is not). Insofar as the two material support offenses are not, in most of their manifestations, based on conduct that involves harm, only the creation of a risk of harm, basing criminal liability on an attempt or conspiracy to commit such “substantive” offenses should immediately set off some alarm bells. This paper is an exploration of the issues thereby raised.

⁶¹ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).

list of crimes that can be the object of the material support are all serious crimes that either are by their terms terrorism crimes or have a significant potential to be committed in a terrorism context, and have been consistently only prosecuted when committed in such a context.⁶²

Although section 2339B is a similar kind of offense, the aid provided under this section, i.e. the material support, is to a foreign terrorist organization, a principal characteristic of which is that, based on its past behavior, it engages in terrorism crimes. Thus, section 2339B differs from section 2339A insofar as the aid provided need not be knowingly provided to aid in any specific terrorism offenses. Both sections 2339A and 2339B also differ from traditional aiding and abetting insofar as a mens rea of knowledge suffices, while the traditional majority view is that a mens rea of purpose is required for aiding and abetting.⁶³

Both of the material support offenses do not require that any harm be caused—in neither instance must any specific object crimes involving harm be committed for liability to be imposed for providing material support.⁶⁴ In this respect, these two substantive offenses each consist of inchoate conduct with respect to the commission of one or more future serious offenses involving harm.

A special aspect of both sections 2339A and 2339B is that prosecutions frequently rely upon one particular category of material support in the statutory definition: to “provide personnel.”⁶⁵ What exactly does it mean to “provide personnel”?⁶⁶ In one of the earliest post-9/11 cases in-

⁶² U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL 9-2.136 — NOTIFICATION, CONSULTATION, AND APPROVAL REQUIREMENTS FOR INTERNATIONAL TERRORISM MATTERS (2015), <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.136> (“While these statutes may be used in a variety of contexts, some not involving terrorism at all and others involving only domestic terrorism, if the investigation in which the statute is used involves an identified link to international terrorism . . . it is encompassed by the policy set forth in this section.”).

⁶³ See Chesney, *Anticipatory Prosecution*, *supra* note 53, at 479–80 (noting that knowledge is sufficient to support a charge under section 2339A).

⁶⁴ See *id.* at 480–86 (discussing the applications of section 2339A, none of which require harm to be committed to satisfy the material support requirement). Because section 2339B incorporates the definition of “material support” from section 2339A, Chesney’s analysis applies to material support crimes under section 2339B as well.

⁶⁵ See 18 U.S.C. § 2339A(b)(1), for the complete definition of material support. See also 18 U.S.C. § 2339B(g)(4) (incorporating the definition of “material support” from section 2339A).

⁶⁶ What does it mean to “provide” the material support, namely, personnel? The case law raised questions about this language. See, e.g., *U.S. v. Stewart*, 590 F.3d 93 (2d Cir. 2009) (considering whether the term “personnel” was unconstitutionally vague as applied to the defendants, and concluding that it was not). Subsequently, section 2339B was amended to include language which answered some, but not all, of the questions inherent in the phrase

interpreting this phrase, John Walker Lindh, the so-called “American Taliban,” was prosecuted under section 2339 for fighting alongside the Taliban against U.S. forces.⁶⁷ The district court adopted the interpretation that when Walker Lindh joined the Taliban in their warring actions, he provided himself to them, thereby providing personnel to the Taliban within the meaning of section 2339B.⁶⁸ Subsequently, there were other judicial decisions that similarly construed the statutory category to include “providing oneself.”⁶⁹ Later, Congress amended the statutes to expressly incorporate this judicial interpretation.⁷⁰ As will be seen, prosecutors can use the “provide personnel” category of material support to increase the flexibility of application and the degree of inchoateness of these offenses.⁷¹

Finally, another important structural feature of section 2339A should be mentioned. As previously described, the offense is not a specialized, single subject substantive offense. Rather, section 2339A is a complex crime, one which contains a very long list of predicate offenses, all of which are thought to somehow involve or relate to terrorism.⁷² The structure thus creates a type of offense that has a very broad reach, a kind of catch-all offense that is, in reality, many different crimes combined under the umbrella of a single provision. By listing a large number

“provide personnel.” Intelligence Reform and Terrorism Prevention Act of 2004, PUB. L. NO. 108-458, § 6603, 118 STAT. 3638, 3762–63 (2004). The statute now states that the accused must have knowingly provided, attempted or conspired to provide personnel (who may be the provider himself) to work under the direction or control of, or to manage a terrorist organization in order to be guilty under that provision. 18 U.S.C. § 2339B(h). In *Holder*, the Supreme Court ruled that a similar limitation under section 2339B inhered in the concept of providing a service—namely that the act must be done in coordination with or at the direction of the FTO to constitute a “service.” 561 U.S. at 23–24. An earlier district court case had concluded that for an individual to be guilty of providing material support under section 2339A, which was not amended to include the “direction or control” proviso, at a minimum, where the material support being provided is the actor himself, the use of the term “personnel” means that there must be “some form of coordination, joint action or understanding” between the actor and the party who will perpetrate the intended target offense. *United States v. Abu-Jihaad*, 600 F. Supp. 2d 362, 400 (D. Conn. 2009).

⁶⁷ *United States v. Lindh*, 212 F. Supp. 2d 541, 545–47 (E.D. Va. 2002).

⁶⁸ *Id.* at 577.

⁶⁹ See, e.g., *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011) (“Section 2339(B) criminalizes providing personnel through self-recruitment (*i.e.*, volunteering oneself to serve under the direction of a terrorist organization) no less than through recruitment (securing another person to serve under such direction).”).

⁷⁰ Intelligence Reform and Terrorism Prevention Act of 2004 § 6603(b) (amending the definition of “personnel” to “include oneself”).

⁷¹ See *infra* Part IV(B) for a discussion of *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011).

⁷² 18 U.S.C. § 2339A(a) (2012) (listing the predicate offenses).

of object or predicate crimes and also having an expansive list of the different kinds of material support that can be the gist of the offense, the statute is designed to reach an extraordinarily wide range of crime-related behavior. Section 2339A thus represents a formulaic approach that legislators could use, with very small adaptations, to extend the reach of inchoate behavior linked to the commission of many serious crimes. It is an approach that is easy to copy and adapt so that it could readily be emulated in other U.S. jurisdictions.⁷³

C. Extended Inchoate Features

Sections 2339A and 2339B include, internal to each of the sections, provisions for attempt or conspiracy liability, thereby confirming the drafters' view of the material support offenses that they can be attempted or be the object of a conspiracy.⁷⁴ When any related interpretative issue has arisen, the court has responded by describing the material support offense as a "substantive offense"⁷⁵ not unlike substantive crimes such as murder, rape, arson, etc. One should not lose sight of the fact, however, that these two provisions in fact describe inchoate conduct that does not involve direct commission of harm.⁷⁶ Thus, there are typically two levels of inchoateness where an attempt or conspiracy to commit the crime of providing material support is involved. In such instances, criminal liability is based on conduct that is also *inchoate with respect to the inchoate substantive offense* of providing material support.⁷⁷

⁷³ A similar feature in the RICO and money laundering statutes has facilitated their spread to additional crimes both in the federal and state systems. See 18 U.S.C. §§ 1961–1962 (2012) (defining "racketeering activity," which is unlawful under RICO, to include a variety of predicate offenses); 18 U.S.C. § 1956(a)(1)(A) (2012) (defining the predicate offenses for money laundering).

⁷⁴ Of course, unless an attempt provision is included in the statute, liability for attempt would not lie: there is no generally applicable federal attempts provision. There is, however, a general conspiracy provision in 18 U.S.C. § 371 (2012).

⁷⁵ See e.g., *United States v. Sattar*, 395 F. Supp. 2d 79, 93 (S.D.N.Y. 2005), *aff'd sub nom*, *United States v. Stewart*, 590 F.3d 79, 93, 119 (2d Cir. 2009).

⁷⁶ There are numerous "substantive" crimes that have an inchoate aspect, but the material support offenses differ from those. See *infra* Part III(D)(1) for a discussion reviewing these other substantive crimes with inchoate features.

⁷⁷ There are two additional notable features in the use of section 2339A which, as mentioned, lists a series of object or predicate offenses in aid of any one of which the material support might be provided. Some of those offenses consist of or include conspiracy provisions. See, for example, 18 U.S.C. § 956(a)(1) (2012), which makes it a crime to conspire within the United States to kill persons abroad, and which can also serve as a predicate for criminal liability under section 2339A. 18 U.S.C. § 2339A(a). When attempt or conspiracy to violate 2339A is charged, and the ultimate object crime alleged as the predicate of the 2339A

Typically, given the peculiar nature of the material support offense—that is, that it consists of complicity-like conduct—another person will be involved or will be contemplated to be involved; the material support is intended to be provided to someone or some organization.⁷⁸

That fact might lead one to think that, in all such cases, a conspiracy charge is a possibility. That conclusion, however, is not warranted. Situations arise with some frequency—certainly among the current prosecutions of these offenses—where the only basis for a criminal material support charge involves liability for the attempted offense. For example, the actor may only be in touch with a feigned accomplice/co-conspirator—with no one else involved—a not-infrequent fact pattern. Similarly, the actor may be an aspiring al Qaeda or ISIS player, but may not actually be in touch with anyone. Although he has the necessary *mens rea* and engages in sufficient conduct for an attempt, a conspiracy

conduct is a conspiracy to engage in specified prohibited conduct, as it was in a number of the two dozen plus cases recently prosecuted, the charge arguably may contain three levels of inchoateness. The third level, of course, is a function of the use of specific object crimes charged, such as section 956 and is not built into every use of section 2339A. Note also that section 2339A includes the phrase “in preparation for. . .” in its link between the material support element and the list of targeted offenses toward the commission of which the material support is being provided. 18 U.S.C. § 2339A. Insofar as the attempted material support crime charged is attempting to provide material support in preparation for the commission of a listed object crime that involves a conspiracy element as part of the completed offense, arguably four levels of inchoateness may be involved. Any issues relating to these additional levels of inchoateness which are dependent on the specific crime(s) charged or the preparation language in the statute are not further addressed in this paper.

⁷⁸ The standard model typically used to discuss a possible attempt to commit a crime assumes a single actor who has either committed the last act or engaged in conduct somewhere along a continuum of conduct leading to the completion of the intended crime, and the question is whether the conduct involved amounts to a substantial step. *See, e.g., supra* notes 19–21 and accompanying text (discussing *Rizzo*). The situation with respect to attempting to commit the crime of providing material support is slightly different. To begin with the substantive crime of providing material support, as mentioned in the text, implicitly contemplates a minimum of two persons—the person providing the material support and the person or persons who is (are) the intended recipient(s) (who in the case of 2339B may be [an] agent[s] of the foreign terrorist organization). 18 U.S.C. § 2339B(a)(1). Accordingly, the attempt situation in some manner needs to take account of one or more potential recipients of the material support.

The attempter may or may not be in communication with the recipient or an agent of the recipient. Even if not in communication with anyone, it still would be required to be proved that the actor’s purpose includes providing the material support to one or more persons. How specific the actor’s intent must be in this regard, and what it must include are familiar issues both in the law of attempts and conspiracy. It would seem that at a minimum, the *mens rea* of the actor must contemplate in some sense the participation of at least one other person. *See Salinas v. United States*, 522 U.S. 52, 65–66 (1997) (contrasting an enterprise, which can exist with only one actor, with a conspiracy).

charge would not be warranted. The need for an attempt charge may arise, too, when the prosecutor wishes to prosecute a crime in addition to conspiracy.⁷⁹

It is also worth noting that the drafters of the two substantive material support offenses did not highlight their inchoate or secondary party nature by using the traditional nomenclature of attempts, aiding and abetting, or attempts to aid.⁸⁰ By creating what are substantive offenses, in form and on the surface, rather than specialized forms of attempts or accomplice liability with serious penalties attached, the drafters effectively assured that these bases for criminal liability themselves could be seen as objects of attempts or conspiracy. Then, they nailed down that conclusion by providing, internal to each of the statutes, that attempts and conspiracy liability were applicable.⁸¹ If these bases for criminal liability had been cast as attempts or complicity, it would be much less likely that these bases would be used as an object of an attempt.⁸²

⁷⁹ Insofar as these offenses created a new pair of substantive offenses that involve inchoate conduct, not unlike that involved in an attempt (but with knowledge rather than specific intent as the minimum *mens rea*), combined with aiding and abetting-like conduct, where proof of the commission of the object offense is not required, they can be analogized to attempts to aid. Further, if one thinks of the material support offenses as analogous to attempts to aid, the attempt to commit either one of them may be likened to an attempt to attempt. It is noteworthy that the MPC included attempts to aid as one of the categories of conduct that could be a basis for complicity liability, and thus opened the door to a limited form of attempt to attempt, insofar as a person could be charged with being an accomplice to an attempt based on an attempt to aid. MODEL PENAL CODE § 5.01(3) (AM. LAW INST. 1985). It should further be noted that not all of the jurisdictions that have largely adopted the MPC attempts and complicity approach have adopted this particular feature. Attempt to aid as a basis for complicity should be distinguished from attempted complicity as a basis for attempt liability, both of which are provided for under the Model Penal Code. *Id.* § 2.06 (criminalizing attempted complicity); *see also infra* Part III(F). Attempt to aid as a basis for complicity under the Model Penal Code can be used as a particular form of conduct that makes one liable for attempted complicity which entails liability for attempt—a specific form of possible liability for attempt to attempt under the MPC. *Id.*

⁸⁰ Compare 18 U.S.C. §§ 2339A–2339B (2012), with MODEL PENAL CODE § 5.01(3).

⁸¹ 18 U.S.C. §§ 2339A–2339B (stating that the offenses are applicable to attempts and conspiracies).

⁸² Compare 18 U.S.C. §§ 2339A–2339B with MODEL PENAL CODE § 5.01(3) (“A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.”); *see also infra* Part III(F).

D. Comparison with Other Inchoate Conduct Offenses that are Substantive in Form

Generally, substantive offenses can be the object of an attempt or conspiracy. It seems odd, however, to provide that an actor can attempt to commit attempt or conspiracy.⁸³ Accordingly, the fact that inchoate criminal conduct is formulated as a substantive offense—that is, its form is that of a substantive offense—usually means that the offense can be the object of an attempt even though it itself is inchoate with respect to harmful conduct comprising the object crime. For present purposes, it is useful to examine the incidence of such offenses in our legal system generally, and particularly, in the federal system.

1. Traditional Serious Offenses—Their Inchoate Features

Substantive offenses defined in such a way that they can be committed and prosecuted, even though the ultimate harm has not occurred, are familiar constructs in the criminal law. Inchoate conduct criminalized in the form of substantive offenses is found with great frequency.⁸⁴ Indeed, many of the most familiar traditional serious substantive offenses are in some sense inchoate.⁸⁵ It can even be argued that substantive crimes in which the ultimate harm contemplated must have been committed before they can be prosecuted are the exception.⁸⁶

It is, for example, a familiar observation that burglary is in some sense an inchoate offense. Common law defined the traditional offense as “breaking and entering the dwelling of another at night with the intent to commit a felony [therein].”⁸⁷ The ultimate goal of this offense is to prevent the commission of a felony in a dwelling due to its concomitant risks to the occupants. The offense, however, is committed when the

⁸³ See Brief and Special Appendix for Defendant-Appellant-Cross-Appellee, United States v. Stewart, 2007 WL 7130845, at *163 (quoting *State v. Hewett*, 158 N.C. 627, 629 (1912)) (arguing that multi-level inchoate offenses are “absurd” because “‘one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt.’ . . . The same conclusion is required when ‘conspiracy’ is substituted for ‘attempt’: a ‘conspiracy to conspire’ is a logical absurdity.”) (citations omitted).

⁸⁴ See Wechsler et al., *supra* note 9, at 571 (noting that “many specific substantive offenses also have a large inchoate aspect”).

⁸⁵ *Id.* at 571–72. These crimes can include larceny, forgery, kidnapping, and burglary.

Id.

⁸⁶ *Id.* at 572.

⁸⁷ *Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1009 (1951).

breaking and entering occurs.⁸⁸ The police can intervene and the individual can be prosecuted for a very serious crime at an early stage and well before the ultimate harm is reached. It can be and has been described as a specialized attempt offense—one that in this instance has been transformed into a substantive crime.⁸⁹

Although sometimes overlooked, larceny, too, has the same general character as burglary. The traditional definition of the offense is “the unlawful taking and carrying away of someone else’s tangible personal property with the intent to deprive the possessor of it permanently,”⁹⁰ but it could have been defined as “the attempt to permanently deprive a person of his property,” since the ultimate harm intended is the permanent deprivation of property.⁹¹ Like burglary, attempt-like conduct in larceny is defined as a substantive crime based on conduct that attains a defined inchoate stage in the chronology of the offense. With the requisite mens rea, that inchoate stage is reached at the time of the taking.⁹² Similarly, robbery, which contains larceny as one of its elements, has an inchoate aspect.⁹³ There are also other traditional offenses that fit the same model, such as arson.⁹⁴ Indeed, among the major traditional common law crimes, the only ones that clearly lack some form of these characteristics are murder and other forms of criminal homicide.

What justifies treating these forms of inchoate conduct as serious crimes in themselves? In each of the mentioned cases, there is some harm at an intermediate stage that warrants treating it as a separate basis for criminal liability—not the ultimate harm, but, for example, the harm of taking the property of another, or the harm of breaking into and entering the premises of another.

⁸⁸ *Id.* at 1016–17.

⁸⁹ *See id.* at 1022–23 (considering whether “burglarious conduct raises a general likelihood of the commission of . . . incidental crimes” and therefore merits “special treatment by the criminal law”).

⁹⁰ 50 AM. JUR. 2d § 1 Common-Law Definition of Larceny (2018).

⁹¹ *See HOLMES, supra* note 6, at 72 (“In theft the intent to deprive the owner of his property establishes that the thief would have retained, or would not have taken steps to restore, the stolen goods *From the point of view of attempt*, the crime was already complete when the property was carried off.”) (emphasis added).

⁹² HOLMES, *supra* note 6, at 72.

⁹³ MODEL PENAL CODE § 222.1(1) (AM. LAW INST. 1985) (an act may be deemed to be in the course of committing a theft, so as to support a robbery charge “if it occurs in an attempt to commit theft”).

⁹⁴ *Id.* § 220.1(1) (defining arson). Thus, similar claims can be made regarding assault and even rape.

2. Crimes of Possession and Related Offenses

Other kinds of inchoate conduct that have been formulated into substantive crimes fit a related but slightly different model. For example, one large, general category involves crimes of possession or related states—e.g., possession of burglary tools; possession of drugs; possession of obscene material; possession of stolen property; and possession of firearms or other weapons.⁹⁵ Related to these offenses are the crimes of selling, distributing, receiving, sending or transporting prohibited materials, which can be viewed as off-shoots of the possession crimes or vice-versa (and implicitly involving possession within the *actus reus* of the offense). These offenses even more clearly fall into the category of specialized attempts crimes—that is, offenses in which specific substantive (but inchoate, not involving harm) conduct that is the rough equivalent of an attempt has been defined as an offense in the statute.

What justification is there for treating this kind of inchoate conduct as a serious crime? The justification is the same as for attempts generally, these are simply specialized versions of attempts. What is the justification for specifying the conduct involved in this particular attempt-like offense and converting it into what superficially appears to be a substantive offense? The conduct involved is specialized, recurring with some frequency in its particular form, and is more clearly indicative of a high risk that a specified type of criminal conduct will be perpetrated, rather than an imprecise substantial step, and is thus non-innocent, even if it does not directly involve harm or intermediate harm.

These offenses do not involve the ultimate harm about which there is concern, namely, the burglary that can be perpetrated with the tools, the drugs that will be used once distributed, or the uses to which various kinds of contraband can be put. Nor is there any clear-cut intermediate harm that warrants separate criminal treatment. What is common to this category of inchoate substantive offenses is the fact that, typically, the items being possessed are not easily subject to non-criminal uses and the possession can be viewed as a type of facial wrong. Although not directly causing harm, the possession of such items is nevertheless a wrong in

⁹⁵ See *id.* § 5.06 (addressing possession of instruments of crime); *id.* § 251.4 (addressing possession of “obscene material”); *id.* § 223.6 (addressing possession of stolen property); see also, e.g., CONN. GEN. STAT. §§ 21a-277, 21a-279 (2018) (addressing possession of controlled substances). Several categories of inchoate substantive offenses are specified here, but these categories are not inclusive of all such offenses on the statute books. Examining them should suffice to identify the issues that arise with these types of offenses and how they should be addressed in light of the analysis in this paper.

itself.⁹⁶

3. Federal Offenses Involving as a Core Element, “Movement in Interstate or Foreign Commerce, with Intent to Engage in Specified Criminal Activity.”

A peculiar, oft-noted feature of many federal criminal statutes, especially older ones, is that they make the central actus reus element of the offense “travel in, transporting in,” (or a similar movement verb) or “the use of a facility of, commerce,” with the mens rea feature of the crime being, “with the intent to perpetrate” (or a similar verb) a particular criminal goal.⁹⁷ The reason for this unusual construction, of course, is the need to include, as a feature of the offense, a federal jurisdictional element.⁹⁸

Scholars have long inveighed against making the jurisdictional element the central actus reus of the offense as a mode of drafting federal crimes.⁹⁹ In modern times, federal criminal legislation has more frequently been drafted in traditional wrongdoing terms with the federal jurisdictional feature included but subordinated, and no longer the central actus reus element of the offense.¹⁰⁰ Generally, however, the scholarly

⁹⁶ See e.g., MODEL PENAL CODE § 5.06 (AM. LAW INST. 1985) (criminalizing possession of instruments of a crime, which are defined as instruments that the violator possesses for the purpose of employing them criminally which either are specially made for criminal use or are commonly used for criminal purposes). For a criticism of the so-called “act” requirement, see generally Douglas N. Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437 (2007), and his critique of Fletcher’s examination of the basis for imposing criminal liability for possession crimes in GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 197–202 (1978), and GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* (2007). While the possession, etc. offenses do not involve harm, they also are different from inchoate offenses where the actus reus consists of entirely innocent, mundane, ordinary activities, i.e. most of the forms of material support in the material support offenses.

⁹⁷ See, e.g., 18 U.S.C. § 2421 (2012) (using this language in the context of sex trafficking).

⁹⁸ The inclusion of the travel, transportation, or use of commerce elements gives rise to federal jurisdiction because Congress may regulate interstate commerce. *United States v. Durham*, 902 F.3d 1180, 1197–98 (“Congress may regulate the channels of interstate commerce. It may prohibit the transportation of goods and people in interstate channels, effectively halting their movements.”).

⁹⁹ See, e.g., L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutor’s Discretion*, 13 LAW & CONTEMP. PROBS. 64, 79 (1948) (criticizing as “nonsense” the use of the jurisdictional element of a crime as the actus reus thereof).

¹⁰⁰ See, e.g., 18 U.S.C. § 1201(a)(1) (2012) (making the actus reus of the federal kidnapping offense the “seiz[ing], confin[ing], inveigl[ing], kidnapp[ing], abduct[ing] or carr[y]ing

criticism of this form of legislative drafting has not emphasized the inchoate nature of many of these offenses.

Some of these “travel or transporting, etc.” statutes, with their specific intent element, and nothing more that denotes the harm at which the offense is aimed, are inchoate crimes. Similar to the offenses discussed immediately above, they also can be viewed as specialized attempts statutes. The conduct that constitutes the actus reus of these offenses—e.g. travel or transportation across a state line—usually involves no harm as such.¹⁰¹ The harm focuses on the mens rea: what is the intended purpose of the travel or transportation? Consider, for example, the Travel Act, codified at 18 U.S.C. § 1952, which generally criminalizes travel in commerce with intent to commit specified types of crimes or to engage in conduct related to defined kinds of unlawful activity.¹⁰²

Because there is no general federal attempts provision, the crimes described by this category of statutes also only include liability for attempt if the legislation contains an internal attempts provision, or if a specific statutory attempts provision is applicable to them. Section 1952, for example, does not contain an attempts provision, and thus, criminal liability for attempt will not lie under that Act.¹⁰³ Another such crime, 18 U.S.C. § 1958, the “travel in aid of murder for hire” provision, similarly does not contain an attempts provision.¹⁰⁴ Conversely, 18 U.S.C. § 2421, which generally criminalizes the transportation of individuals for illegal

away and hold[ing] for ransom” of a person, but imposing the secondary condition that the person be willfully transported in interstate commerce).

¹⁰¹ See, e.g., 18 U.S.C. § 2421 (2012) (criminalizing the knowing transport of “any individual in interstate commerce . . . with intent that such individual engage in prostitution”).

¹⁰² The Travel Act, 18 U.S.C. § 1952 (2012). Section 1952 provides:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life. . . .

Id. § 1952(a).

¹⁰³ See *id.*

¹⁰⁴ 18 U.S.C. § 1958 (2012). The fact that the ultimate intended harm of this inchoate offense is murder, and the offense is not subject to attempts liability is noteworthy.

sexual purposes, contains an internal attempts provision.¹⁰⁵

Note, however, that all federal crimes can be the object of a conspiracy under 18 U.S.C. § 371,¹⁰⁶ but many federal offenses, including some of those that involve the transportation/travel model, also contain specific conspiracy provisions, which usually provide a more severe penalty for a conspiracy charge relating to that crime than under the general conspiracy provision.¹⁰⁷ Sometimes, where there is the internal attempts provision, a conspiracy provision accompanies it; sometimes it stands alone.¹⁰⁸

These offenses differ from the traditional serious offenses and the “possession, etc.” offenses, discussed above, insofar as the core element involves neither harm nor conduct involving a high risk of harm; travel across a state boundary itself is neither intrinsically harmful nor a wrong in itself.

4. Persuading, Inducing or Enticing a Minor to Engage in Criminal Sexual Activity, Using a Facility of Commerce.

Another inchoate crime variant on the “travel, transport in commerce” category of federal crime is 18 U.S.C. § 2422(a), which makes it a crime to knowingly persuade, entice or induce any individual to travel in commerce to engage in criminal sexual activity; similarly, 18 U.S.C. § 2422(b) makes it a federal crime, through use of “the mail or any facility or means of interstate or foreign commerce . . . [to] knowingly persuade[,], induce[,], entice[,], or coerce[.] any [underage person] to engage in [criminal sexual activity.]”¹⁰⁹ Both subsections (a) and (b) of sec-

¹⁰⁵ 18 U.S.C. § 2421 (2012). Similarly, section 2423 makes unlawful the criminal transportation of minors in commerce for unlawful sexual purposes or travel in commerce for the purpose of engaging in sexual conduct with a minor or commercial sex acts with a minor. 18 U.S.C. § 2423(a) (2012). Section 2423 contains an internal attempt and conspiracy provision. *Id.* § 2423(e). It is difficult to construct a theory to explain why some of these federal offenses contain specific attempts provisions, and some do not. Perhaps, crimes involving sexual misconduct are more likely to include attempts and/or conspiracy provisions.

¹⁰⁶ 18 U.S.C. § 371 (2012).

¹⁰⁷ For example, conspiracy under section 2423 carries with it the same maximum penalty as for the substantive offense, i.e. ten years, 18 U.S.C. § 2423(a),(e), whereas the general conspiracy provision, section 371, provides a maximum penalty of five years, 18 U.S.C. § 371.

¹⁰⁸ Compare 18 U.S.C. § 2421 (example of attempt standing alone in the statute without a conspiracy provision), with 18 U.S.C. § 2423(e) (example of combining attempt and conspiracy in an internal provision).

¹⁰⁹ 18 U.S.C. § 2422(a)–(b) (2012).

tion 2422 contain internal attempts provisions.¹¹⁰ There have been many recent prosecutions under subsection (b).¹¹¹

The indicated substantive federal crimes, as interpreted, do not require that sexual activity occur.¹¹² As the Sixth Circuit stated in *United States v. Bailey*, “Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.”¹¹³ Accordingly, the substantive crime is an inchoate offense—persuading. Although the interstate travel or use of a facility of commerce is not the central element of the offense, it injects another inchoate element into the offense.

It is noteworthy that some charges of attempted violation of 2422(b)—that is, attempted persuading—present travel scenarios somewhat like the travel to Syria attempted-material-support fact pattern discussed in Part IV(A) below. For example, in several cases, courts upheld attempt charges under 2422(b) in which the defendant, with his criminal purpose evidenced by previous conversations over the internet with an undercover police officer, traveled to a motel or other place where he believed that a meeting with the minor was to take place.¹¹⁴ But, in *United States v. Gladish*, in which the defendant sent sexual online messages to a person he thought was a minor girl but did not make plans to meet her, the court, in an opinion written by Judge Posner, ruled that an attempt had not been committed: “Treating speech (even obscene speech) as the ‘substantial step’ would abolish any requirement of a substantial step,” and fail to “distinguish people who pose real threats from those who are all hot air.”¹¹⁵ Judge Posner, however, without apparent disapproval, also described and cited the following cases in which various circuit courts upheld criminal liability despite the absence of travel to the meeting place where the sexual activity was to occur:

The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting. *United States v. Yost*, 479 F.3d 815, 820 (11th Cir.2007); *United States v. Thomas*, 410 F.3d 1235, 1246 (10th

¹¹⁰ *Id.*

¹¹¹ See, e.g., *United States v. Bailey*, 228 F.3d 637, 638 (6th Cir. 2000); *United States v. Lundy*, 676 F.3d 444, 447 (5th Cir. 2012); *United States v. Young*, 613 F.3d 735, 738 (8th Cir. 2010); *United States v. Tykarsky*, 446 F.3d 458, 462–63 (3d Cir. 2006).

¹¹² See *Bailey*, 228 F.3d at 639 (“[A] conviction under [section 2422(b)] only requires a finding that the defendant had an intent to persuade or to attempt to persuade.”).

¹¹³ *Id.*

¹¹⁴ See e.g., *Lundy*, 676 F.3d at 447, 455; *Young*, 613 F.3d at 739–40; *Tykarsky*, 446 F.3d at 462, 469.

¹¹⁵ *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

Cir.2005); *United States v. Bailey*, 228 F.3d 637, 639–40 (6th Cir.2000); cf. *United States v. Ramirez*, 348 F.3d 1175, 1180–81 (10th Cir.2003). It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable. “[T]he defendant’s initiation of sexual conversation, writing insistent messages, and attempting to make arrangements to meet” were described as a substantial step in *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir.2007).¹¹⁶

In the aforementioned *Bailey* case, it is noteworthy that the defendant tried to set up a meeting seven or eight times, but he never actually met with any of the girls.¹¹⁷ His conviction under section 2422(b) was affirmed.¹¹⁸

While the matter may be debated, these offenses have something in common with the possession offenses: the conduct engaged in carries with it a special risk of the ultimate harm occurring, and the very conduct engaged in—persuading, inducing, or enticing to engage in criminal sexual activity—can be argued to be a kind of wrong in itself.¹¹⁹ Furthermore, the ultimate wrong involved, for example, under section 2422(b),¹²⁰ seduction of young females to have criminal sex, is one about which society has special concerns, and, therefore the use of special preventative modes of law enforcement can be justified.

¹¹⁶ *Id.* at 649.

¹¹⁷ *Bailey*, 228 F.3d at 640.

¹¹⁸ *Id.* An additional form of inchoate liability created by the Model Penal Code is the crime of reckless endangerment. MODEL PENAL CODE § 211.2 (AM. LAW INST. 1985). This crime can be viewed as a type of reckless assault not involving a battery. If there is apprehension on the part of the potential victim, that itself would be a type of harm. Absent apprehension, the justification for this offense would seem to be that the conduct involved creates a significant risk of a potential harm that is very serious, i.e., danger of death or serious bodily injury. The Model Penal Code makes this conduct a misdemeanor. *Id.*

¹¹⁹ There are various approaches to the issue of whether particular conduct is a wrong. One approach illustrated by the discussion in the text of the possession offenses looks to whether the conduct creates a high risk of harm occurring. Another approach depends on whether the conduct as it is characterized, can be viewed as wrongful. For example, if the conduct here at issue is seen as persuading an underage female to have criminal sex, it can readily be argued to involve wrongful conduct. On the other hand, if it is seen as simply persuading someone to do something, it would seem to be as innocuous as the traveling across a state boundary or providing non-dangerous material support. Ultimately, such characterization issues need to be resolved in the specific context. See generally Finkelstein, *supra* note 60 (discussing whether risk of harm is itself a harm under the criminal law); Adler, *supra* note 60 (analyzing whether risk should be defined as a harm or not, and how it should be regulated).

¹²⁰ See 18 U.S.C. § 2422(b) (2012).

E. Two Early Perspectives on Attempts to Commit Inchoate Substantive Offenses

In the aforementioned Columbia Law Review article, Professor Wechsler and his co-authors recognized that attempts to commit substantive crimes comprised of inchoate conduct is a category of criminal liability that merits special attention.¹²¹ They stated the matter as follows:

The situation is somewhat different when the attempt is not described as such, but is defined as an act done with intent to commit some other crime. Among the traditional offenses burglary is such an attempt, a breaking and entering under certain circumstances with intent to commit a felony. But there has been no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liability when the “substantive offense” is even more clearly an attempt: possessing burglar’s tools with intent to commit burglary; conveying tools into prison with intent to facilitate an escape; offering a bribe; exploding a substance with intent to cause personal injury; employing a drug or instrument with intent to procure a miscarriage; procuring a noxious drug with intent to supply it to another for use in committing abortion. For each, attempt liability has been sustained. It would be possible to treat each of these acts as an attempt to commit the more remote substantive crime, but this is unduly cumbersome; the existing approach seems preferable. If a preliminary act is prominent enough to serve as the basis of substantive liability, it should also provide a sufficient foundation for attempt liability.¹²²

In this discussion of attempts to commit attempt-like substantive offenses, the authors touch upon issues similar to those we have thus far addressed here, but they fail to take into account any differences among the various attempt-like substantive offenses, and, of course, they also do not take into account how substantive crimes like the material support offenses (which, of course, did not exist in 1961)¹²³ or the travel or transportation in commerce offenses (many of which did exist at the time)¹²⁴ should be factored into the discussion.

Professor Wechsler and his co-authors were not the first to recognize the issues that arise in connection with charges of attempting an in-

¹²¹ See Wechsler et al., *supra* note 9, at 620 (“One of the questions frequently litigated is whether there can be an attempt to attempt.”).

¹²² *Id.* at 620–21.

¹²³ See Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J. L. & PUB. POL’Y 461, 462 (2004) (discussing the history of section 2339A’s enactment in 1994 and section 2339B’s enactment in 1996).

¹²⁴ See, e.g., 18 U.S.C. 2260 (2012); 18 U.S.C. 2261 (2012).

choate substantive offense. Professor Thurman Arnold also recognized the issues in his 1930–1931 paper:

Very often, an emotional reaction toward the kind of conduct prohibited by the statute is about all that will guide us. Thus we probably will not punish an attempt to drive while intoxicated, but we will punish an attempt at statutory rape. We will not punish attempts at attempts for the purely administrative reason that it is cumbersome procedure—but we may depart from this rule if a feeling of fairness compels us to adjust the penalty.¹²⁵

Compare Arnold’s “feeling of fairness” with Wechsler’s “prominent enough” approach. Wechsler’s approach seems to imply that liability will lie for all such attempts to commit inchoate/substantive offenses: if the conduct is “prominent enough” to support substantive liability, attempts liability applies.¹²⁶ Arnold, on the other hand, would distinguish between such offenses based upon “a feeling of fairness.”¹²⁷ The analysis in this text, specifically Part V, can be compared with the approaches taken by Arnold and Wechsler.¹²⁸

F. Attempted Complicity under the Model Penal Code

Another way to characterize the material support offenses, or at least the section 2339A offense, is to view the substantive conduct involved as a form of attempted complicity—that is, the conduct involved—providing “material support” in aid of an intended offense (or offenses) in which the ultimate offense need not be committed.¹²⁹ The MPC created a general version of an attempted complicity offense in section 5.01(3):

¹²⁵ Arnold, *supra* note 6, at 75.

¹²⁶ See Wechsler et al., *supra* note 9, at 621. The choice of the term “prominent” here is somewhat odd. It hardly conveys the varying justifications for the creation of such substantive offenses. Using this terminology, it would seem to follow that acts of material support are “prominent enough” to support substantive liability. Odd indeed.

¹²⁷ Arnold, *supra* note 6, at 75.

¹²⁸ One also can wonder, had they foreseen the development of offenses like sections 2339A and 2339B, would these eminent scholars, at least, have given the subject more extensive treatment? As it was, they dealt with the implications summarily. Of course, it is easy enough to criticize the authors’ comments on this set of issues for not having gone far enough, but one can also admire their prescience in addressing a category of problems that only now has attained a broader significance, almost 60 years (or, close to 90 years in Arnold’s case) later.

¹²⁹ See 18 U.S.C. § 2339A(a) (2012).

(3) Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.¹³⁰

Just a few paragraphs above, we noted that the drafters most likely did not envisage crimes like the material support offenses, but now we take note of the fact that they themselves created a category of crime that is arguably a generalized version of liability somewhat similar in effect to the material support offenses. The crime category created in section 5.01(3) indeed has some similarity to the material support offense—it involves the creation of criminal liability for aid that is inchoate to an ultimate offense, with liability being imposed even though that latter offense is not committed. Stated thusly, it sounds very similar to the liability created in section 2339A.¹³¹ Recall, however, that the section 2339A offense is also different from attempted complicity liability because it can be committed with a mens rea of knowledge, as opposed to intent.¹³²

The liability created under section 5.01(3) is different, moreover, in a key feature. The MPC drafters did not make it a substantive offense; rather, the nomenclature of attempt is used, and criminal liability is imposed in the form of an attempt to commit the crime (“is guilty of an attempt to commit the crime”).¹³³ The consequence, of course, is that this crime, unlike the material support offense which is treated as if it is an ordinary substantive offense, would in normal course not be subject to being made the object of an attempt.

Can we infer from their creation of inchoate criminal liability in this particular form that the drafters of the MPC provision were not prepared to make the generalized form of criminal liability thus created also subject to further inchoate treatment through attempts liability? That is too strong a conclusion to draw, but the fact remains that the drafters adopted an approach that appears to be more limited than the liability created through material support cum attempts.

¹³⁰ MODEL PENAL CODE § 5.01(3) (AM. LAW INST. 1985).

¹³¹ See 18 U.S.C. § 2339A(a).

¹³² *Id.*; see also Abrams, *Material Support Terrorism Offenses*, *supra* note 52, at 6. For present purposes, this difference is not significant.

¹³³ MODEL PENAL CODE § 5.01(3).

IV. PROSECUTION OF THE COMBINATION OF A MATERIAL SUPPORT OFFENSE AND ATTEMPT (AND/OR CONSPIRACY)

A. *The Travel-to-Syria/ISIS Cases*

As previously mentioned, prosecutors are utilizing the material support offenses in a wide variety of factual terrorism settings, which are usually inchoate with respect to the ultimate object crime(s). But, prosecutors are also frequently using these offenses in inchoate situations in which the only basis for a criminal charge is an attempt or conspiracy—that is, where material support has not yet been provided. A significant batch of such offenses are the previously-mentioned travel-to-Syria cases which nicely illustrate how attempts and/or conspiracy liability combined with the offenses of section 2339B and/or section 2339A, are being used today in numerous prosecutions based on conduct that is far removed from the completion of the substantive material support offense.¹³⁴

¹³⁴ For example, between February, 2013 and September, 2015, at least twenty-four such cases were filed. Some involved multiple defendants. Individuals in this cohort of cases were prosecuted for attempt or conspiracy (or both) to provide material support under 18 U.S.C. § 2339B or 2339A, in connection with trying to travel to Syria or other Middle East countries to join ISIS (ISIL). An illustrative selection of about a half dozen of these cases is summarized here:

Complaint and Affidavit in Support of Application for Arrest Warrant at 12, *United States v. Saleh*, No. 1:15-mj-00886 (E.D.N.Y. Sept. 16, 2015) (2339B attempt-defendant tried to board flights to Yemen and a train to Canada (with plans to travel from Canada to Yemen), but was blocked from traveling and arrested at his home); Criminal Complaint at 15, 19, *United States v. Topaz*, No. 2:15-cr-00450 (D.N.J. June 18, 2015) (2339B conspiracy-defendant said he had passport but needed cash to buy ticket; discussed plans to travel to join ISIL by going through other countries, stating “we gotta leave ASAP”); Affidavit in Support of Criminal Complaint at 4, 6, *United States v. Dakhalla*, No. 1:15-cr-00098 (N.D. Miss. Aug. 8, 2015) (2339B conspiracy and attempt—couple obtained passports and were arrested at local airport, confessed that they planned to fly to Greece and to take a bus to Istanbul on their way to Syria); Complaint at 6, 8, *United States v. Saadeh*, No. 2:15-mj-07200 (D.N.J. June 26, 2015) (a companion case to *Topaz*, 2339B conspiracy and attempt—defendant discussed plans to travel to Syria to join ISIL); Plea Agreement at 2, *United States v. Davis*, No. 1:15-cr-00059 (S.D. Ga. May 27, 2015) (2339B attempt-defendant purchased one-way ticket to Turkey but was arrested at airport and confessed to his plan to be smuggled into Syria to join ISIL); Complaint at 9–10, 15–16, *United States v. Elhuzayel*, No. 8:15-mj-00275 (C.D. Cal. May 22, 2015) (2339B conspiracy in which one defendant allowed another to use his credit card to purchase a ticket to Israel via Turkey, both were arrested at airport and admitted to plan to join ISIL once having reached Turkey); Complaint at 6, *United States v. Kaliebe*, No. 2:13-cr-00072 (E.D.N.Y. Jan. 2, 2013) (2339A and 2339B, attempt-defendant was charged with attempt under 2339A and another was charged with attempt to violate both 2339A and B; each defendant planned to go to Yemen but each individual was separately arrested at airport in route at different times to Yemen and Muscat, Oman, respectively).

Both sections 2339A and 2339B have been used in many of these cases, but the former has been used somewhat less frequently; in some cases, violation of both provisions has been charged. In none of these recently prosecuted cases is the commission of a completed violation of 2339B or 2339A charged. Indeed, the real inchoate crime power of the 2339A and 2339B offenses is illustrated by the ability of federal prosecutors to charge attempt and/or conspiracy, the two classic forms of inchoate criminal liability, in combination with this modern category of inchoate substantive crime.¹³⁵

Most of these cases have involved prosecutions of individuals trying to go to Syria to wage jihad with ISIS; most have been initiated since 2013. Those cases that have been concluded have mostly been resolved through guilty pleas;¹³⁶ there have been few trials,¹³⁷ and there do not appear to be, as of yet, any appellate opinions arising out of this batch of cases.¹³⁸

In those cases involving a charge of attempted violation of or conspiracy to violate section 2339A, the theory of the prosecution is typically that the defendant(s) is (are) guilty of attempting or conspiring to provide material support—namely, personnel (which can be themselves)—in aid of a violation of or plan to violate another federal offense or offenses (one or more listed in 2339A), typically, 18 U.S.C. § 956.¹³⁹ Similar charges involve an attempt or conspiracy to violate section 2339B by providing material support—namely, personnel (which can be themselves)—in aid of a foreign terrorist organization, ISIS or ISIL.¹⁴⁰ The main focus in the discussion here is on the charge of attempt to violate section 2339A.

The following composite scenario (with features drawn from a

¹³⁵ See, e.g., Affidavit in Support of Criminal Complaint at 1, United States v. Dakhalla, No. 1:15-cr-00098 (N.D. Miss. Aug. 8, 2015) (charging an “attempt to provide material support or resources”).

¹³⁶ See, e.g., Plea Agreement at 1, United States v. Davis, No. 1:15-cr-0059 (S.D. Ga. May 27, 2015).

¹³⁷ But see *infra* Part IV(B).

¹³⁸ But see United States v. Farhane, 634 F.3d 127 (2d Cir. 2011), discussed in Part IV(B), *infra*.

¹³⁹ 18 U.S.C. § 2339A(a) (2012) (listing attempt or conspiracy to violate 18 U.S.C. section 956 as a predicate crime); 18 U.S.C. § 956 (2012) (criminalizing conspiracies to kill, kidnap, maim, or injure persons or damage property in a foreign country); see also *supra* note 134 and accompanying text.

¹⁴⁰ See 18 U.S.C. § 2339B(a)(1) (2012) (criminalizing attempts or conspiracies to provide material support or resources to foreign terrorist organizations); 18 U.S.C. § 2339B(g)(4) (incorporating section 2339A’s definition of material support); 18 U.S.C. § 2339A(b) (defining material support).

number of the cases) reflects the typical pattern in this large set of prosecutions.

The accused is a resident legal alien who lives in Minneapolis, Minnesota and who has family in Jordan. He applies for and obtains a visa to visit Jordan; he telephones an airline or goes online to inquire about the airline schedules and the cost of an air ticket to Jordan, and finally, he buys the ticket over the phone or online using his credit card. During this general period, he also makes a number of statements to an FBI informant about his plans to join ISIS in Syria.¹⁴¹ The informant offers to assist him in this activity by providing names of contacts in Jordan who can help him. The accused discusses with the informant how he plans to travel to Jordan and, once there, contact one of the persons whose name has been given to him, and that he plans to cross the border into Syria to join up with ISIS.

Note that his actual behavior is consistent with a criminal purpose—that his plan is to travel to Jordan, cross the border, etc. But it is also consistent with the explanation that he might offer at trial (if the case goes to trial), that his plan was to travel to Jordan to visit family; and that the statements he made to the informant were only idle boasting designed to impress him.

Typically in these ISIS-related prosecutions, the government has waited until the accused actually goes to the airport, often until he has even gone through security, before making the arrest.¹⁴² The government thus waits until the “last practical moment,” as once the person gets on the airplane and travels to a distant foreign city, arresting and bringing him or her back to the United States would be a more complicated endeavor. In effect, the government has been using in most of these cases “a last opportunity to easily arrest the suspect” approach.¹⁴³ Waiting until the suspect has almost boarded the flight may also reflect the government’s view that it does not want there to be any doubt that the conduct of the accused is a substantial step within the meaning of the relevant MPC standard.¹⁴⁴

In some types of terrorism cases, the government may prefer an ear-

¹⁴¹ If, in addition to the suspect, only a person working for the government is involved, the prosecution may only be able to charge attempt since conspiracy will not lie.

¹⁴² See, e.g., Complaint at 16, *United States v. Elhuzayel*, No. 8:15-mj-00275 (C.D. Cal. May 22, 2015) (arrest was completed after the defendant received his boarding pass).

¹⁴³ This approach is not the same as the familiar “last act” test for criminal attempts.

¹⁴⁴ See e.g., *United States v. Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976) (wherein the government waited until the suspects were about to enter the bank to make their arrests despite the fact that “a jury could properly find that preparation was long since completed”).

lier intervention when doing so may help to avoid the risk that the putative terrorist might escape from government surveillance and thereby be enabled in the intervening period to perpetrate catastrophic crimes. Therefore, an interpretation of a substantial step that makes possible an earlier intervention can be a very important tool. In these travel cases however, intervention earlier than the time when the suspect goes to the airport to begin his travel to the Middle East has usually not been required, since the government through its oversight of major points of exit from the country can usually ensure that the suspect does not escape detection.

If the foregoing statements accurately describe the government's reasoning, it amounts to an approach that limits the use of very early substantial step intervention to cases when it is deemed necessary to ensure the security needs of the country. Waiting until the suspect goes through airport security in these cases also amounts to an approach that leans in the direction of providing the suspect with the maximum opportunity to desist and withdraw from the planned criminal conduct consistent with the prevention needs of national security.¹⁴⁵

One can imagine travel-to-Syria cases, however, where the government may indeed be concerned about the suspect evading surveillance and leaving the country by another route. Some of the cases indeed have involved such a possibility.¹⁴⁶ Given that type of scenario, how early in the chronology can the government be confident that it has a basis for successfully pursuing a charge of attempted violation of section 2339A? Can the government base an attempted violation of 2339A on the accused calling a friend who has a private plane to request that the friend fly him to Mexico? On the accused renting a car and requesting maps of the highway route to Guadalajara? Similarly, can earlier points in the standard travel to Syria chronology—e.g. applying for a visa to visit Jordan, or buying the air tickets—separately, or in combination, constitute a substantial step?¹⁴⁷ I believe so, at least with respect to the

¹⁴⁵ See Herbert Morris, *Punishment for Thoughts*, 49 *MONIST* 342, 371–72 (1965) (“It is not, then, that a rule framed in terms of intentions has any greater deterrent value than one framed in terms of acts or harm but it may well have a greater preventative value” because the would-be perpetrator can be stopped before they do what they intend to).

¹⁴⁶ See, e.g., Affidavit in Support of a Criminal Complaint and Arrest Warrant at 2, *United States v. Ahmed*, No. 0:15-cr-00049 (D. Minn. 2015) (wherein four individuals took steps to depart separately from different cities, but the FBI intervened to prevent their departures and the agents escorted the defendant off of the plane that he had already boarded in order to complete his arrest).

¹⁴⁷ Compare this scenario to the cases cited by Judge Posner in *United States v. Gladish*,

last two-mentioned scenarios, but there is only limited case law¹⁴⁸ regarding these or similar bases for a substantial step attempt in a material support prosecution context.

B. United States v. Farhane

There is one Second Circuit case, *United States v. Farhane*, which, by a divided panel, applied a substantial step analysis to an attempt/material support charge in early-in-the-chronology circumstances, which bear some resemblance to the travel-to-Syria hypotheticals described above.¹⁴⁹ The case involved prospective travel to Saudi Arabia, not Syria, and involved an emergency room physician rather than a prospective foot soldier.¹⁵⁰

The defendant, Dr. Sabir, received his medical training in the United States and after spending two years working in Riyadh, Saudi Arabia, he had returned to New York City for a period but was planning to return to Riyadh.¹⁵¹ While in New York, meetings took place in which Dr. Sabir entered into the following agreements and engaged in specific acts that were proved at trial in order to establish the necessary intent and substantial step—the defendant had sworn an oath of allegiance to Osama bin Laden and agreed to provide medical services to wounded al Qaeda mujahideen (jihad warriors) in Saudi Arabia.¹⁵² The defendant also indicated that he had a car and that he would be able to drive to where the wounded were located when he was back in Riyadh.¹⁵³ The defendant gave his professional and personal (cell phone) contact information to a person he thought was an al Qaeda agent (but in fact was an FBI undercover agent) so that he could be contacted when needed to provide

536 F.3d 646, 649 (7th Cir. 2008), in the context of the offense of trafficking minors into prostitution. There, Judge Posner summarized the cases, stating that “travel is not the sine qua non of finding a substantial step in a section 2422(b) case.” *Id.*

¹⁴⁸ See, e.g., Criminal Complaint at 4–6, *United States v. Thomas*, No. 2:15-cr-00171 (E.D. Pa. Apr. 23, 2015) (wherein defendant was arrested after he applied for a passport, did online research about routes to Turkey, purchased electronically a visa to Turkey, bought online an airline ticket to Barcelona, Spain and researched bus routes from Barcelona, Spain to Turkey); Minute Entry, *United States v. Thomas*, No. 2:15-cr-00171 (E.D. Pa. Sept. 20, 2016) (defendant pled guilty to violation of 18 U.S.C. section 2339B).

¹⁴⁹ See *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011).

¹⁵⁰ *Id.* at 133.

¹⁵¹ *Id.*

¹⁵² *Id.* at 133, 149.

¹⁵³ *Farhane*, 634 F.3d at 133, 149.

medical services to al Qaeda wounded.¹⁵⁴

The conduct on which the government relied as a substantial step did not involve actions directly relating to travel arrangements. While these acts could be viewed as steps chronologically earlier than making travel arrangements, they also strongly evinced the criminal purpose and were less ambiguous than making arrangements to travel. Interestingly, unlike most of the travel to Syria cases, in *Farhane*, the government did not delay its intervention until the defendant was about to get on the flight to Saudi Arabia.¹⁵⁵

The dissenting judge's opinion responded to the majority's conclusion that defendant's words and conduct added up to a substantial step:

Finally, and most importantly, the majority proposes that Sabir went beyond attending a meeting and agreeing to serve: he "took a step essential to provide al Qaeda with personnel in the form of an on-call doctor" by "provid[ing] the means by which *mujahideen* in Riyadh could reach that doctor at any time." This observation might have some significance if Sabir's "enlistment" came at or near some jihadist camp or battleground, and he was situated, equipped and ready to assist; but the location in question was almost 7,000 miles away, and no preparations to be "on call" had been made or even discussed, leaving the actual provision of material support entirely a matter of speculation and surmise.¹⁵⁶

The majority opinion in turn responded as follows:

Chief Judge Dearie submits that the time and distance to be traveled by Sabir before he actually provided any medical treatment to al Qaeda warriors was too great to permit a jury to find that his actions constituted a substantial step towards commission of the charged crime. This mistakenly equates the provision of *personnel* to a terrorist organization with the subsequent provision of *services* by that personnel, a misapprehension that pervades the dissent and in-

¹⁵⁴ *Id.* at 133. The *Farhane* majority opinion characterized what Sabir had offered to do: Sabir was prosecuted for offering to work for al Qaeda as its on-call doctor, available to treat wounded *mujahideen* who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities In offering this support for al Qaeda, Sabir . . . swore a[n] . . . oath of allegiance to al Qaeda, making clear that his treatment of wounded *mujahideen* would be provided not as an independent physician but as "one of the soldiers of Islam," duty bound to obey al Qaeda's leaders, including Osama bin Laden, and to protect his fellow "brothers on the path of *Jihad*" and "on the path of al Qaeda." No reasonable person with a common understanding of al Qaeda's murderous objectives could doubt that such material support fell squarely within the prohibitions of [section] 2339B.

Id. at 141. (citation omitted).

¹⁵⁵ *Id.* at 133–34.

¹⁵⁶ *Id.* at 179–80 (citations omitted).

forms its conclusion that Sabir stands guilty “for an offense that he did not commit.” . . . [E]vidence sufficient to demonstrate a substantial step towards the provision of personnel may not always be sufficient to demonstrate a substantial step towards the personnel’s provision of services.¹⁵⁷

The majority also made the following argument:

To illustrate, assume that, instead of offering himself as an on-call doctor to al Qaeda, Sabir had recruited a doctor who was, in all respects, identically situated to himself. Assume further that Sabir then brought that doctor to a meeting in New York where the doctor swore allegiance to al Qaeda, promised a supposed al Qaeda member that he would work as an on-call doctor for the organization, and gave the member contact numbers so that wounded jihadists in Saudi Arabia could reach the doctor when necessary. Even the dissent concedes that such evidence would be sufficient to prove Sabir “guilty of attempting to provide personnel,” although the recruited doctor would not provide actual medical services until sometime in the future and after he traveled from New York to Saudi Arabia. Because Sabir would be guilty of attempting to provide personnel in the circumstances hypothesized, we think it necessarily follows that he is equally guilty on the record facts To hold otherwise would be to apply a different standard of sufficiency to the provision of personnel depending on whether the person being provided is oneself or another, a distinction for which there is no support¹⁵⁸

There are, of course, differences between the early-in-the-chronology conduct engaged in by Dr. Sabir and by the putative accused in the travel-to-Syria scenarios suggested above. Dr Sabir’s acts are clearly, even uniquely, related to the terrorism purpose while the travel-to-Syria accused—if the charge is based on the acts previously hypothesized—may involve mundane and ambiguous acts of arranging for travel, buying a ticket, or obtaining a visa. But, both sets of acts occur very early in the chronology, are removed from the planned intervening travel, and are even further removed from the conduct that directly implements the ultimate terrorism-related purposes.¹⁵⁹

¹⁵⁷ *Farhane*, 634 F.3d at 150–51 (citations omitted).

¹⁵⁸ *Id.* at 151 (citations omitted).

¹⁵⁹ The majority opinion in *Farhane* did not expressly apply the strongly corroborative requirement to the facts in the case, although it did mention the requirement in its review of the Model Penal Code attempts provisions. *Id.* at 146–47. The court may not have addressed the strongly corroborative requirement because it was so obvious on the facts that the requirement was met. The steps taken by the accused were easily strongly corroborative of the criminal purpose and not easily subject to another non-criminal interpretation. Sabir engaged in special and decisive things—namely, providing his personal contact information so that when he returned to Riyadh he could function as a doctor on-call, and encoding the contact information himself per the instructions of the feigned accomplice. See *Farhane*, 634 F.3d at

The opinions in *Farhane* make clear that there is a significant distinction between attempting to commit the ultimate object crime (although in *Farhane*, the object of the attempted aid was the terrorist organization and not the commission of a specific crime) and attempting to commit the crime of providing material support.¹⁶⁰ The opinions also make clear that the provision of material support in the form of personnel enables prosecution for an attempt at an earlier point than, for example, providing services.¹⁶¹ *Farhane* confirms that the combined use of attempt and the providing personnel provision enhances the very early prevention potential of the material support offense.¹⁶²

The providing of oneself as personnel also merits closer attention, especially when, as here, it is the object of an attempt. What does this mean and how does it function? It means that the prosecutor can allege that the accused attempts to provide personnel—i.e. attempts to provide himself, when he takes a substantial step toward making himself available to the intended recipient.¹⁶³ In *Farhane*, the substantial step was, among other steps, taking the al Qaeda oath.¹⁶⁴ In the context of the travel-to-Syria cases, it would seem that the prosecutor could rely on the obtaining of a visa or the buying of an air ticket as a substantial step toward providing oneself in aid of persons focused on killing people.

V. MOUNTING A CONSTITUTIONAL CHALLENGE TO A CHARGE OF ATTEMPT TO COMMIT A MATERIAL SUPPORT OFFENSE

A. Introduction

Generally, conduct that constitutes an attempt to commit a crime under existing law has not been deemed to raise questions about whether, in its creation of this form of criminal liability, the legislature has ex-

148–49.

¹⁶⁰ See *id.* at 149–50 (explaining that Sabir “did more than manifest radical sympathies,” he attempted to provide material support to terrorism; nevertheless, he did not attempt to commit the ultimate act of terrorism).

¹⁶¹ See *id.* at 150–51 (“Whether or not Sabir’s . . . actions were a substantial step in the provision of expert medical services to terrorists, we conclude that they were a substantial step in the provision of Sabir himself as personnel.”).

¹⁶² See *id.* at 152–53 (describing how, under the attempted provision of personnel charge, the attempt could be complete weeks, months, or even years before the individual would have actually been called upon to provide services, allowing for much earlier intervention than other provisions under the section).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 150.

ceeded constitutional limits relating to the actus reus of the crime.¹⁶⁵ For example, while as detailed above, the drafters of the MPC in the 1950s proposed a somewhat more expansive idea of attempt than under both the common law and under the then-existing statutes, the test proposed was not viewed as extending criminal liability for attempt so far as to raise any significant questions about the constitutional adequacy of the actus reus.¹⁶⁶ Accordingly, the courts have been accustomed only to address the question of whether the conduct involved is sufficient for an attempt, or, as they are wont to say, amounts to mere preparation.

Indeed, as a general matter, constitutional decisions imposing limits on the legislative creation of crimes or new bases for criminal liability are rare and, when they are handed down, are usually founded in constitutional doctrines relating to vagueness or First Amendment concerns.¹⁶⁷ What triggers constitutional interest here is the fact that the form of liability in the crime of attempting a material support offense, upon close analysis, seems to go beyond existing kinds of extended criminal liability. As noted and discussed above, the liability involved in attempting a material support offense is somewhat unusual: it does not relate directly to attempting a crime involving harm but rather only to a crime constructed out of conduct that is itself inchoate with respect to a crime involving harm; the conduct may also be facially innocent.¹⁶⁸

¹⁶⁵ See Wechsler et al., *supra* note 9, at 573–77 (discussing questions raised by attempt crimes without mentioning potential legislative excesses).

¹⁶⁶ See *id.* at 592–94 (exploring the code’s expansion of liability for attempts without raising the issue of whether the actus reus was constitutionally adequate).

¹⁶⁷ See, e.g., *Robinson v. California*, 370 U.S. 661, 662, 664 (1962) (questioning the constitutionality of California’s interpretations of a statute regarding the use of narcotics); *Powell v. Texas*, 392 U.S. 514, 536–37 (1968) (upholding a conviction under a Texas statute that criminalized public drunkenness and rejecting the defendant’s challenge under the eighth amendment’s prohibition on cruel and unusual punishment as interpreted in *Robinson*); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding a Florida vagrancy statute void for vagueness because it “[failed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute”); *Fenster v. Leary*, 229 N.E.2d 426, 428 (N.Y. 1967) (holding New York state vagrancy statute to be an unconstitutional “overreach” of “police power,” as the prohibited conduct did not threaten others and had only tenuous connection to crime prevention). See generally Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1220–23 (1953) (discussing attacks on the constitutionality of various vagrancy statutes for vagueness).

¹⁶⁸ For example, compare criminal liability for loitering or similar statutes. Those offenses suffer from the uncertainty of what is the prohibited conduct and what is the harm or danger, and thus they are subject to a vagueness challenge. See, e.g., Lacey, *supra* note 167, at 1220–21 (discussing the constitutional issue of vagrancy statutes, which are often challenged as excessively restrictive of personal liberty or as unconstitutionally vague because the prohibited activities, such as loitering roaming, idleness, and association with criminals may be in-

The potential issues raised thereby have not been the subject of much litigation and the only Supreme Court case dealing with constitutional issues relating to the material support statutes does not address issues that are helpful here.¹⁶⁹ That the courts might strike down any statutes to be discussed here, real or hypothetical, on the grounds that they do not meet the minimum threshold for the *actus reus* of a crime does not seem very likely. There are no modern precedents that one can cite to support such action. Nevertheless, some possible lines of constitutional argument are worth developing if for no other reason than as a way to test some outer limits for the definition of crime while also identifying concerns that could provide support for some important policy positions.

The material support statutes' creation of attempts liability does suggest issues that may have a constitutional dimension. As far as can be determined, with one exception, the type of constitutional issue relating to attempts to violate a material support offense to be considered has not been discussed in detail in the case law, and in that one instance, the court failed to come directly to grips with the substance of the issue.¹⁷⁰

nocent).

¹⁶⁹ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010). In *Holder*, only section 2339B was at issue and the case did not raise any issues under the attempts or conspiracy clauses of the statute. *Id.* The Court did address constitutional issues arising under the statute, however, holding, *inter alia*, that section 2339B was not unconstitutionally vague and did not violate the plaintiffs' first amendment speech and association rights in making criminal the plaintiffs' intended providing of "support for the humanitarian and political activities of [two designated foreign terrorist organizations] in the form of monetary contributions, other tangible aid, legal training, and political advocacy." *Id.* at 10–11, 20, 39–40.

¹⁷⁰ See *United States v. Stewart*, 590 F.3d 93, 118–19 (2d Cir. 2009) (stating that the court "need not consider" the argument against the logic and language of section 2339A, which "criminalizes a 'conspiracy to conspire,'" because the charge under that statute "functions as a traditional conspiracy charge"). In the Defendant-Appellant's Brief, he made arguments challenging the legal validity of charges of conspiracy or attempt to violate the material support statutes. Defendant-Appellant's Brief, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009) (No. 06-5015), 2007 WL 7130845, at *163–69. This effort, however, was unsuccessful and failed to identify very clearly the exact nature of any constitutional concerns. *Stewart*, 590 F.3d, at 119 n.22. Regardless of the outcome, it was an early move in the right direction. The government's theory in the case was that Stewart had provided material support to a conspiracy (in the U.S.) to kill people abroad, *viz.* which conspiracy was a violation of 18 U.S.C. section 956, and that she also conspired to provide material support in aid of the same section 956 offense. *Id.* at 108. The material support she was alleged to have provided and conspired to provide was "personnel"—in this instance, making the imprisoned Sheik available to his foreign terrorist organization (she was functioning as his lawyer and visiting him in prison), through her assistance in surreptitiously helping the Sheik's interpreter to transcribe and communicate messages from the Sheik. *Id.* at 98, 102–08, 114. The messages were intended to reach the Sheik's foreign terrorist organization in Egypt, authorizing them to end a cease fire and allowing them to renew violent terrorist activities (which in the past had included the grisly killing of a bus load of tourists). *Id.* at 99, 103. Ms. Stewart's conviction was upheld, as

B. A Constitutional Line of Argument Based on Punishment for Thoughts

was her eventual sentence of ten years in prison.

The defendant's claims in the Stewart case were that the charges involved double inchoateness creating a risk of "liability to merely preparatory acts." Defendant-Appellant's Brief, *supra*, at *164 (quoting Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 72 (1989)). The defendant also argued that the two levels of inchoate crime were equivalent to charging an "attempt to attempt" or a "conspiracy to conspire" which is a "logical absurdity." *Id.* at *163 (quoting *Wilson v. State*, 53 Ga. 205, 206 (Ga. 1874)). In referring to a "logical absurdity" the defendant relied on Professor Ira P. Robbins' discussion of that phrase in his article, *Double Inchoate Crimes*. *Id.* at *164 (citing Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 72 (1989)). This logical absurdity argument, however, does not further the analysis very much. The key to an understanding of the constitutional issues in the case would have been for the defendants to persuade the court to be willing to see through the substantive crime veil and view the material support offenses as what they really are—inchoate crimes.

Regrettably, the Stewart Court, though recounting the foregoing contentions, did not address them on the merits. The arguments were discounted on the ground that what was involved in the case was not a conspiracy to conspire; rather it was a conspiracy to violate a substantive offense: "We need not consider this argument; Count Five charges the knowing provision of aid—a substantive, not inchoate, offense—and Count Four, pursuing a conspiracy to commit that substantive offense, functions as a traditional conspiracy charge." *Stewart*, 590 F.3d at 119.

One can see, in this context at least, how the legislative strategy of converting inchoate conduct into the substantive offense of material support succeeded. As a result, the court failed to address sufficiently the issues that were being raised.

The defendant characterized the issue as a conspiracy to conspire, but the charge in *Stewart* was conspiracy to violate the providing of material support, the object of which in this instance was an intended violation of 18 U.S.C. section 956, which includes a conspiracy element. *Id.* at 137. It is not clear whether the defendant's argument phrasing the issue as involving a conspiracy to conspire was referring to section 956 as the second conspiracy. If so, that left open the question about the intervening substantive object crime, the providing of material support, which involved inchoate conduct, but was not based in liability for conspiracy.

Alternatively, the defendant may have been arguing that the material support charge involved inchoate conduct and when combined with conspiracy amounted to double inchoateness, and this was *equivalent* to a conspiracy to conspire. If this was the claim, however, it was not clearly made. The defendant's failure to clarify its argument or to focus on the inchoate nature of the material support charge as the object of the conspiracy that was charged left the defendant's argument on this point vulnerable to the brief, dismissive treatment that the court's opinion gave it.

Treating the material support charge as a substantive offense as the court did, of course, was correct up to a point. *Id.* at 119. What the court did not do and the defendant did not argue clearly enough, was to take into account the intrinsic nature of the charge—since it consisted of conduct that was inchoate with respect to an ultimate crime involving harmful conduct, in this case, section 956.

Had the defendant made that point clearly, or had the court on its own motion taken into account and addressed the true nature of the material support offense, the court would have been more likely to address the implications of the issues raised by the defendant on the merits. In the end, however, it seems likely that even had the court done so, the result in the case would not have been different.

It is helpful to identify the type of constitutional concerns to be considered here, first by locating the potential source of those concerns and second, by identifying the provisions of the Constitution to which they might be related. One way to begin to focus on such issues is through the following simple thought experiment.

Suppose the legislature were to enact a crime punishing criminal intent without any accompanying act. This, of course, raises a familiar theme of legal philosophy—the issues posed by punishment for thoughts.¹⁷¹ Assume that the legislative language targets not just any passing bad or general criminal thoughts, but rather the legislature makes it a crime to harbor a *specific concrete intent* to commit a specific crime. Let us say, for example, the intent in question is to rob a specific bank on a particular day. In other words, in our hypothetical, the legislature has made it a crime to have the *mens rea* to commit a specific crime, without requiring that any conduct or act, i.e., an *actus reus*, also be involved.

The usual objections might be raised: how would this criminal intent be proved if everything is mental, in the mind of the potential accused? For purposes of the hypothetical, let us assume that there is adequate proof from a confession of the accused to the police plus statements that he has made to acquaintances about his criminal intent, and that, as a matter of law, corroboration is not a requirement. Further,

¹⁷¹ See generally Morris, *supra* note 136. On the issue of punishing intentions, Professor Morris stated:

Nevertheless, there may be a point in framing laws, at least some laws, in terms of intentions rather than acts. There will be some persons who form intentions despite the existence of rules prohibiting the acts they intend to perform. By framing offenses in terms of intentions we may be enabled to interfere with such persons at the stage of intending and thus prevent them from doing what they intend to do. It is not, then, that a rule framed in terms of intentions has any greater deterrent value than one framed in terms of acts or harm but it may well have a greater preventative value. We have seen that this was so with respect to attempts. We are to imagine, then, a system the thrust of which is primarily preventative rather than deterrent. Now, I think, that one can see that the implications of such a system are such that it diverges considerably from what we understand by a legal system.

Id. at 371–72.

Professor Morris here appears to be discussing some issues similar to those addressed in this paper, but in philosophic rather than legal or constitutional terms. He would appear to be in general agreement with the basic conclusion in this paper—that a crime grounded in intention rather than action (arguably, like an attempt to provide material support) is problematic (that is, “diverges considerably” from attributes of a legal system). In this connection, however, he does not appear to recognize in his philosophic assessment the possibility of certain exceptions to the conclusion of impermissibility for crimes of intention. Perhaps, however, this is to read too much into his analysis.

how long must the defendant hold the criminal intent in his or her mind and must the defendant have held it at the time of the police intervention? Again, we assume that the defendant must have held the criminal intent long enough to show a seriousness of purpose and that the defendant must still be holding it as of the time of the arrest. But again, let us assume that the evidence is sufficient regarding such issues.

It is fair to conclude, I believe, that on one ground or another, the courts would strike down this statute on constitutional grounds—on the ground, for example, that this criminal intent is too remote from commission of any harm; or that, without any conduct in furtherance thereof, there is insufficient proof of the firmness of the intent or even the willingness to follow through on it; or that the intent has not taken flight in the form of necessary action; or that there is insufficient opportunity for the individual to desist or abandon the intent; or that by definition a crime requires both *mens rea* and *actus reus* and the latter is missing—that is, that the common law was in existence at the time of the drafting of the Constitution and that common law principles informed, were read into and were relied upon in the Constitution.

The most likely provision of the Constitution to be relied upon to invalidate this hypothetical statutory provision would be the Due Process Clause, probably relying on the notion that substantive due process requires that to punish a person for a crime, he/she must have “done” something—that is, taken some action.¹⁷² One can imagine, however, a court also invoking the First Amendment on the ground that the Amendment protects thoughts of an individual that have not ripened into action,¹⁷³ or, potentially, the Cruel and Unusual Punishment Clause insofar as punishment arguably should not be imposed without adequate justification.¹⁷⁴

One can also imagine a court bolstering its conclusion by invoking common law notions that a crime by definition requires an *actus reus* as well as a *mens rea*,¹⁷⁵ and that in a free society the government should not be allowed to impose criminal punishment for thoughts alone; also

¹⁷² See generally Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3 (2004) (arguing that “the criminal law substantive due process cases, when read together, advance a constitutional harm principle”).

¹⁷³ See U.S. CONST. amend. I; see also *Nifla v. Becerra*, 138 S.Ct. 2361, 2379 (2018) (Kennedy, Roberts, Alito & Gorsuch, concurring) (“Freedom of speech secures freedom of thought and belief.”).

¹⁷⁴ See U.S. CONST. amend. XVIII.

¹⁷⁵ *United States v. Abfelbaum*, 445 U.S. 115, 131 (1980) (“In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.”).

that reliance only on statements of the accused without the corroboration of acts entails too many risks of unreliability; and too many possibilities of abuse; that imposing this kind of criminal liability would lead to a greater reliance on the fruits of interrogation, creating incentives to use coercion, or, even torture.¹⁷⁶

Note that because we drafted the hypothetical statute as described, in order to reach the conclusion that criminal liability cannot be imposed under such a statute, the courts would be forced to address the issue in constitutional terms. Considerations drawn from the law of attempts could inform their decision, but the courts would not be able to simply dispose of the issue through application of attempts doctrine. Most often, however, issues of insufficient conduct to provide a basis for criminal liability tend to be raised in connection with a charge of attempt and are decided applying attempts doctrine alone, without ever reaching any underlying constitutional issues.¹⁷⁷

¹⁷⁶ See generally Katherine Sheridan, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221 (2011) (discussing the risks and inherent unreliability of coerced witness testimony).

¹⁷⁷ It would be very unusual for a criminal prosecution to be initiated for attempt where the accused only has the criminal intent to perpetrate the offense and there is no act in furtherance. Consider the facts in *State v. Sawyer*, 187 A.3d 377, 378–380 (Vt. 2018), wherein a schoolboy was charged with attempted murder based on his writings in his journal about his plan to shoot up his former school, expressing admiration for a recent multi-victim school shooting, and his recent purchase of a shotgun. The court described part of his journal writing as follows:

Defendant had placed a label on the front of the journal, which read “The Journal of an Active Shooter.” In the journal, defendant expresses suicidal ideation and his desire to commit “suicide by homicide.” In an entry dated October 25, 2017, he writes that he wants to commit suicide “in a bigger and better way than just the stereotypical suicide.” Regarding his alleged plan to commit a mass shooting at [his former high school], in an entry dated November 29, 2017, he writes: “I’ve had a change in plans. The day will be coming much more sooner than previously thought. I’ve realized the huge importance of being able to kill the kids that I actually know vs. waiting a year or so until they’re all gone. I’m aiming to kill as many as I can and whoever I can, but it’d also be more fun and satisfying to kill a lot [of people] that I actually went to school with, I know what they’re like and how idiotic they are. With the sudden shift in plans, that also means that I need to prepare and gather supplies quicker. It shouldn’t take too extremely long to buy the guns, but it’ll be difficult to make the bombs since I don’t really have a good place to practice detonating them, but I’ll probably figure it out.”

Id. at 381; see also Jess Bidgood, *He Wrote Disturbing Plans for a School Shooting. But Was That a Crime?*, N.Y. TIMES (May 5, 2018), <https://www.nytimes.com/2018/05/04/us/mass-shooters-law-enforcement-vermont.html> (discussing the incident and its implications).

The issue decided in *Sawyer* was procedural; specifically, the court questioned whether the defendant qualified for bail. *Sawyer*, 187 A.3d at 378. He could be held without bail if, with

Assume for purposes of discussion that the conclusion regarding the mens rea-only statute is correct—that is, that it would be held unconstitutional. Let us add to the hypothetical, by also including in the imagined statute a clause that in order to impose criminal liability a person must have had the aforementioned mens rea and must also have done an overt act in furtherance of that intent. Assume that the statute defines the overt act as any act, however minimal in nature, as long as it is “in furtherance” of the criminal purpose (that is, an overt act requirement similar to that provided for under many conspiracy statutes).¹⁷⁸ Would the addition of a minimal overt act requirement change the result and make the statute constitutional?

The requisite overt act as defined would be much less than an attempt; applying the MPC notion of an attempt, a court is unlikely to deem a minimal act of the type contemplated as a substantial step. But it is an act; that is, it could be viewed as a type of actus reus. Should it be deemed sufficient to be the actus reus of the offense?

Having concluded that a legislative effort to criminalize mens rea standing alone would violate the Constitution, the question is whether the addition of minimal conduct, constituting much less than an attempt, would change the constitutional conclusion. Stating the matter differently, does adding the overt act as a required element of the offense vitiate the concerns that would arise out of a charge only involving punishment for thoughts? Stating the issue once more in different terms, for constitutional purposes, can this hypothetical offense be deemed the virtual equivalent of punishment for thoughts?

It is useful here to recall a part of the previously quoted statement

respect to the crimes charged—attempt to commit various forms of murder and attempt to commit bodily injury with a deadly weapon—“the evidence of guilt [was] great.” *Id.* at 379. Distinguishing the Model Penal Code’s “lower bar” and applying the Vermont test for attempt—a pre-MPC proximate-to-completion test—the court concluded that the evidence of guilt for attempted murder was not great and overturned the lower court’s order to hold the defendant without bail. *Id.* at 385–86. Even under the Model Penal Code, it is not absolutely clear that the facts in Sawyer would have qualified as a substantial step, though certainly the chances would have been greater than under the existing Vermont test.

Sawyer was subsequently charged with making threats against the school and carrying a dangerous weapon, both of which are punishable under Vermont law as misdemeanors, and was released on bail. Bidgood, *supra*. The same article reports that people in the community were upset that Sawyer had been released on bail and terrified that he would try to fulfill his deadly plans. *Id.*

¹⁷⁸ See, e.g., *United States v. Kozeny*, 667 F.3d 122, 130–132 (2d Cir. 2011) (discussing the overt act requirement in the context of a conspiracy charge and holding that the act need not be a crime and that the jury need not even agree on *which* specific act was in furtherance of the crime).

from Holmes' *Common Law*:

If a man starts out from Boston to Cambridge for the purpose of committing a murder when he gets there, but is stopped by the draw and goes home, he is no more punishable than if he had sat in his chair and resolved to shoot somebody, but on second thoughts had given up the notion.¹⁷⁹

While Holmes was not addressing the constitutional question, but rather, the issue of criminal liability at common law under a dangerous proximity test, it is noteworthy that he uses the simile of equivalence between conduct short of an attempt on one hand and simply intending to kill someone without doing any act at all in regard thereto on the other. What is the insight that lies behind treating these two situations as if they are the same, i.e. as virtually equivalent?

Holmes *may* have been saying that when a criminal mens rea is accompanied by conduct short of that which would supply a basis for criminal liability under traditional inchoate crime standards, that conduct does not, and cannot, convert the mens rea into a crime: imposing criminal liability in that situation would amount to the equivalent of punishing for thoughts.¹⁸⁰ A further statement of the proposition is that there are traditional minimal acti rei of inchoate crime: attempts, conspiracy and solicitation. To create crimes more inchoate than these is to create crimes that normally do not involve a sufficient risk of harm to warrant punishment. To create such crimes places too much emphasis on the mental state of an accused and not enough on the conduct needed for criminal liability.¹⁸¹

¹⁷⁹ HOLMES, *supra* note 6, at 68.

¹⁸⁰ See *id.* at 67–68 (“The reason for punishing any act must generally be to prevent some harm which is foreseen as likely to follow that act under the circumstances in which it is done The law does not punish every act which is done with the intent to bring about a crime.”).

¹⁸¹ For another explanation of the actus reus requirement, see Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 689 (1969):

Similarly, the objective elements of the crime—those definitional elements of the crime relating to conduct as distinguished from the mens rea—serve to identify and limit those cases which are to be the objects of prosecutorial and judicial interest. The police, of course, when informed that someone is planning a crime, must take steps to investigate the matter before any criminal acts have been committed; they must ordinarily seek to prevent the crime, or at least catch the culprit while committing it. But the exercise of prosecutorial and judicial discretion to investigate the existence of mens rea and invoke the severe penal sanctions regarded as punishment should ordinarily be limited to those cases in which the alleged mens rea accompanies objectively defined illegal

C. Implications of the Punishment for Thoughts Analysis for Attempts to Commit Material Support Offenses.

1. Arguing the Unconstitutionality of Attempt to Commit a Generic Material Support Offense

What are the implications of the foregoing punishment-for-thoughts constitutional analysis for material support offenses viewed generically, not the specific statutory offenses relating to terrorism? Suppose that Congress or a state legislature were to enact the following statute: “Whoever provides or attempts to provide material support [as defined in 2339A] for the purpose of aiding in the commission of [or preparation to commit] bank robbery, burglary, arson. . . etc. shall be [provision for a serious penalty].”

Clearly, this statutory offense is different from the hypothetical offense involving mens rea plus minimal overt act just discussed. Indeed, initially it seems to be so different in structure as to present, if at all, an entirely different set of concerns. But on closer examination, it has some aspects in common with the previous hypothetical. As previously described, a material support offense can criminalize the provision of “material support,” including personnel, that is, oneself, in aid of the perpetration of specified offenses, even though the object offense(s) are not committed.¹⁸² As previously discussed, the material support offense is inchoate, may be seen as attempt-like, and does not, in most instances, involve any harm or involve facially dangerous conduct.

While the generic substantive material support offense may be defensible, the “attempt” to commit that offense seems more problematic.

conduct.

Ordinarily, then, the criminal act itself, as distinguished from the act with its accompanying mens rea, should set off the actor from the rest of society. The act should be unique rather than so commonplace that it is engaged in by persons not in violation of the law. In the case of uncompleted conduct, this is a key factor that distinguishes preparation from attempt.

Id.

Professor Enker in the above-quoted excerpt, of course, was addressing the traditional question of what is generally required for an attempt. His discussion was not framed in constitutional terms, rather, he was contending for a test for attempt that would require that the conduct component be “unique rather than so . . . commonplace.” *Id.* It would seem, a fortiori, that he would find the “commonplace” acts that can comprise most of the material support acts, let alone the attempt to commit a crime involving such acts, as insufficient for an attempt under his criteria.

¹⁸² 18 U.S.C. § 2339B(h) (2012); see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–9 (2010).

An attempt to commit the crime of “providing material support” can be based on a substantial step toward the commission of that offense. But actions that can constitute a substantial step directed to provision of material support, while substantial in relation to material support, can be very minimal in relation to the down-the-road ultimate harm crime that is the object of the material support.¹⁸³

It is the combination of all of these characteristics that reveal the commonality between this type of offense and the mens rea plus overt act hypothetical statute. In both instances, the actus reus of the offense can involve conduct very remote from the crime involving harm, and the conduct is (usually) facially innocent and minimal in relation to the ultimate harmful criminal conduct; it is insufficient to constitute an attempt to commit that crime. Accordingly, it is arguably insufficient to constitute an adequate indication of the likelihood that the actor will follow through in committing the ultimate crime involving harm. In the attempted/material support context, it can provide an adequate indication that the actor will follow through in committing the crime of providing material support, but after all, what is that crime but an empty vessel of inchoate conduct, typically not itself involving harm?

Once one pierces the veil of a substantive offense that covers the material support offenses, the act constituting the attempt to commit that offense hardly seems different from the mens rea cum overt act involved in the punishment for thoughts analysis.¹⁸⁴ Accordingly, an argument can be made that an attempt to violate the hypothetical generic material support statute, in application, similar to the mens rea cum overt act, may also violate a constitutional norm.

The argument for unconstitutionality here ultimately rests on the same factors rendered above for the hypothetical mens rea/overt act offense: the conduct is simply too remote from the object crime involving harm; it is too far removed to show a firmness of purpose and a willing-

¹⁸³ It should be noted that, as illustrated earlier in this paper, there is a range of points that might be chosen (if the facts permit) as the basis for a charge of attempt to provide material support in aid of a crime. For constitutional purposes, are all these points going to be treated as legal equivalents? For example, is a phone call to a travel agency to book a flight going to be treated as equivalent to entry through security just prior to getting on the airplane? This is a problem that would arise in the application of the constitutional doctrine that has been developed in the text. For present purposes, a plausible position (but certainly not the only one) would treat all the points in the chronology leading up to the commission of the material support offense as equivalent for constitutional purposes. It is assumed that none of these points would constitute a substantial step in relation to the ultimate harm crime that the material support was in aid of.

¹⁸⁴ See *supra* note 171 and accompanying text.

ness to follow through or for the actor to be given enough of an opportunity to desist. While it may involve a more significant act than the simple overt act in the mens rea plus overt act hypothetical, it can be argued to amount to its legal equivalent.

Unless constitutional limits are imposed, if this hypothetical statute were generalized to all serious crime, it could: a) precipitate a new pattern of very early intervention by the police in regard to ordinary crime; and b) open up the possibility of going still further back in the chronology of crime-related conduct. Thus, if one can create a first level attempt-to-commit-a-material-support-ordinary-crime offense, what principle would prevent building a second level attempt/material support offense on top of the first?¹⁸⁵

¹⁸⁵ Thus, suppose that in addition to the hypothetical statute proposed in the text, another hypothetical statute were also added: “Whoever provides or attempts to provide material support for the purpose of aiding a person who provides or attempts to provide material support to aid in the commission of [substantive offense].” While the statute described in the text seems not unrealistic, this one seems to be more the stuff that law professors dream up. That may be an apt characterization. Before concluding that such a statute is too far-fetched to be taken seriously, however, consider the recent case of Joseph Hassan Farrokh, 28, and Mahmoud Amin Mohamed Elhassan, which the Department of Justice described in a Press Release as follows:

According to the criminal complaints, Elhassan introduced Farrokh to a person who Elhassan believed maintained connections to individuals engaged in jihad overseas According to the criminal complaints, Elhassan picked up Farrokh . . . and drove him to Richmond to a location approximately one mile from the airport. Farrokh then took a cab to the airport, checked in for his flight, cleared security and was arrested as he was approaching his departure gate. After driving Farrokh to Richmond, Elhassan returned to Woodbridge yesterday afternoon.

Press Release, U.S. Dpt. Just. E. Dist. Va., Woodbridge Men Charged with Terrorism Offenses Related to Travel to Syria to Join ISIL (Jan. 16, 2016), <https://www.justice.gov/usao-edva/pr/woodbridge-men-charged-terrorism-offenses-related-attempting-travel-syria-join-isil> [hereinafter Press Release].

Elhassan was prosecuted for aiding and abetting an attempt to provide material support to Farrokh in connection with the latter’s planned travel to Syria to join up with ISIL. *Id.*; see also *Mahmoud Amin Mohamed Elhassan*, 26, of Woodbridge, *Supported ISIS*, POTOMAC LOCAL (Feb. 24, 2017), <https://potomaclocal.com/2017/02/24/mahmoud-amin-mohamed-elhassan-26-woodbridge-supported-isis/>. Elhassan pled guilty and was sentenced to eleven years in prison and ten years of supervised release. *Id.* Farrokh pled guilty to attempting to provide material support to ISIL and was sentenced to 102 months in prison. Nora Ellingsen, *Joseph Hassan Farrokh Sentenced for Attempted Material Support to ISIL*, LAWFARE (July 19, 2016), <https://www.lawfareblog.com/joseph-hassan-farrokh-sentenced-attempted-material-support-isil>. The Elhassan case involved building an aiding and abetting charge on to a charge of attempt to commit a material support offense, thus building in three levels of inchoateness and remoteness from the ultimate object offense(s). It is not a very great leap to imagine converting that aiding and abetting conduct into a substantive offense that could then itself be attempted. The conclusion to be derived from this hypothetical statute is that absent some constitutional limit, such a statute would be a theoretical possibility.

2. The Relationship Between the Constitutional Issue and the Statutory Liability for Attempt Line

A final point: how does the constitutional issue here differ, if at all, from the statutory line of liability for attempt? The answer is that in many contexts, they would be essentially the same. Thus, conduct that is less than an attempt or is deemed merely preparatory is normally not held to be criminal because it does not rise to the level of an attempt. *Viewed through a constitutional lens, it could be a violation of the Constitution to impose criminal liability for such conduct.* As suggested above, it can be argued that it amounts to the legal equivalent of imposing punishment for thoughts. Courts, however, do not typically reach the constitutional issue, the matter is not addressed in constitutional terms, and is instead disposed of by utilizing attempts doctrine.¹⁸⁶

But, courts would need to face the constitutional issue if the legislature were to ordain that conduct less than an attempt is criminal. In that situation, only the Constitution would stand as a barrier to criminal liability. Or suppose the legislature were to change the statutory standard for attempts—i.e. were to broaden it to something significantly less than a substantial step plus strongly corroborative conduct. Under the foregoing analysis, the courts would need to determine whether the criminalized conduct under this new attempts standard is sufficient to satisfy constitutional concerns. Finally, legislation that criminalizes the attempt to provide material support in aid of a crime arguably also poses the constitutional issue, as discussed in the previous subsection.

D. Does Liability for Conspiracy to Violate a Material Support Statute have Implications for the Constitutional Analysis?

A slight digression is necessary here in order to consider whether the existence of liability for criminal conspiracy undermines either the practical significance of the foregoing analysis or its constitutional underpinning.

1. Practical Considerations

What practical difference would it make if, based on the type of analysis developed in the prior section, the courts determine that an attempt to commit a statutory generic material support offense is unconsti-

¹⁸⁶ See *infra* note 177 and accompanying text.

tutional? Is not the prosecutor able to charge conspiracy to commit the same material support offense, as was done in many of the travel-to-Syria cases described above?¹⁸⁷ The answer, of course, is yes: conspiracy can be substituted for attempt in many cases where more than one culpable party was involved, though there are cases involving a single culpable person, sometimes acting entirely alone, or more frequently, where the culpable party is acting with (or being led along by) an informant or an undercover government agent.¹⁸⁸

Indeed, the greatest importance of having the possibility of a prosecution for the attempted violation of a material support offense available is that it makes feasible the prosecution of a single actor who is working only with an informant or undercover agent. In such instances, unless the courts apply a unilateral conspiracy approach,¹⁸⁹ the prosecution cannot charge conspiracy; attempt would seem to be the only avenue for the criminal charge.

2. Punishment for Thoughts and Conspiracy

Conspiracy also relates to the constitutional issue addressed here in other ways. The punishment-for-thoughts hypothetical, discussed earlier, conjured up a single actor who planned to commit a specific crime but did not act in furtherance thereof. Similarly, a two person hypothetical can be imagined where the two do nothing more than agree to commit a specific crime. This hypothetical also involves a type of punishment for

¹⁸⁷ See *supra* Part IV(A).

¹⁸⁸ See *e.g.*, 21 U.S.C. § 846 (2012) (treating attempt and conspiracy penalties identically in the food and drug context); see also Part IV(A) for further discussion of the ability to charge conspiracy in lieu of attempt.

¹⁸⁹ The Model Penal Code proposed a unilateral conspiracy approach, that is, a single individual could be held liable for conspiracy where he thought he was agreeing with a second person who was feigning agreement, i.e., a government agent, to commit the intended offense. See MODEL PENAL CODE § 5.03 (AM. LAW INST. 1985); see also Dierdre A. Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DEPAUL L. REV. 75, 75–76 (1979) (discussing the history and use of the Model Penal Code’s unilateral conspiracy approach). Several of the circuits and many states have rejected the unilateral theory of conspiracy. See, *e.g.*, IOWA CODE § 706.1(4) (2018) (rejecting the use of conspiracy in Iowa, expressly, in a unilateral undercover agent fact situation); *United States v. Valigura*, 54 M.J. 187, 189–92 (C.A.A.F. 2000) (rejecting liability for conspiracy on a unilateral approach and upholding liability on a theory of attempted conspiracy). States that accept the unilateral approach include, for example, New Hampshire and Nebraska. See *State v. Blackmer*, 816 A.2d 1014, 1017 (N.H. 2003) (holding that under New Hampshire Law “it is immaterial that the defendant’s co-conspirator was a police officer who lacked the requisite criminal intent”); *State v. Tyma*, 651 N.W.2d 582, 591 (Neb. 2002).

thoughts—in this instance, the mutual thoughts of two people communicated to each other, in which they are in agreement. Do the differences between the two hypotheticals make a difference for constitutional purposes?

The argument for distinguishing the two cases—that is, for upholding the constitutionality of the two person/conspiracy case—takes the following familiar form: (1) the conspiracy hypothetical by its terms involves more than thought alone; naturally, the parties must be in communication for there to be a conspiracy.¹⁹⁰ That communication goes beyond thought; it involves external action and thus is a step forward (albeit an early step) in the chronology leading to commission of the offense.¹⁹¹ Furthermore, it is a more significant step than just any random overt act. (2) In the conspiracy hypothetical, there is less likely to be desistance (than in the single person case) before committing the object crime, since the parties are likely either to encourage each other to continue, or discourage the one from desisting by cajoling, the offering of inducements, or the using of threats.¹⁹² Even without such communications, the very existence of another party to the plan may have an encouraging effect on each of the participants.¹⁹³ (3) As a general matter, where two or more are involved, the crime or crimes contemplated are likely to be offenses of greater magnitude and seriousness.¹⁹⁴ (4) Apart

¹⁹⁰ See 18 U.S.C. § 371 (2012) (requiring more than one knowing person and an agreement among them to fulfill the statutory requirement of conspiracy). It is possible that conspiracy can be carried out without communication where the parties act in parallel being aware of each other, but that involves significant acts not present in the hypothetical under consideration. See, e.g., *F.T.C. v. Lukens Steel Co.*, 454 F. Supp 1182, 1189 (D. D.C. 1978) (“It is well settled that concerted action may be established by circumstantial evidence.”).

¹⁹¹ “In most conspiracy statutes, the government must show that one of the conspirators took some step to further the conspiracy. This step need not be significant, and it does not have to be unlawful. The agreement itself will not satisfy the requirement, nor will acts taken by acquitted co-conspirators.” PAUL MARCUS, 1 PROS & DEF OF CRIMINAL CONSPIRACY CASES § 2.08 (2018).

¹⁹² See *Callanan v. United States*, 364 U.S. 587, 593 (1961) (discussing the principle that “collective criminal agreement” is more likely to be successful and decreases the probability of desistance as compared to individual criminal conduct).

¹⁹³ See Laurence Steinberg, *Friends Can Be Dangerous*, N.Y. TIMES (Apr. 25, 2014), <https://www.nytimes.com/2014/04/27/opinion/sunday/the-dangers-of-friends.html> (discussing a study which found that teenagers took significantly more risks when surrounded by their peers, whether encouraged or not).

¹⁹⁴ See *Callanan*, 364 U.S. at 593 (“[C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.”).

from reducing the chances of desistance, the presence of two or more participants makes the successful completion of the crime more likely.¹⁹⁵ As a general matter, two are likely to be able to successfully accomplish more than one. And, even if one of the conspirators desists or if the police apprehend one, the other may still be able to successfully complete the plan. Think, for example, of a military mission where the commander sends two soldiers separately to deliver a message, hoping that one will get through. (5) Finally, if the conspiracy continues in existence beyond completion of the intended offense(s), there is the chance that additional crimes will be committed.

These of course, are the standard arguments in support of the special danger of a conspiracy that warrant penalties separate from and in addition to the penalties for the object crime. Similarly, there are standard counters to each of these claims. For example, instead of bolstering each other, the parties may mutually encourage desistance. The fact of two or more being involved may increase the likelihood of mistakes being made that will defeat the criminal goal. And if the police do indeed apprehend one of the conspirators, he may inform on the other and make his arrest more likely.

Despite such concerns, and unlike the single person case where there has been almost no judicial testing of the issue, the law allows for criminal liability based on conspiratorial inchoate conduct at the very early stage of the offending agreement.¹⁹⁶ Such liability seems unlikely to be vulnerable to constitutional attack at this late date. Were the unconstitutionality of the attempt to commit a generic material support offense established, however, one could imagine new challenges to the constitutionality of a charge of conspiracy based on a simple agreement of two or more persons to violate a generic material support offense.

What is important to take away from this review of the arguments for earliest stage conspiratorial liability is how many arguments are in favor of allowing this form of inchoate liability, and how none of the same arguments are available in the one person/planned offense (i.e. attempt) context.¹⁹⁷

¹⁹⁵ *Id.*

¹⁹⁶ *See, e.g.,* United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975) (“Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.”)).

¹⁹⁷ Two problematic cases involving single persons should be mentioned here. The first was previously alluded to in the text—a person who is charged with conspiracy on a unilateral theory, or, alternatively, a person who is charged with attempting to conspire. In both versions of the same type of liability, only one potentially dangerous person is objectively in-

E. Implications of the Constitutional Analysis for Material Support/Terrorism Offenses and Other Inchoate Substantive Crime Categories: Carving Out Some Exceptions

1. Terrorism Offenses

While plausible arguments have been made here challenging the constitutionality of attempts to perpetrate a generic material support offense, there is no guarantee that they would be successful in the courts. But, suppose for a moment that they were to be successful. What would be the implications of such a constitutional result for the existing material support terrorism offenses and other inchoate federal offenses? Would it follow that a charge of attempt to provide material support in aid of a terrorism offense or in aid of a foreign terrorist organization under section 2339A or section 2339B should also be held unconstitutional?

A strong argument can be made that where the ultimate object crime involving harm is a terrorism offense, an exception should be recognized to the otherwise applicable conclusion that an attempt to commit a material support offense is unconstitutional. The basis for distinction—for carving out an exception—is the fact that the down-the-road harmful offenses in terrorism cases potentially involve catastrophic results much more devastating than those involved in the perpetration of ordinary crime (such as a bank robbery), and that, therefore, allowing the law to work in a prevention mode at an earlier point in the chronology leading to the commission of the intended offenses is justified.

There is a principle underlying the making of this exception which should be identified and, arguably, can be generalized—that attempts to commit inchoate crimes may be allowed where there are special dangers associated with the ultimate object crimes or special societal concerns, either of which may warrant imposing liability at an earlier point and

involved, although the single person actor believes that one or more additional persons are involved. The multiple person situation, complete with its accompanying additional dangers, is present in the circumstances contemplated only in the mind of the accused.

The crime of solicitation can present a similar issue. This crime contemplates a situation in which A solicits B to commit a serious crime. In such a circumstance, at least some of the multiple person risks that arise in a conspiracy context are present. But, the MPC would also impose liability for solicitation in a situation where A attempts to communicate with B intending to solicit him to commit a crime but is not able to get in touch with him. See MODEL PENAL CODE § 5.01(2)(g) (AM. LAW INST. 1985) (considering soliciting an innocent agent as a “substantial step” to satisfy section (1)(c)). Because of the absence, objectively, of a multiple person circumstance to the knowledge of the actor in this hypothetical, the kind of constitutional concerns identified in the text may be argued to be present.

consequently allowing earlier police intervention in order to provide necessary protection to society.

2. Federal Inchoate Substantive Offenses in which the Jurisdictional Element has an Important Role: The Possession Offenses, etc.

Part III(D) contains a discussion of federal substantive offenses that are also inchoate in nature, mostly because they include a federal jurisdiction element as the core component.¹⁹⁸ A constitutional analysis of those offenses can be developed along the same lines and generally using the distinctions that were drawn in that section.¹⁹⁹

Similarly, should the law make an exception similar to that for material support of terrorism offenses to support the constitutionality of attempts to possess burglary tools or to possess illegal drugs or contraband? The response to concerns about the constitutionality of an attempt to commit these several substantive inchoate offenses can be cast in terms similar to those that justified recognition of this category of inchoate liability in the first place. Attempts liability attached to the possession offenses should survive constitutional scrutiny because the conduct involved is facially dangerous—i.e., it carries the badge of its danger openly, and involves a higher than normal risk that a crime involving harm will be committed. While it does not involve direct harm itself, it is conduct that may be viewed as intrinsically wrong and as a close precursor of harm. Those factors warrant, so the argument goes, treating attempts to commit these inchoate offenses as specially justified—as a sufficiently direct means of preventing the harm offenses that are their ultimate goal—and therefore making an exception to the constitutional concerns previously identified.

The same principle underlies recognition of an exception for the persuading/enticing minors to sexual activity offense. It, too, involves activity that is arguably facially dangerous, involves a high risk of perpe-

¹⁹⁸ *Supra* Part III(D).

¹⁹⁹ Given the absence of a generally applicable federal criminal attempts provision, it would have been an elegant result if the distinction between those federal offenses that contained internal attempts language and those that did not followed the argued-for constitutional line and its exceptions as developed in the text. But alas, that does not seem to be the case. *See, e.g.*, 18 U.S.C. § 2421 (2012) (criminalizing attempted sex trafficking in interstate commerce). Transportation in aid of prostitution is argued here, as a constitutional matter, not to be an offense for which an exception to allow attempts liability should be made. Yet, section 2421 contains attempts language. *Id.*

tration of the ultimate harm offense, and is, additionally, a category of crime about which there is special societal concern.

And what about liability for attempt to transport a person in commerce with intent that the person engage in illegal prostitution?²⁰⁰ While the substantive inchoate offense would seem to pass constitutional muster, adding another level of inchoateness through an attempt charge arguably goes too far without an adequate justification for making an exception. Transporting is itself a mundane, innocent-appearing activity that does not involve intrinsic wrong, nor is it specially related to harmful conduct. While there are reasons to impose restrictions on prostitution, these reasons are not as strong as those involving the protection of underage females from sexual predators.²⁰¹ If a line is to be drawn between instances that warrant making an exception to a judgment of unconstitutionality and those that do not, this would seem a good point to draw it.

3. Problems in Applying the Categories

The analysis developed in the foregoing pages supporting recognition of an exception to an argued-for constitutional rule requires some qualifiers, as problems may arise in applying the distinctions that have been articulated.

First, the foregoing analysis assumes that the material support as defined by the statute consists of facially innocent, mundane conduct. As was recognized earlier in the paper, there are a few categories of material support that do not fit that description, for example, explosives and weapons.²⁰² Of course, when these categories are involved in material support terrorism contexts, they do not undermine the analysis; they simply reinforce and strengthen the grounds for carving out an exception.

Second, recognition of an exception for material support of terrorism offenses assumes that a reasonably clear line can be drawn between

²⁰⁰ See *id.*

²⁰¹ See e.g., Lisa Ottisova et al., *Psychological Consequences of Child Trafficking: An Historical Cohort Study of Trafficked Children in Contact with Secondary Mental Health Services*, PLOS ONE, Mar. 8, 2018, at 2 (explaining that “emerging research suggests that 24–56% of trafficked children experience physical violence and 21–51% experience sexual abuse”). Of course, the victim being transported may be an underage female. In such case the preferred basis for prosecution should be under 18 U.S.C. § 2423 (2012) (criminalizing sex trafficking of minors).

²⁰² See *supra* Part III(B).

terrorism offenses and ordinary crimes. The line between these two categories is easier to articulate in the abstract than to apply in practice. There are different ways to address this type of issue. For present purposes, it is suggested that the basic category for this particular exception should be whether the offense charged in the particular case qualifies as a terrorism charge and that in determining that issue, the courts should use the statutory definitions in 18 U.S.C. § 2331,²⁰³ as well as whether the offense is listed in 2339A. The general point is that when there is a question raised as to whether an exception to the general constitutional rule is warranted, the justification for each exception should be clear; absent such justification, the determination of unconstitutionality should hold.

VI. IS ATTEMPT/MATERIAL SUPPORT LIABILITY BEING EXTENDED TO NON-TERRORISM CASES?

A. Introduction

The constitutional concerns identified in the previous section provide, at the least, signposts that should counsel the federal government, as well as the states, as a matter of policy, to avoid going down a path toward imposing criminal liability for attempted material support for ordinary crime.

These concerns would cast a constitutional shadow over any prosecutions of attempts to commit certain inchoate federal crimes—where there is no special justification for recognizing an exception. If states were to enact crimes emulating generic versions of the material support offenses²⁰⁴ and then initiate prosecutions for attempts to commit such offenses, it would cast a similar constitutional shadow over such prosecutions.²⁰⁵

The state criminal systems frequently copy federal provisions, often

²⁰³ 18 U.S.C. § 2331 (2012) (defining international and domestic terrorism).

²⁰⁴ Because they arise out of the special requirements of federal jurisdiction, the travel, transporting or using facilities of commerce forms of inchoate crimes are not subject to being readily copied in the state criminal systems. See *supra* note 98 and accompanying text (explaining interstate commerce as a federal jurisdictional element).

²⁰⁵ Note that usually state criminal codes contain a generally applicable attempts provision that can be applied to any serious state crime. See, e.g., CONN. GEN. STAT. § 53a-49 (2018) (Connecticut's criminal attempt statute). Accordingly, the state criminal systems typically do not present the spotty pattern of the possibility of attempts liability that exists in the federal system.

with some variations and especially where the federal statutes are innovative and serve a special law enforcement purpose. For example, states have copied the federal Racketeer Influenced and Corrupt Organizations Act, or RICO, statute, in various forms known as “little RICO statutes.”²⁰⁶ A somewhat similar phenomenon has occurred with respect to the federal money laundering statutes.²⁰⁷ Has this pattern occurred in relation to the material support statutes and have such offenses, at the state or federal level, been extended beyond the serious terrorism offense context?

As mentioned previously, the material support statutes provide a generic form that is very easy to copy and adapt to other offenses. Given the structure of 2339A, a complex crime with a long list of predicate offenses, it would be easy to add to the federal crime list of offenses, or enact a similar provision with a different list. The fact that the core element of the crime essentially specifies traditional complicity-like acts in the statute also makes it easy to copy and adapt to ordinary crime objects. As for section 2339B, it would also be easy to substitute for or add to the foreign terrorist organization a definition of organization that would, for example, cover street gangs or other forms of domestic non-terrorist criminal groups.²⁰⁸

Apart from questions of legal validity, the spread of this type of double inchoateness liability into the general arena of criminal enforcement would be undesirable as a matter of criminal enforcement policy relating to ordinary crime. It could also encourage even more widespread use of undercover agents. Further, because there would be an incentive to employ more police in early-stage investigations, it could also lead to growth in the size of our police forces and, overall, result in an increased police presence in the society.

How likely is the spread of offenses modeled on these two statutes into ordinary criminal enforcement areas? The RICO statute, for exam-

²⁰⁶ JOHN E. FLOYD & AMERICAN BAR ASSOCIATION, INTRODUCTION: RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (2d ed., June 28, 2017), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/november_2012/introduction_rico_state_by_state/.

²⁰⁷ Most states have their own money laundering statutes, but they tend to embrace a wider range of conduct than the federal statute does. See *Money Laundering*, JUSTIA, <https://www.justia.com/criminal/offenses/white-collar-crimes/money-laundering/> (last visited Jan. 2, 2018).

²⁰⁸ But see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (noting that the court was not “suggest[ing] that Congress could extend the same prohibition on material support at issue here to domestic organizations”).

ple, which began life with a list of predicate offenses that the legislature added numerous additional offenses to over the course of years,²⁰⁹ could arguably be viewed as a precedent for a similar kind of extension of a new form of criminal liability to other kinds of criminality. Could such a development also occur by way of mission creep? As a practical matter, it could occur if legislators at the federal level were inclined to amend the existing material support provisions or enact additional ones. There could also be a similar development at the state level.

B. The Potential for Extension of the Application of Section 2339A and Section 2339B in the Federal Criminal System

To assist in assessing the risk of the extension of attempts liability applied to material support offenses in ordinary crime enforcement, it is helpful to examine certain features of section 2339A. The federal provision currently lists more than sixty offenses as predicate crimes,²¹⁰ an increase from the forty-seven offenses reported as predicate offenses a little more than ten years ago.²¹¹ The growth in the reach of section 2339A through the addition of crimes to the list has been steady.

The caption of 2339A reads, “Providing material support to terrorists.”²¹² In other statutory contexts, the Supreme Court has ruled that the caption in a federal criminal statute does not legally limit the crime prosecuted to offenses that fall within the caption’s terms if the language describing the offense is broader than suggested by the caption.²¹³ There is no reason to believe that that rule would not be applied to section 2339A. Therefore, the fact that the caption to section 2339A mentions terrorists may not, as matter of law and by itself, restrict the use of the provision to terrorism prosecutions.

Generally, the predicate crimes listed in section 2339A are highly specialized offenses that are of a type that are likely often to be perpe-

²⁰⁹ U.S. DEP’T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A MANUAL FOR FEDERAL PROSECUTORS 1–19 (6th ed. 2016), <http://www.justice.gov/usam/file/870856/download> (discussing the legislative history of RICO and its amendments).

²¹⁰ CHARLES DOYLE & CRS, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B 6–7 n.37 (2016).

²¹¹ Chesney, *Anticipatory Prosecution*, *supra* note 55, at 475 (reporting forty-seven predicate offenses at the time the article was published in 2007); *see also* 18 U.S.C. § 2339A(a) (2012) (listing the predicate offenses)

²¹² 18 U.S.C. § 2339A.

²¹³ *See, e.g.,* *Caminetti v. United States*, 242 U.S. 470, 489 (1917) (observing that “the title of an act cannot overcome the meaning of plain and unambiguous words used in its body”).

trated in the course of terrorist actions, though many of them can be perpetrated in non-terrorism contexts, no matter how broadly one defines terrorism. For example, one can easily imagine a person prosecuted for carrying a concealed dangerous weapon on an airplane under 49 U.S.C. section 46505 in a non-terrorism setting.²¹⁴ Accordingly, one can imagine a prosecution of an individual for providing material support in aid of or in preparation for a violation of section 46505, and finally, for a prosecution for attempting to commit a 2339A violation, all without any link to terrorism.

For the most part, traditional ordinary serious crimes—e.g., murder, manslaughter, robbery, burglary, larceny, kidnapping, assault with a deadly weapon and arson—unless committed in some special circumstances, are not included in the basic section 2339A list. (18 U.S.C. section 2332b, which makes it a crime to kill kidnap, assault or maim within the United States where the conduct transcends national boundaries and otherwise involves a federal jurisdictional base (e.g., use of the mails or a facility of interstate commerce), may be viewed as an exception.)²¹⁵

Despite the fact that the statutory language does not as a matter of law limit all prosecutions under section 2339A to terrorism cases, as far as can be determined, in practice and, to date, no material support or attempt to violate (or conspiracy to violate) cases filed have been brought in what can fairly be denoted as non-terrorism or ordinary crime contexts. In other words, prosecutors have thus far not extended material support charges or attempts relating to such charges to non-terrorism ordinary crime contexts in the federal system, even though, given some of the types of offenses listed and the absence of legal limitation to terrorism cases, this could have occurred.

What probably accounts for the absence of any slippage in this area, is the fact that U.S. Attorneys' decisions to charge and related decisions in cases involving international terrorism are reviewed centrally in the Department of Justice in Washington, D.C. under the terms of the applicable DOJ policy set forth in the U.S. Attorney's Manual.²¹⁶ Undoubted-

²¹⁴ See 18 U.S.C. § 2339A(a) (incorporating 18 U.S.C. 46505 as a predicate offense); see also 18 U.S.C. 46505 (2012) (criminalizing carrying a weapon or explosive on an aircraft).

²¹⁵ See 18 U.S.C. 2339A(a); but see 18 U.S.C. 2332b (2012) (which is included as a predicate felony under 2339A).

²¹⁶ U.S. DEP'T OF JUSTICE, JUSTICE MANUAL TITLE SECTION 9-2.136—NOTIFICATION, CONSULTATION, AND APPROVAL REQUIREMENTS FOR INTERNATIONAL TERRORISM MATTERS (Mar. 31, 2016).

ly, the existence of that policy affects the chances that section 2339A might be used in any non-terrorism context.²¹⁷

Furthermore, despite the breadth of application created by some of the predicate offenses listed, section 2339A was undoubtedly intended to be used only in terrorism cases.²¹⁸ Accordingly, the possibility of attempted material support prosecutions under the existing statute migrating into ordinary crime cases in a kind of mission creep does not seem likely. If such a mission creep were to occur, it would likely only result from an important policy shift within the Department of Justice.

Of course, the implications of a mission creep into ordinary crime enforcement in the federal system—where as a general matter, criminal enforcement is already quite specialized—would be quite different from what it would mean in state/local law enforcement where ordinary crimes are extensively prosecuted. Indeed, use in ordinary crime cases in the state/local systems of the kind of multi-level inchoate attempts (and conspiracy) material support prosecutions that already exist in the federal system in terrorism cases would have great significance.

C. *State Material Support Terrorism-Related Offenses*

It should not be a surprise that states have already adopted the material support offense model, but in almost all instances, legislators have drafted these statutes in a manner delimited for use only in terrorism contexts.

In most states, it seems unlikely, however, that in practice such statutes would be used in a terrorism-related mode since the primary responsibility for anti-terrorism prosecutions belongs to the federal government. Nevertheless, since these statutes can also provide a vehicle for mission creep and slow migration into ordinary crime enforcement as well as a model and foundation for extending their application through statutory amendments or new statutes, they merit our attention.

²¹⁷ Strictly speaking, however, were a U.S. Attorney inclined to prosecute someone for an attempted violation of, for example, material support in aid of violating section 46505 in a non-terrorism context, he or she could probably do so without obtaining approval from Washington and, indeed, without being in violation of the aforementioned policy. The policy covers matters involving international terrorism, and generally does not appear to address cases where section 2339A might be used in a non-terrorism context. *See id.* Generally, however, one would expect U.S. Attorneys, out of an abundance of caution, to consult with Washington when an issue arises regarding a questionable use of the statute.

²¹⁸ *See* DOYLE & CRS, *supra* note 210, at 1 (“The two federal material support statutes have been at the heart of the Justice Department’s terrorist prosecution efforts.”).

There are some important differences between the federal material support offenses and the form such statutes have taken in most of the states where they have been enacted. Nineteen jurisdictions have adopted variations on the federal material support statutes.²¹⁹ Sixteen of them use the same legal terms, material support, mostly defining it along the same lines by specifying a series of categories that can qualify as material support.²²⁰ Most of these statutes, however, also follow a pattern that differs from the federal approach in one respect: rather than listing specific crimes that can be the object of the material support, they make it a crime to provide material support in aid of an “act of terrorism” or in aid of “terrorism.”²²¹ The statute then defines act of terrorism or terrorism, whichever is used, as a violent act or a similar general crime category, where the act is done for a terrorism purpose. Terrorism purpose is defined in these statutes using a general definition similar to that used in the Federal Criminal Code in 18 U.S.C. § 2331, which provides :

As used in this chapter—

(1) the term “international terrorism” means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

²¹⁹ See, e.g., Alabama (ALA. CODE § 13A-10-153 (2018), ALA. CODE § 13A-10-151(2) (2018)); Arizona (ARIZ. REV. STAT. ANN. § 13-2308.01(6)(c) (2018), ARIZ. REV. STAT. ANN. § 13-2301(9) (2018)); Arkansas (ARK. CODE ANN. § 5-54-202(b) (2018), ARK. CODE ANN. § 5-54-201(12) (2018)); District of Columbia (D.C. CODE § 22-3153(m) (2018), D.C. CODE § 22-3152(4) (2018)); Idaho (IDAHO CODE § 18-8106 (2018)); Illinois (720 ILL. COMP. STAT. 5/29D-29.9 (2018)); Iowa (IOWA CODE § 708A.4 (2018), IOWA CODE § 708A.4(1) (2018)); Kansas (KAN. STAT. ANN. § 21-5423 (2018), KAN. STAT. ANN. § 21-5421 (2018), KAN. STAT. ANN. § 21-5422 (2018)); Louisiana (LA. STAT. ANN. § 14:128.2(A),(C) (2018) LA. STAT. ANN. § 14:128.1 (2018)); Michigan (MICH. COMP. LAWS § 750.543K(b) (2018), MICH. COMP. LAWS § 750.543K(d) (2018)); Minnesota (MINN. STAT. § 609.714 (2018)); Missouri (MO. REV. STAT. § 576.080 (2018) (criminalizing support to terrorism organizations only)); Nevada (NEV. REV. STAT. § 202.445(2)(c) (2018), NEV. REV. STAT. § 202.4433 (2018)); New Jersey (N.J. STAT. ANN. § 2C:38-5 (West 2018)); New York (N.Y. PENAL LAW § 490.15 (Mckinney 2018), N.Y. PENAL LAW § 490.10 (Mckinney 2018), N.Y. PENAL LAW § 490.05 (2) (Mckinney 2018)); Ohio (OHIO REV. CODE ANN. § 2909.22 (West 2018), OHIO REV. CODE ANN. § 2909.21(H) (West 2018)); Oklahoma (OKLA. STAT. tit. 21 § 1268.7(A) (2018), OKLA. STAT. tit. 21 § 1268.1 (2018)); Tennessee (TENN. CODE ANN. § 39-13-807 (2018), TENN. CODE ANN. § 39-13-803(7) (2018)); Virginia (VA. CODE ANN. § 18.2-46.5 (2018), VA. CODE ANN. § 18.2-46.4 (2018)).

²²⁰ At least one state, Oklahoma, does not use the concept of material support or its equivalent. See *supra* note 219 and accompanying text.

²²¹ See statutes cited, *supra* note 219.

- (i) to intimidate or coerce a civilian population;²²²
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.²²³

Thus, most of these statutes, though using the same basic legal category, material support, as the federal statute, differ in an important detail from the approach taken in section 2339A, which lists numerous crimes to which material support might be provided, presumably deeming them to be crimes that would typically be violated in terrorism events and can reasonably be restricted to terrorism contexts through the centralized approval mechanism that has been established. The state statutes use the same material support category but restrict the crime(s) that can be the object of the material support to the category of violent crimes and through the requirement that they be committed for a terrorism purpose.

A few of the nineteen states also make it a state crime to provide material support to a foreign terrorist organization designated as such by the Secretary of State under 18 U.S.C. § 1189, thereby adopting the federal offense (section 2339B) as a state crime by incorporating federal law directly into state law in this limited context.²²⁴

²²² In the infamous 2002 sniper case that terrorized populations over a four state area plus Washington, D.C. for a forty-seven day period, in the state of Virginia prosecution of one of the two perpetrators, among other offenses, the defendant was charged under the state terrorism statute. See *Muhammad v. Commonwealth*, 619 S.E.2d 16, 24, 30 (Va. 2005). The snipers perpetrated sixteen shootings involving ten murders and toward the end of their rampage made a demand for ten million dollars. *Id.* at 24, 29. In affirming the convictions and sentence of death for one of the snipers, the Supreme Court of Virginia stated,

Significantly, Muhammad does not contest the sufficiency of evidence to support the charge that acts of violence committed by him and Malvo were done with the intent to “intimidate the civilian population at large” or to “influence the conduct or activities of the government of the United States, a state or locality through intimidation.”

Id. at 36.

Generally, acts intended to force governments to act in certain ways are going to be bold, dramatic and intended cause significant societal reaction, for example, large explosions or the killing of many people. Thus there is a direct link between this kind of definition and the idea of catastrophic violent outcomes, a link that would normally not exist where ordinary crime is the intended outcome.

²²³ 18 U.S.C. § 2331(1)(A)–(C) (2012).

²²⁴ See *e.g.*, Illinois (720 ILL. COMP. STAT. 5/29D-29.9 (2018)); Missouri (MO. REV.

Generally, unlike section 2339A, these state material support statutes do not contain internal attempt or conspiracy provisions, but as previously mentioned, the state criminal codes—in contrast to the approach to attempts in the federal system—typically contain general attempt and general conspiracy provisions that can be applied to the material support offense.²²⁵

The result of these existing differences in approach is that if mission creep under most of these state statutes were to happen without any new or amended legislation, it would be likely to occur only through expansive interpretation of the terrorism purpose statutory phrase. Given the fact that the underlying predicate crime is essentially any ordinary crime of violence, these existing material support statutes could begin to be used in ordinary crime cases if the terrorism purpose language were to be given a watered down interpretation. Short of that development, however, the double inchoate feature of the state material support crimes could spread to ordinary crime enforcement only if state legislatures were to amend the material support statutes to drop or significantly modify the terrorism purpose requirement, or if they were to enact additional offenses similar to the material support offenses that do not include the terrorism purpose element. In the present state of the matter, the prospect of such actions seems unlikely.

D. A State with Potential for Mission Creep

One of the nineteen states, however, may be viewed as somewhat more susceptible to a risk of mission creep. New Jersey has enacted several provisions that, taken together, prosecutors could use to support a broad application of New Jersey's material support provision.²²⁶ One of those provisions, like that in many of the other state statutes, makes it a crime to provide material support in aid of an act of terrorism.²²⁷ New Jersey's approach differs, however, in its definition of the crime of terrorism which the statute defines as various listed violent crimes committed with the purpose: "(1) to promote an act of terror or (2) to terrorize five or more persons; or (3) to influence the policy or affect the conduct

STAT. § 576.080 (2018)); New Jersey (N.J. STAT. ANN. § 2C:38-5 (West 2018)).

²²⁵ See statutes cited *supra* note 219 and accompanying text.

²²⁶ See N.J. STAT. ANN. § 2C:38-2 (West 2018) (defining the scope of the crime of terrorism under New Jersey law).

²²⁷ N.J. STAT. ANN. § 2C:38-5 (West 2018).

of government by terror.”²²⁸ The third category is the standard one used in defining a terrorist purpose; but the first two, each of which is a separate and independent basis for prosecution of the material support offenses, are dependent on the definition of act of “terror” and “terrorize.” Those two concepts are defined further along in the same statute as follows: “‘Terror’ means the menace or fear of death or serious bodily injury.”²²⁹ “‘Terrorize’ means to convey the menace or fear of death or serious bodily injury by words or actions.”²³⁰

The definitions used for terror and terrorize reflect a not uncommon usage for these terms—namely, engendering fear—but in the context of the New Jersey statute, it means that the state’s material support offense and attempts or conspiracy to commit it could be used in a wide variety of ordinary violent crime situations. For example, suppose a bank robber “terrorizes” a dozen people in the bank during a robbery. New Jersey may have tried to limit the possibility of such applications of the statute by providing that prosecutions under the statute require approval by the Attorney General of the State.²³¹ This centralized approval mechanism could prevent ordinary crime mission creep, depending, of course, on how the Attorney General interprets the statute, but the fact that the language of the statute expressly uses a broad definition of “terrorize” could, of course, influence the Attorney General’s interpretation.

Given the provisions of the New Jersey statute, one could argue that at least one state jurisdiction has opened up the possibility of using its material support statute, in combination with its attempt or conspiracy provisions, to prosecute crimes that under most definitions of terrorism do not qualify as fitting into that category. Will it do so? This kind of development remains a possibility. Also, the more federal prosecutors prosecute inchoate conduct normally outside the reach of the criminal law under the material support provisions, the greater the temptation will be for other jurisdictions to follow suit. Moreover, because of the dominance of the federal enforcement arms in the terrorism prosecution arena, the states are unlikely to have many opportunities to use their material support statutes in terrorism matters. This could be another reason why there could be a temptation to use them in ordinary crime contexts.

²²⁸ N.J. STAT. § 2C:38-2(a).

²²⁹ *Id.* § 2C:38-2(d).

²³⁰ *Id.*

²³¹ *Id.* § 2C:38-2(e).

VII. CONCLUSION

Although section 2339A and section 2339B are terrorism statutes, this paper is less about criminal enforcement against terrorism than it is about doctrinal innovation in the criminal law—new kinds of crimes and criminal liability that make possible multiple levels of attempt and inchoate liability and thus spread the net of criminal liability more widely than it has generally historically been applied. This paper describes how the technique of creating a new substantive crime based on inchoate conduct—and thus one that can be attempted—creates the possibility of multi-level inchoateness and intervention by the police at an early stage of activities planned to culminate in the commission of crimes.

The fact that nowadays charging an attempt to violate a federal material support statute in a federal court typically brings to bear the provisions of the MPC approach to attempts liability must also be taken into account when assessing the type and significance of enforcement that extends the application of the criminal law to conduct very remote from the ultimate object crime involving harmful conduct. The adoption by the drafters of the MPC attempts provision of a substantial step test²³² emphasizing the dangerousness of the actor instead of the previously-used common law dangerous proximity approach, expanded the circle of possible criminal liability to include conduct somewhat more remote from the commission of the crime being attempted than under other tests. Add to that the fact that the drafters, while applying as the new test the idea that the substantial step conduct must strongly corroborate the criminal purpose, interpreted that feature of the test in a manner that makes it a fairly weak limitation on the scope of criminal liability for attempt.

The end result of combining the MPC approach to attempts with an attempted material support inchoate offense means that attempt to commit the material support offense can involve conduct still farther removed from the harmful conduct/crime that is the ultimate target of the accused's conduct. The combination also means that the conduct on which the law bases criminal liability can be facially innocent or, essentially ambiguous, with the criminal purpose of the accused mainly evidenced by statements he has made. This analysis helps to explain how so many individuals who have made certain types of statements and then traveled to an airport and gone through security may thereby have

²³² MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985).

opened themselves up to a criminal sentence of decades in a federal prison, based on a legal theory of attempting or conspiring to provide material support in the form of personnel, in aid ultimately of a terrorism-related crime that would, if committed, involve serious harm.

There is a line of constitutional argument to challenge this use of multiple levels of inchoate criminal liability, even in a terrorism context, but our judgment is that courts would and should uphold an exception for terrorism use of this form of liability. It is, with justification, being used in a preventative mode to investigate and prosecute terrorists in order to prevent catastrophic terrorist events. While there are risks in this form of expansive use of criminal enforcement, the Judiciary, the Executive, the Congress and much of the populace are receptive to the arguments in support of the use of this approach to prevent these kinds of terrorism acts.

But, there remains another concern—the use of the tool of multiple inchoateness in criminal enforcement at an early stage and in a preventative mode may be constitutionally defensible and tolerable as a matter of policy when used against terrorism-related conduct, and, arguably, in certain other contexts where there is special justification for doing so. But there is a risk law-makers, prosecutors, and judges might move this tool outside of terrorism prevention and other special contexts, and transform it into a material support offense cum attempts liability relating to ordinary crimes. Such a use should raise constitutional concerns, and would be a bad development as a matter of policy.

Care should be taken, at both the federal and state levels, to prevent the mutation and migration of the material support offenses into the realm of ordinary crime enforcement. These doctrinal developments should be viewed as special only to terrorism prevention and certain other specially justified uses, and not be allowed to infect the larger criminal enforcement system.

Some of the possible ways in which the material support statutory approach might be extended into the arena of ordinary crime enforcement have been sketched here, but the fact remains that some twenty plus years after the original enactment of these offenses, there has been no significant movement of these offenses beyond the realm of terrorism enforcement. Should not that fact allay concern? Not necessarily. On the time scale of how long it typically takes for creative enforcement uses of new kinds of crimes to come to full flower, the material support offenses are still young. The concern is that their real future may lie ahead.