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ASSESSING UNCONVENTIONAL APPLICATIONS OF THE “TERRORISM” LABEL

Sudha Setty

## *Assessing Unconventional Applications of the “Terrorism” Label*

Sudha Setty\*

### *Introduction*

When a situation is deemed to involve anything labeled as “terrorism,” a lot of things happen. Resources that are not available in other contexts are made available for the government to investigate and surveil suspects. The legal authority of the government to investigate, detain, interrogate and punish increases dramatically. The right of the public to access information about the government’s actions diminishes significantly. The willingness of legislatures and judges to effect meaningful oversight wanes. The societal stigma associated with the underlying behavior skyrockets.

Fully understanding what acts qualify as terrorism such that the enormous power of the law and the government ratchets up is essential. Yet international law has failed to fully define it, and lawmakers and judges in numerous countries struggle to understand the parameters and the application of the term. This ambiguity has been used by politicians and government officials in different ways: sometimes toward categorizing a traditionally underfunded or politically marginal issue as “terrorism” in a good faith effort to increase public attention and resources, but sometimes for political manipulation such that non-terrorism crimes have been redefined as terrorism, bringing with it all of the consequences that follow.

This Chapter explores some non-conventional applications of the label of “terrorism” and considers calls for continued expansion of the definition of terrorism to encompass crimes that have not traditionally been considered terrorism.<sup>1</sup>

Part 1 briefly lays out the working definition of terrorism on an international level, and the gray areas in which individual nations make their own determinations as to what constitutes terrorism and, on the other hand, what is often considered ordinary crime.

Part 2 focuses on the definitions of terrorism under a number of common counterterrorism statutes in U.S. federal law, and then considers contexts that fall outside of the common usage

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\* Professor of Law and Associate Dean for Faculty Development and Intellectual Life, Western New England University School of Law. I am grateful to Matthew H. Charity and Surabhi Chopra for suggestions and comments, and to law librarian Renee Rastorfer for excellent research assistance. I thank the Fulbright Senior Specialist program and the Centre for Rights and Justice at the Chinese University of Hong Kong Faculty of Law for their support as I worked on this Chapter.

<sup>1</sup> Some analysis here is drawn from a previous work: Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. Penn. J. Int’l L. 1 (2011) (analyzing definitions of terrorism as developed and used on an international, comparative and domestic level).

terrorism in the context of U.S. law, exploring instances in which gang violence and animal rights-based crimes are treated legally as terrorism.<sup>2</sup>

Part 3 briefly considers the application of the label of “terrorism” in India, where concerns that broad and vague definitions of terrorism, religious bias against Muslims and targeting of disfavored political minorities, combined with extraordinary powers granted to the government to deal with the threat of terrorism, pose a serious risk to due process and the rule of law.

Some have called on governments to continue to broaden the reach of counterterrorism law to reach other issues, such as sex trafficking<sup>3</sup> or some hate crimes.<sup>4</sup> This Chapter concludes that most such efforts are founded in a well-placed sympathy for the victims of crimes,<sup>5</sup> and some are backed by powerful groups with political influence. However, because in many democratic nations terrorism is granted unique legal treatment as an area in which expansive government power with lessened oversight and protection for individual rights is considered acceptable, importing such standards into other contexts is inviting a distortion of the traditional limits on governmental power and would allow for increases in government abuse and overreach.

## 1. The Definitional Dilemma

The quest to establish a universal definition of terrorism is entangled in questions of law, history, philosophy, morality, and religion. Many believe that the definitional question is, by nature, a subjective one that eludes large-scale consensus. However, to address the problem of terrorist activity, the law must first define terrorism’s parameters. This foundational question is

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<sup>2</sup> These issues serve only as exemplars of the many unconventional contexts in which the federal government has identified the threat of terrorism. See, e.g., Jerome P. Bjelopera, *The Domestic Terrorist Threat: Background and Issues for Congress*, Congressional Research Service, Jan. 17, 2013, available at <http://fas.org/sgp/crs/terror/R42536.pdf> (visited 16 October 2014) (listing anarchism, white supremacy, anti-government ideals, black separatism, and anti-abortion beliefs as additional areas in which the government has evinced heightened concern over terrorism). Further, the question of whether counterterrorism statutes have unconstitutionally criminalized speech and expressive conduct is a related but separate question from what is being addressed in this Chapter.

<sup>3</sup> Human trafficking is already conflated with terrorism in particular sections of U.S. law. See Intelligence Reform and Terrorism Prevention Act of 2004: Title VII—Implementation of the 9/11 Commission Recommendations, Subtitle B—Terrorist Travel and Effective Screening, §7202 (2004) (establishing a Human Smuggling and Trafficking Center, in accordance with recommendations of the 9/11 Commission). Calls for the treatment of sexual violence as “terrorism” go back at least two decades. See, e.g., Carole J. Sheffield, *Sexual Terrorism*, in Jo Freeman, ed., *Women: A Feminist Perspective* 409, 409-10 (5<sup>th</sup> ed., Mayfield Publishing Co. 1995). Sheffield analyzes rape, spousal abuse, sexual abuse of children and sexual harassment as four forms of “sexual terrorism,” and identifies several more, including threats of violence, stalking, coercive sex, pornography, prostitution, sexual slavery and femicide. *Id.* at 412.

<sup>4</sup> See Dawinder S. Sidhu, *Lessons on Terrorism and “Mistaken Identity” from Oak Creek, with a Coda from the Boston Marathon Bombings*, 113 Colum. L. Rev. Sidebar 76 (2013) (arguing that the 2012 killings of six Sikhs at an Oak Creek, Wisconsin temple by a known white supremacist should be considered a terrorist act).

<sup>5</sup> E.g., LZ Granderson, *Treat Chicago gangs as terrorists*, *cnn.com*, Apr. 24, 2013, available at <http://edition.cnn.com/2013/04/24/opinion/granderson-chicago-terror/> (lamenting that the level of resources often allocated toward counterterrorism efforts is not also directed at gang violence).

of the utmost importance in determining who a state, nation or international body will consider a terrorist and, therefore, who will be subject to the stricter laws, diminished rights protections, and harsher penalties that are concomitant with the designation of “terrorism.” For example, in different jurisdictions, the designation of terrorist activity could result in the criminalization of otherwise protected speech,<sup>6</sup> a significant delay in access to counsel and other criminal due process protections,<sup>7</sup> trial in a specialized court with fewer protections for defendants,<sup>8</sup> and, if convicted, significantly enhanced sentences for crimes.<sup>9</sup>

The definitional ambiguity surrounding terrorism, along with the heightened legal and societal consequences of being designated as a terrorist, gives rise to international concern that governments will undercut civil liberties and civil rights by defining terrorism in an overly broad manner, allowing them to unfairly punish those who would not, in most situations, be considered by the international community as “terrorists.”<sup>10</sup>

The United Nations General Assembly has tried to establish an internationally accepted definition of terrorism numerous times since the 1960s,<sup>11</sup> with the belief that “the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed

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<sup>6</sup> See, e.g., [Holder v. Humanitarian Law Project](#), 130 S. Ct. 2705 (2010) (holding constitutional under the First Amendment a Patriot Act provision which made it unlawful to provide material support and assistance to organizations deemed terrorists, even where such support was nonviolent).

<sup>7</sup> For example, in 2010, U.S. Attorney General Eric Holder shifted the Justice Department’s policy with regard to the public safety exception articulated in [N.Y. v. Quarles](#), 467 U.S. 649 (1984). Quarles held that the obligation of law enforcement officers to inform arrestees of their right to counsel, among other *Miranda* rights, was subject to a public safety exception under certain circumstances. Holder’s new policy articulation focused on the “magnitude and complexity of the threat often posed by terrorist organizations” and concomitant need for leeway in interrogation procedures as justification for delaying the reading of *Miranda* rights to suspects. See Attorney General Eric Holder, Jr., *Guidance for Conducting Interviews without Providing Miranda Warnings in Arrests of Terrorism Suspects*, U.S. Department of Justice, Oct. 19, 2010. A high-profile application of this policy occurred in conjunction with the interrogation of Dzhokhar Tsarnaev, one of the attackers in the April 2013 bombing at the Boston Marathon. See Charlie Savage, *Debate Over Delaying of Miranda Warning*, [nytimes.com](#), Apr. 20, 2013, available at [http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html?\\_r=0](http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html?_r=0).

<sup>8</sup> See generally Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 Me. L. Rev. 131 (2010) (discussing how specialized trials for terrorism in India allow for otherwise inadmissible evidence to be used against the defendant, place unusual limits on the right of the defendant to consult with counsel, and, in some cases, allow for burden shifting on the weight of evidence before the court).

<sup>9</sup> See, e.g., U.S. Sentencing Guidelines Manual, 18 U.S.C. Appx. 3A1.4 (allowing for sentence enhancement for federal terrorism crimes). See also Wadie E. Said, *Sentencing Terrorist Crimes*, 75 Ohio St. L. J. 477 (2014) (describing how terrorism-related crimes carry significantly greater sentences than their non-terrorism counterparts).

<sup>10</sup> See U.N. Econ. & Soc. Council, Comm’n on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, PP 26-27, U.N. Doc. E/CN.4/2006/98 (Sept. 28, 2005), at 27 (“[R]epeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights.”)

<sup>11</sup> The search for a supranational definition of terrorism dates at least back to 1937, when the League of Nations considered the Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1938, 19 League of Nations O. J. 23. Article 1(2) of the proposed Convention defined terrorism as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” Id. art. 1(2).

definition of international terrorism.”<sup>12</sup> Each effort, however, failed based on the perceived subjectivity of any such definition, with some countries seeking exemptions for freedom-fighting or anti-colonial violence,<sup>13</sup> and others seeking to ensure that state-sponsored violence is not categorized as terrorism.<sup>14</sup> Nevertheless, almost all nations agreed that the definition of “terrorism” included common core elements such as the purposeful killing of civilians.

With a strong post-September 11 mandate to establish robust counterterrorism measures,<sup>15</sup> but without universal definition of terrorism on which to depend, the United Nations Security Council has established partial measures, such as including general descriptions of acts that fall within the rubric of terrorist activity without purporting to fully define terrorism. One working definition used by the United Nations is:

Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.<sup>16</sup>

Security Council Resolution 1566 offers this partial definition:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism . . . .<sup>17</sup>

Although seemingly expansive, Resolution 1566 limits the use of the label of “terrorism” to offenses that are recognized in previously agreed upon international conventions and protocols, thereby tethering the implementation of Resolution 1566 to offenses commonly understood to fall under the umbrella of terrorism. Further, the language of the resolution limits its application

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<sup>12</sup> G.A. Res. 42/159, U.N. Doc. A/RES/42/159 (Dec. 17, 1987).

<sup>13</sup> Alex Schmid, *Terrorism--The Definitional Problem*, 36 Case W. Res. J. Int'l L. 375, 386 (2004).

<sup>14</sup> See Bruce Hoffman, *Inside Terrorism* 35 (Columbia Univ. Press 1998) (arguing that state-sponsored actions may be distinguished from terrorism because such actions can be deemed violations of international law or military rules of engagement and prosecuted accordingly as war crimes).

<sup>15</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (mandating that all U.N. harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists).

<sup>16</sup> *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57<sup>th</sup> Sess., Annex at para. 13, U.N. Doc. A/57/273-S/2002/875 (2002).

<sup>17</sup> See S.C. Res. 1566, P 1, U.N. Doc. S/RES/1566, at ¶ 3 (Oct. 8, 2004) (condemning all forms of terrorism, regardless of its motivations).

to acts that are intended to provoke terror and/or compel a political response from a government. Even with these interpretive limitations, the Security Council went further in protecting individuals and organizations from inappropriate designation as “terrorists” given the harsh consequences of such a designation. The Security Council designated an Ombudsperson to field petitions from individuals and organizations seeking to be delisted from being subject to international sanctions as terrorists.<sup>18</sup> Concerned about the severe repercussions of being designated as a terrorist, various Member States also moved to make the designation process more transparent, allowing for a challenge and delisting process for individuals and organizations, and strengthening international security by bolstering the perceived legitimacy of the United Nations as a regulator of security matters.<sup>19</sup>

## 2. Non-traditional applications of “terrorism” in the United States

In the United States, federal law and agencies utilize dozens of different definitions of terrorism based on the function of the agency and the purpose for which the definition is used.<sup>20</sup> Two commonly used federal definitions can be found in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>21</sup> and the USA PATRIOT Act (“Patriot Act”) of 2001,<sup>22</sup> and they are worth considering here in terms of applying “terrorism” to conventional and unconventional contexts.

The AEDPA was enacted in response to the 1993 World Trade Center bombings and the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City as part of a broader plan to prevent material support to terrorists that was seen as essential to those bombings. Under the AEDPA, terrorism is defined as:

An activity that involves a violent act or an act dangerous to human life, property, or infrastructure, and appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of government by mass destruction,

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<sup>18</sup> See S.C. Res. 1904, P 20, U.N. Doc. S/RES/1904 (Dec. 17, 2009) (mandating that “when considering delisting requests, the [Counter-Terrorism] Committee shall be assisted by an Office of the Ombudsperson”).

<sup>19</sup> E.g., Press Release, Security Council, Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson to Handle Delisting Issues, P 14, U.N. Press Release SC/9825 (Dec. 17, 2009), available at <http://www.un.org/News/Press/docs/2009/sc9825.doc.htm> (noting the concern of delegations from various nations that the process of designating terrorists be made more accessible, transparent, and equitable).

<sup>20</sup> See Nicholas J. Perry, The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. Legis. 249, 249-50 (2004) (examining twenty-two definitions of terrorism under U.S. federal law).

<sup>21</sup> See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217 (codified in scatter sections of 8, 18, and 28 U.S.C.) (authorizing the Secretary to designate foreign organizations as terrorists if they engage in terrorist activity as defined by the statute).

<sup>22</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.) [hereinafter Patriot Act].

assassination, kidnapping, or hostage-taking.<sup>23</sup>

The AEDPA is a wide-reaching statute, defining terrorism for the purpose of designating Foreign Terrorist Organizations (FTOs) and freezing the assets of such organizations.<sup>24</sup> Because the consequences of FTO designation can be severe—financial institutions may block or freeze assets of an FTO,<sup>25</sup> individuals may be barred from entry into the United States,<sup>26</sup> and material support to such an organization is a criminal offense carrying potentially lengthy prison sentences.<sup>27</sup> Therefore, the procedural safeguards for erroneous designation, however limited, are crucial.

One such safeguard in the FTO designation process is the opportunity to contest the designation proposed by the State Department. This layer of judicial review offers some protection against arbitrariness in the designation that might otherwise constitute a substantive due process violation, and requires some disclosure of the basis upon which the State Department made its determination.<sup>28</sup> A second important safeguard is the mandatory review and renewal process: at least every five years, the State Department must review the designation to determine whether it should be revoked based on changes to the organization's actions or in the national security assessment by the United States.<sup>29</sup> These safeguards echo the review and delisting process that the United Nations adopted to improve procedural protections against erroneously being labeled as a terrorist and suffering the ramifications of that inappropriate designation.

The Patriot Act is also a reactive statute, passed in immediate response to the September 11, 2001 attacks. It included a panoply of counterterrorism resources to the government: an increase in surveillance powers and government authority to conduct intelligence-gathering operations in matters of suspected terrorism, allowing for the civil seizure of assets based only on probable cause, heightened punishments for any of the underlying crimes related to the newly broadened

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<sup>23</sup> See [Exec. Order No. 13224](#), 31 C.F.R. 594 (explaining Congressional findings and purpose).

<sup>24</sup> See, e.g., AEDPA §§ 219(a)(1)(A)-(C), 219(a)(2)(C) (codified in [8 USC §1189\(a\)](#)) (finding that anyone who interacts with FTOs is violating the statute, and authorizing the Secretary of the Treasury to freeze the assets of entities designated as FTOs). President Clinton signed [Executive Order 12,947](#) in January 1995, which was geared toward facilitating a peace agreement in the Middle East, but gave broad authority to cabinet departments to designate Foreign Terrorist Organizations (FTOs) with the purpose of disrupting their financial and operational capabilities, thereby laying the foundation for the authority granted under the AEDPA.

<sup>25</sup> [18 U.S.C. § 2339B\(a\)\(2\)](#) (2006).

<sup>26</sup> [8 U.S.C. §§ 1182\(a\)\(3\)\(B\)\(i\)\(IV\)-\(V\)](#) (2006).

<sup>27</sup> [18 U.S.C. § 2339B\(a\)\(1\)](#) (2006). The constitutionality of the FTO designation process authorized by [Executive Order No. 13,224](#) and various statutes was upheld by the U.S. Supreme Court in [Humanitarian Law Project v. Holder](#), [Holder v. Humanitarian Law Project](#), 130 S. Ct. 2705 (2010).

<sup>28</sup> Under the AEDPA, courts have the power to set aside the State Department designation of an FTO if it is arbitrary, capricious, and an abuse of discretion, or if it is not based on substantial evidence. AEDPA § 302(b)(3) (codified as [8 U.S.C. § 1189\(c\)\(3\)](#)). Courts have, however, been extremely deferential to the State Department, choosing not to review classified evidence in some instances, but relying instead on State Department affirmations of substantial evidence to support its designation decision. E.g., *People's Mojahedin Org. of Iran*, 327 F.3d 1238, 1244 (D.C. Cir. 2003).

<sup>29</sup> [8 U.S.C. § 1189\(a\)\(4\)\(C\)](#), [\(a\)\(6\)](#) (2006).

understanding of “domestic terrorism,” and numerous other powers.

The Patriot Act definition of terrorism includes:

[A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.<sup>30</sup>

This definition includes reference to some commonly understood elements of terrorism, such as acts that are dangerous to human life and that are intended to intimidate a civilian population, and the definition offers examples of common underlying crimes, such as mass destruction, assassination or kidnapping. Nonetheless, critics of this broad definition have noted that such language could encompass the work of numerous activist groups, including Greenpeace, protestors of the World Trade Organization, and Operation Rescue.<sup>31</sup> Indeed, because the definition suggests, but does not require, politically motivated violence as an element, a literal reading of the statutory language suggests that almost any violent act toward a civilian could qualify as “terrorism.”

The definition of terrorism used in the Patriot Act was imported from the Foreign Intelligence Surveillance Act of 1978 (“FISA”).<sup>32</sup> Like other definitions already examined, the definition of international terrorism in FISA includes several elements: that it “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 any State;” that it “appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by assassination or kidnapping” and occur totally outside the United States, or transcend national boundaries.

Given the far-reaching consequences of being suspected of terrorism and the broad powers for surveillance authorized under FISA at the time of its enactment, Congress expressed significant concern over the implications of FISA on civil liberties, and the potential for government overreach. This concern led to numerous safeguards beyond the limited scope of application of the legislation, including the reporting requirements of the Attorney General to

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<sup>30</sup> Id. § 802.

<sup>31</sup> See How the USA PATRIOT Act redefines “Domestic Terrorism,” Am. Civ. Liberties Union (Dec. 6, 2002), <http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domestic-terrorism> (analyzing the effect of the Patriot Act definition of terrorism if the government applied the act to Vieques protesters).

<sup>32</sup> See Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(c) (2006).



Congress regarding the nature and extent of FISA-based surveillance conducted,<sup>33</sup> the mandated minimization procedures to ensure that individual privacy rights are safeguarded to some extent,<sup>34</sup> and the penalties available to punish those who conduct unlawful and overreaching surveillance.<sup>35</sup>

The Patriot Act uses the FISA definition of terrorism without the concomitant FISA safeguards in place, an especially problematic footing in light of the limited original application of the FISA definition to the non-criminal purpose of intelligence-gathering. The lack of parallel due process protections in the application of the Patriot Act exacerbates the problems inherent in applying conflicting definitions of terrorism, including the potential lack of notice to individuals as to whether they will be categorized as a terrorist and exactly what kind of conduct is prohibited.<sup>36</sup> Even with some safeguards in place, vagueness in these statutes has led to concern of potential abuse if definitions are repurposed to punish non-terrorist activity, precisely the concern when applying the label of terrorism to unconventional contexts.

Two unconventional applications of the term “terrorism” to law enforcement and intelligence-gathering efforts—gang violence and animal-rights activism—offer examples of the possibilities and concerns in re-contextualizing terrorism.<sup>37</sup>

a. Gang violence

There are two primary ways in which gang violence and terrorism are conflated under legal standards. The first is a concern that powerful U.S. gangs, who are known to smuggle drugs,<sup>38</sup>

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<sup>33</sup> See 50 U.S.C. §§ 1807, 1808 (2006) (describing the reports required by the Attorney General and other congressional oversight measures).

<sup>34</sup> See, e.g., 50 U.S.C. § 1801(h) (2006) (directing the use of minimization procedures to “minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons”)

<sup>35</sup> E.g., 50 U.S.C. §§ 1809, 1810 (2006) (describing civil liability and criminal sanctions for breaches of FISA).

<sup>36</sup> See, e.g., Perry, *supra* note \_\_, at 270 (arguing that conflicting definitions of terrorism could result in confusion and ambiguity)

<sup>37</sup> There are too many unconventional contexts to evaluate in one book chapter, but these serve as exemplars for the concerns of applying the term elsewhere. E.g., Michal Buchhandler-Raphael, *What’s Terrorism Got to Do with It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1909505](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909505) (arguing that the terrorism charges brought against a microbiologist who attempted to use toxic chemicals to harm another person as part of a personal vendetta were inappropriate).

<sup>38</sup> A related area of concern is that of “narco-terrorism,” in which a drug trafficking and terrorism nexus must be demonstrated to prosecute under counterterrorism statutes. See USA PATRIOT Improvement and Reauthorization Act of 2005, 21 U.S.C. §960a (criminalizing the funding of terrorist activity or an FTO through drug trafficking); John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties?* 66 Wash. & Lee L. Rev. 1881 (2009) (arguing that the requirement of a drug trafficking-terrorism nexus is too easy to meet and may encourage government abuse of powers granted under the Patriot Act); see also Johnny Dwyer, *The Threat of Narcoterror: How the Strange New Iran Case Affects the Definition*, time.com, Oct. 17, 2011, available at <http://content.time.com/time/nation/article/0,8599,2096950,00.html> (visited Nov. 18, 2014) (noting the political expedience of labeling drug trafficking as “terrorism” for U.S. politicians during a campaign season).

weapons and other illegal items into the United States, will also smuggle terrorists into the United States.<sup>39</sup> However, research suggest that this nexus remains speculative,<sup>40</sup> and some reports on domestic terrorism do not include discussion of gang violence at all.<sup>41</sup> In such a situation, it appears that the concern focuses on the prospect of gangs providing material support to terrorists,<sup>42</sup> not committing acts of terrorist violence themselves.

The second context is the legal treatment of gang violence itself as terrorism. Six days after the September 11, 2001 terrorist attacks, New York became the first state in the United States to pass its own general anti-terrorism statute,<sup>43</sup> the Anti-Terrorism Act of 2001.<sup>44</sup> This law ratchets up the potential penalties where an underlying criminal act is committed with the intent to “intimidate or coerce a civilian population; influence the policy of a unit of government by intimidation or coercion; or affect the conduct of a unit of government by murder, assassination or kidnapping.”<sup>45</sup>

The only use of this statute has been in the case of *People v. Morales*, a case that deserves close examination not only because of the nature of the crimes allegedly committed, but for the

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Others have noted that the conflation of the “war on drugs” and “war on terror” on a policy level has sometimes resulted in unintended policy consequences that undercut the ability to undercut terrorism. See Chris J. Dolan, *United States’ Narco-Terrorism Policy: A Contingency Approach to the Convergence of the Wars on Drugs and Against Terrorism*, 22 Rev. of Policy Research, 451, 467-69 (2005).

<sup>39</sup> See Testimony of FBI Assistant Director, Criminal Investigative Division, Christopher Swecker, before the House International Relations Subcommittee on the Western Hemisphere, *Gangs and Crime in Latin America* (April 20, 2005).

<sup>40</sup> E.g., Celinda Franco, *Youth Gangs: Background, Legislation, and Issues*, Congressional Research Service, Jan. 25, 2008, at 24 (noting that “no evidence has been found linking U.S. gangs...with the smuggling of terrorists into the country”); cf. Mark Randol, *CRS Issue Statement on Organized Crime and Gangs in the United States*, Congressional Research Service, Jan. 12, 2010, at 2 (noting that “[t]he potential nexus between [drug trafficking organizations], organized crime, and terrorist organizations may be of interest for Congress. Terrorists may collaborate directly with organized crime groups to secure funding for their operations. Terrorist organizations may also use the structure and activities of organized crime groups as models for structuring their own organizations and financing their operations”).

<sup>41</sup> See Bjelopera, *supra* note \_\_\_\_.

<sup>42</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (holding that it is constitutional to criminalize the provision of material support and assistance to organizations deemed to be Foreign Terrorist Organizations, even where such support is nonviolent).

<sup>43</sup> Many other U.S. states have passed anti-terrorism statutes as well; they are seldom used, and with mixed application and results. For example, an Illinois anti-terrorism statute was the basis for prosecuting three men for material support for terrorism and conspiracy to commit terrorism in conjunction with their protests of a 2012 NATO summit in Chicago. Those defendants were ultimately acquitted of terrorism-related crimes, but convicted of misdemeanor mob action and felony possession of an incendiary device. See Steve Schmadeke, *Found guilty of mob action and arson, but not terror charges*, *chicagotribune.com*, Feb. 7, 2014, available at [http://articles.chicagotribune.com/2014-02-07/news/chi-closing-arguments-underway-in-nato-3-trial-20140206\\_1\\_brian-church-jared-chase-brent-betterly](http://articles.chicagotribune.com/2014-02-07/news/chi-closing-arguments-underway-in-nato-3-trial-20140206_1_brian-church-jared-chase-brent-betterly). Other states have labeled gang-related violence as a form of terrorism for decades, but not as part of a general anti-terrorism law. See, e.g., California Street Terrorism Enforcement and Prevention Act, Cal. Pen. Code §186.22 (1988)(using the term “terrorism” in the title of the act, but not using or defining the term in the body of the statute).

<sup>44</sup> Anti-Terrorism Act of 2001, 2001 N.Y. Laws, Ch. 300 (Sept. 17, 2001).

<sup>45</sup> N.Y. Penal Law §490.25 (1) (defining the act of terrorism for the purposes of the Anti-Terrorism Act of 2001).

judicial response to the broad definition of terrorism being put forward by the prosecutors. Edgar Morales was allegedly involved in a gang-related shooting at a 2002 christening in the Bronx in New York City, in which a child was killed and another bystander was severely injured.<sup>46</sup> In this case, the Bronx district attorney indicted Morales on charges of murder, attempted murder, manslaughter, gang assault and criminal possession of a handgun, but also indicted Morales on those same charges under the auspices of the New York terrorism statute under the theory that Morales acted with the intent to intimidate the Mexican-American civilian population living in the area of the shooting.<sup>47</sup> A jury convicted Morales of a variety of offenses, including manslaughter, attempted murder, weapons possession, conspiracy, as well as the terrorism-related corollaries of these crimes; Morales was sentenced to 40 years to life in prison.<sup>48</sup>

The intermediate appellate court modified Morales' sentence based on its findings that Morales' gang-related activity in a civilian neighborhood did not qualify as terrorist activity.<sup>49</sup> In doing so, the appellate court looked to the language of the Anti-Terrorism Act itself, notably the examples given by the New York state legislature as prior terrorist activity that helped motivate the passage of the statute. In addition to the September 11 attacks, the legislature cited the 1993 attack on the World Trade Center, the 1998 bombings of U.S. embassies in Kenya and Tanzania, the 1995 Oklahoma City federal building bombing, the 1988 downing of Pan Am flight 103 over Lockerbie, Scotland, a 1997 shooting at the Empire State Building, and the 1994 murder of a teenager on the Brooklyn Bridge as acts of terrorism.<sup>50</sup>

The appellate court further considered examples of international terrorism that motivated the Foreign Intelligence Surveillance Act of 1978 (FISA),<sup>51</sup> since the New York terrorism act was informed by language from FISA. The legislative history of FISA included examples of terrorism such as "the detonation of bombs in a metropolitan area" and "the deliberate assassination of persons to strike fear into others to deter them from exercising their rights."<sup>52</sup> And the court noted that a 1986 federal statute specifically distinguished terrorism from

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<sup>46</sup> See *People v. Morales*, 20 N.Y. 3d 240, 244-45 (NY 2012).

<sup>47</sup> *Id.* at 245.

<sup>48</sup> *Id.* at 246.

<sup>49</sup> See *People v. Morales*, 86 A.D. 3d 147, 157 (NY 1<sup>st</sup> Dep't 2011).

<sup>50</sup> See N.Y. Penal Law §490.00 (2001). Whether all of those acts should have been described as "terrorism" remains a matter of debate. See Shaila K. Dewan, U.S. Decides '94 Attack on Hasidim Was a Lone Act, *nytimes.com*, Dec. 6, 2000, available at <http://www.nytimes.com/2000/12/06/nyregion/us-decides-94-attack-on-hasidim-was-lone-act.html> (noting that the U.S. Attorney had, in 2000, re-characterized the 1994 murder of Ari Halberstam on the Brooklyn Bridge as a "terrorist act"); but see Glenn Greenwald, *New York's top court highlights the meaninglessness and menace of the term "terrorism,"* *theguardian.com*, Dec. 16, 2012, available at <http://www.theguardian.com/commentisfree/2012/dec/16/court-terrorism-morales-gangs-meaningless> (critiquing the inclusion of all of these highly differentiated crimes as terrorist acts, opining that the single common theme for six of these seven acts is that they were committed by Muslims against non-Muslims, and suggesting that the label of "terrorism" is a tool used to create a lesser system of justice for Muslim defendants).

<sup>51</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq.

<sup>52</sup> *People v. Morales*, 86 A.D. 3d at 158.

“nonterrorist violence” such as “normal street crime.”<sup>53</sup> The appellate court considered Morales’s crime against this backdrop of examples and found that, although heinous, what Morales did was not terrorism. Although the appellate court cleared Morales of the terrorism-related convictions, it let stand all of the underlying convictions, holding that Morales’ trial was sufficiently untainted despite the stigma associated with terrorism and the additional evidence that prosecutors were able to introduce due to the alleged terrorism nexus.<sup>54</sup>

The Court of Appeals<sup>55</sup> in New York went further, ordering a new trial for Morales based on the finding that the entire trial was tainted by the unreasonable categorization of Morales’ acts as terrorism as opposed to “gang-on-gang street violence.”<sup>56</sup> The Court offered further clarification of what does not constitute terrorism: drive-by shootings, “ordinary violent crimes” such as robbery or personal vendettas, or the orchestration of a murder by an organized crime family of another syndicate’s soldier.<sup>57</sup>

The Court’s language as to how a terrorism trial is substantially different than one for other crimes in terms of the prosecutor’s ability to introduce evidence is helpful in considering the ramifications of labeling a crime as “terrorism”:

“By proceeding on the terrorism theory, the People were able to introduce evidence about numerous alleged criminal acts committed by members of [Morales’ gang] over the course of three years. Without the aura of terrorism looming over the case, the activities of defendant’s associates in other contexts would have been largely, if not entirely, inadmissible. Based on the record, it is apparent that the volume of proof regarding unrelated assaults, murders and other offenses created a reasonable possibility that the jury’s findings were prejudicially influenced. Hence, the spillover effect requires reversal and a new trial on the underlying offenses.”<sup>58</sup>

After the Court of Appeals’ decision, Morales was retried on the non-terrorism related charges and was found guilty of manslaughter, attempted murder, gang assault, criminal possession of a weapon, and conspiracy. In early 2015, he was sentenced to 50 years in prison for those crimes.<sup>59</sup>

#### b. Animal rights activism

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<sup>53</sup> *Id.* at 159.

<sup>54</sup> *Id.* at 163-64.

<sup>55</sup> The Court of Appeals is the highest court within the New York State judicial system.

<sup>56</sup> See *People v. Morales*, 20 N.Y. 3d at 248, 250.

<sup>57</sup> *Id.* at 249.

<sup>58</sup> *Id.* at 250.

<sup>59</sup> See Press Release of Bronx District Attorney Robert T. Johnson, *50 Years in Prison for Gangbanger Twice Convicted in Shooting that Killed Little Girl, Paralyzed a Bystander*, Feb. 20, 2015, available at <http://www.bronxda.nyc.gov/information/2015/case16.htm>.

The boundaries among constitutionally protected political protest, politically motivated non-violent crime, and domestic terrorist activity come into sharp focus in a number of criminal cases involving supporters of animal rights. Animal rights-related crimes, unlike most other types of domestic criminal activity (whether usually designated as “terrorist activity” or not), is an area in which Congress has seen fit to enact legislation that is unusual in its specificity and nomenclature.<sup>60</sup> The Animal Enterprise Terrorism Act of 2006 (AETA)<sup>61</sup> expands the federal government’s legal authority to combat animal rights extremists who engage in criminal activity and, as the name of the statute suggests, looks to stigmatize and penalize criminal activity by animal rights groups<sup>62</sup> by designating a variety of animal enterprise<sup>63</sup>-related crimes as terrorism.<sup>64</sup> This effort was led by a coalition of advocacy groups finding support in various business interests (e.g., livestock farms; fur operations; cosmetic, pharmaceutical and biomedical companies; as well as animal-based entertainment businesses such as circuses and rodeos) and academic institutions engaging in animal research.<sup>65</sup>

The AETA’s definition of terrorism includes provisions for terrorist activity that are common to other federal statutes, but also has a variety of unique provisions that label non-violent crimes such as trespass, property damage and vandalism as “terrorism” as well:

- (a) Travel[] in interstate or foreign commerce, or use[] or cause[] to be used the mail or any facility of interstate or foreign commerce--
  - (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
  - (2) in connection with such purpose--
    - (A) intentionally damage[] or cause[] the loss of any real or personal property

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<sup>60</sup> One context analogous to that of animal rights-related “terrorism” is that of “eco-terrorism,” which has been treated by the FBI as a “serious terrorist threat,” with the use of multi-agency taskforces and Joint Terrorism Task Forces to investigate alleged eco-terrorist organizations. Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, Federal Bureau of Investigation, Feb. 12, 2002, available at <http://web.archive.org/web/20080311231725/http://www.fbi.gov/congress/congress02/jarboe021202.htm>. See Federal Bureau of Investigation, Press Release, *Eco-Terror Indictments: ‘Operation Backfire’ Nets 11*, fbi.gov, Jan. 20, 2006, available at <http://www.fbi.gov/news/stories/2006/january/elf012006>. But see Steve Vanderheiden, *Eco-terrorism or Justified Resistance? Radical Environmentalism and the “War on Terror,”* 33 *Politics & Society* 425 (2005) (arguing that the conflation of counterterrorism operations and criminal investigations of “radical environmentalists” is misplaced).

<sup>61</sup> Animal Enterprise Terrorism Act of 2006, P.L. 109-374.

<sup>62</sup> See Statements on Introduced Bills and Joint Resolutions, 152 Cong. Rec. S9254-01 (2006) (discussing actions by “extremist activists, acting in the name of animal rights”)

<sup>63</sup> An “animal enterprise” is defined as any “commercial or academic enterprise that uses or sells animals or animal products for profit.” 18 U.S.C. § 43 (d)(1)(a).

<sup>64</sup> Signed into law in November 2006, the AETA amended the Animal Enterprise Protection Act of 1992, 18 U.S.C. §43 (2000) (enacted Aug. 26, 1992) (AEPA). The AEPA was amended in 1996 and 2000 to increase penalties and sentences. See Kim McCoy, *The Animal Enterprise Terrorism Act: Protecting Profits of Animal Enterprises at the Expense of the First Amendment*, in Jason Del Gandio & Antony J. Nocella II, eds., *THE TERRORIZATION OF DISSENT: CORPORATE REPRESSION, LEGAL CORRUPTION, AND THE ANIMAL ENTERPRISE TERRORISM ACT* 6-7 (Lantern Books 2014).

<sup>65</sup> McCoy, *supra* note \_\_\_, at 8-9.

(including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;

(B) intentionally place[] a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family... of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or

(C) conspire[] or attempt[] to do so[.]<sup>66</sup>

Civil rights groups have challenged the AETA on behalf of criminal defendants based in part on this broad definition of terrorism.<sup>67</sup> Given the fact that the label of terrorism carries significant legal and societal consequences, challenges to this designation allege a substantive due process violation in the labeling of crimes such as criminal trespass when there is no intent to injure a person and no such injury occurs, no explosive devices are used, and the behavior is otherwise criminalized under state or federal law.<sup>68</sup>

Looking at international working definitions and other definitions used by the U.S. federal government in its counterterrorism efforts,<sup>69</sup> this provision of the AETA as to what constitutes terrorism is a significant outlier. Although the international community has not achieved consensus on the definition of terrorism, these acts that the AETA includes as terrorist activity—trespassing, releasing animals, vandalism, and destroying records—do not comport with the usual definitions of terrorism that use politically motivated murder or hostage-taking meant to intimidate significant groups of civilians as exemplars for the types of crimes to be designated as “terrorism.”

The AETA exploits the vagueness problems of defining terrorism in international and federal law to explicitly define terrorism as something it is not commonly understood to be. Also, whereas the international community and U.S. government have often sought to ameliorate the stigma and legal impact of being erroneously labeled a terrorist by establishing safeguards against inappropriate designation as a “terrorist,” the AETA moves in the opposite direction by explicitly attaching the “terrorist” label to crimes that are usually categorized as ordinary felonies and misdemeanors, without protections in place that would necessitate additional review to determine whether “terrorism” is the appropriate label for the act in question.

This problem of expansive labeling without thoughtful scrutiny and judicial review is not

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<sup>66</sup> 18 U.S.C. §43(a).

<sup>67</sup> See Defendant’s Motion to Dismiss Indictment and Memorandum of Law in Support, *United States v. Johnson*, No. 14 CR 390 (N.D. Ill. Nov. 6, 2014), available at <http://ccrjustice.org/ourcases/US-v-Johnson> (viewed November 18, 2014).

<sup>68</sup> See *id.*

<sup>69</sup> For example, the FBI’s website on its counterterrorism efforts lists multiple definitions of terrorism under federal law, none of which resemble the AETA definition. See Federal Bureau of Investigation, *Definitions of Terrorism in the U.S. Code*, available at <http://www.fbi.gov/about-us/investigate/terrorism/terrorism-definition> (visited October 31, 2014).



merely an issue in the United States; in fact, the history of and potential for abuse by Indian law enforcement and intelligence officers involved in counterterrorism law and policy illustrates this dynamic as well.

### 3. India's broad treatment of "terrorism"

India has struggled with internal and external national security threats since its independence in 1947.<sup>70</sup> India's legal response has relied on a framework of constitutionally and statutorily granted emergency powers, plus non-emergency criminal laws granting broad intelligence-gathering and police powers that in many ways operate similar to emergency powers.<sup>71</sup> This makes it all the more precarious for individuals or organizations labeled as terrorists, who often find themselves in a draconian criminal justice system that limits their rights and access to justice.<sup>72</sup> From a rule of law perspective, India should be ensuring that the legal definition of terrorism remains narrowly written and construed so as to avoid the potential for abuse. Yet the persistence of India's expansive definition of terrorism and its application to a variety of conventional and unconventional contexts suggests that the Indian government is more focused on maintaining broad authority to investigate and prosecute security threats as it sees fit to define them, and less concerned with the human rights abuses that follow.

In the year after Emergency Rule ended, political, economic and security-related pressures continued to undercut stability in India. In the early 1980s the Punjabi separatist movement fueled fears that separatist movements throughout India would gain strength, motivating Parliament to pass the Terrorist Affected Areas Act of 1984 (TAAA), which granted more structured and comprehensive police and intelligence-gathering powers.<sup>73</sup> This statute contains the first legislative definition of a "terrorist," which requires that a person kills, acts violently, disrupts essential services, or damages property; with the purpose of intimidating the public, coercing the government, endangering the sovereignty or integrity of India, or "affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities."<sup>74</sup> This extraordinarily broad definition, although only applicable to designated

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<sup>70</sup> See Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 Colum. J. Asian L. 93, 99 (2006) (describing violence related to terrorism as a "chronic crisis of national security").

<sup>71</sup> See India Const. arts. 352-56, amended by The Constitution (Ninety-fourth Amendment) Act, 2006 (stating the emergency powers provisions); see also Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 295-97 (2003) (discussing the era of Emergency Rule under Prime Minister Indira Gandhi).

<sup>72</sup> See Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, 16 Or. Rev. Int'l L., at \*29-35 (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2441652](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441652) (describing the broad scope of India's antiterrorism laws, and the effects on individuals within their purview); Setty, *Comparative Perspectives*, *supra* note \_\_\_, at 164-171 (discussing rule of law concerns with regard to the specialized courts used to try some terrorists in India).

<sup>73</sup> See Terrorist Affected Areas (Special Courts) Act, 1984, No. 61, Acts of Parliament, 1984 (India) [hereinafter TAAA] ("An act to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith.").

<sup>74</sup> See *id.* § 2(1)(h).

“affected areas” within India, had the potential, like the Patriot Act or other U.S. legislation, to create “terrorists” out of those conducting protected activities. Yet the TAAA contains no restrictive language or ameliorating procedures to protect against improper designation, creating a genuine concern for the overlabeling of ordinary crimes or legal activities as “terrorism.”

Due to the political furor over the assassination of Prime Minister Indira Gandhi in 1984, the Terrorist and Disruptive Activities (Prevention) Act (TADA) was passed in 1985.<sup>75</sup> This new act defined terrorism in even broader terms as TAAA, with no geographic restriction to “affected areas”:

Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, commits a terrorist act.<sup>76</sup>

The constitutionality of this vague and broad definition of terrorism has been upheld by the Indian Supreme Court,<sup>77</sup> despite reservations about potential abuse of power<sup>78</sup> and accusations that TADA was being employed against political enemies of the government.<sup>79</sup> TADA expired in 1995, but its definition of terrorism was reused and broadened further with the enactment of the Prevention of Terrorism Act, 2002 (POTA), which has a checkered legacy that, in some respects, continues to define Indian counterterrorism policy today.

#### a. Prevention of Terrorism Act 2002

POTA was passed quickly by the Indian parliament, partly resulting from post-9/11 international mandates to strengthen counterterrorism operations worldwide.<sup>80</sup> POTA defined a terrorist as one who:

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<sup>75</sup> See The Terrorist and Disruptive Activities (Prevention) Act, 1985, No. 31, Acts of Parliament, 1985 (India) [hereinafter TADA] (“An act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto.”).

<sup>76</sup> TADA, Part II, § (3)(1).

<sup>77</sup> See *Madan Singh v. State of Bihar*, (2004) 3 S.C.R. 692 (India) (observing that it is not possible to provide a precise definition of terrorism).

<sup>78</sup> See *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375 (India) (upholding the constitutionality of TADA after acknowledging potential problems of overreach).

<sup>79</sup> See Kalhan, *supra* note \_\_\_, at 177-78.

<sup>80</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (mandating that all U.N. member nations take proactive steps to combat terrorism).



[W]ith intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances ... of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act ....<sup>81</sup>

The determination of who is considered a terrorist under this provision falls to the central government and the state governments that have adopted POTA. Those groups designated as “terrorist organizations” have the right to challenge their designation through a petition to the Central Government and to appeal unsuccessful challenges to a Review Committee.<sup>82</sup> Judicial review over the designation is explicitly barred under POTA,<sup>83</sup> but courts later suggested that some degree of judicial review would be available as a constitutional matter.<sup>84</sup>

The POTA definition came under critique for, among other human rights concerns, selective prosecutions of Muslims, poor people, members of tribal groups, protesters and Dalits as “terrorists” in special courts with diminished protections for defendants, whereas others accused of the same acts were often not prosecuted at all or were charged with ordinary criminal offenses and were tried in ordinary courts.<sup>85</sup> Perhaps the most graphic example of this occurred in conjunction with the 2002 train fire in the town of Godhra, Gujarat, in which 59 people, mostly Hindu activists who were part of the Vishwa Hindu Parishad, a group affiliated with the Hindu conservative political party, the Bharatiya Janata Party (BJP), died. A large group of Muslim residents of Godhra had surrounded the train at the time and were in a heated argument with those on the train; investigations by the Gujarat state government concluded that those outside of

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<sup>81</sup> The Prevention of Terrorism Act, 2002 (POTA), No. 15, Acts of Parliament, 2002 (India) Chapter II, § 3(1)(a).

<sup>82</sup> POTA, Ch. III, §19.

<sup>83</sup> POTA, Ch. VI, §54.

<sup>84</sup> See *POTA's review panel's recommendation binding on Gujarat: Supreme Court*, thehindu.com, Oct. 22, 2008, available at <http://www.thehindu.com/todays-paper/tp-national/pota-review-panels-recommendation-binding-on-gujarat-supreme-court/article1361671.ece> (mentioning that although the review committee's designation was considered final, Article 226 of the Indian Constitution allows for High Courts to issue writs that could bring such matters under judicial review).

<sup>85</sup> See Ujjwal Kumar Singh, *The State, Democracy and Anti-Terror Laws in India* 165-219 (Routledge 2007) (documenting selective prosecution under POTA); see also Chopra, *supra* note \_\_\_, at 30-35 (discussing ways in which the powers granted under POTA were abused); Amos Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 *San Diego Int'l L.J.* 125, 171 (2005) (noting that some described POTA as a “terrorist law [that would be] ... used to terrorise minorities”); Sudha Ramachandran, *Filling India's Anti-terrorism Void*, Asia Times Online, Sept. 23, 2004, [http://www.atimes.com/atimes/South\\_Asia/FI23Df03.html](http://www.atimes.com/atimes/South_Asia/FI23Df03.html) (noting that while the majority of the 32 organizations banned under POTA were Muslim, none of the Hindu extremist groups were ever targeted); Sachin Mehta, *Repeal of POTA Justified*, Legal Services India, <http://www.legalservicesindia.com/articles/pota.htm> (last visited Oct. 10, 2011) (observing that POTA had been “abused to book, without lucidity and accountability, political opponents and underprivileged communities”).

the train were a “mob” that lit the fire purposefully, whereas the Indian central government’s investigators concluded that the fire originated accidentally.<sup>86</sup> Following the train fire, rioting and extreme violence broke out in multiple parts of Gujarat, and approximately 1,100 people, mostly Muslims, were killed.<sup>87</sup>

POTA was used to charge many of the Muslims who were part of the crowd outside of the train, and 79 of those suspects were held in POTA-authorized pre-trial detention for approximately seven years.<sup>88</sup> Those detainees were transferred for ordinary criminal processing only in early 2009, after the POTA Review Committee found that the designation of “terrorism” was inappropriate under the circumstances, and the Gujarat High Court affirmed that the starting of the train fire, although arguably criminal, was not an act of terrorism.<sup>89</sup>

Even in 2002, however, POTA was not used to charge Hindus involved in the violence and rioting, leading to allegations of selective prosecution.<sup>90</sup> Further charges were made that local law enforcement, the BJP-led Gujarat state government and its chief minister at the time, Narendra Modi (now India’s prime minister), were complicit in and, in some instances, encouraging and instigating violence against Muslims.<sup>91</sup> Although others in the Gujarat state government were convicted where Modi was not,<sup>92</sup> domestic and international suspicion of Modi’s complicity in the communal violence remained.<sup>93</sup>

POTA was repealed in 2004 over sustained concern of human rights abuses by the police and intelligence community, but the bulk of its powers were encapsulated in other statutes. The 2004

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<sup>86</sup> Compare Report by the Commission of Inquiry Consisting of Mr. Justice G.T. Nanavati and Mr. Justice Akshay H. Mehta, Part I, Sept. 8, 2008, at ¶227 (the Gujarat government’s commission concluded that the train fire was a premeditated crime that was part of a larger conspiracy intended to kill Hindu activists); *Fatal ‘02 Hindu train fire laid to accident, not mob*, nytimes.com, Jan. 18, 2005, available at <http://www.nytimes.com/2005/01/17/world/asia/17iht-india.html> (reporting that the central government’s investigating concluded that the train fire was an accident).

<sup>87</sup> See Celia W. Dugger, *Religious Riots Loom Over Indian Politics*, nytimes.com, July 27, 2002, available at <http://www.nytimes.com/2002/07/27/international/asia/27INDI.html> (describing the heinous ways in which many Muslims were killed and injured during the riots).

<sup>88</sup> See *Pota not applicable in Godhra riots case: Gujarat HC*, thehindu.com, Feb. 13, 2009, available at <http://timesofindia.indiatimes.com/india/Pota-not-applicable-in-Godhra-riots-case-Gujarat-HC/articleshow/4120487.cms>.

<sup>89</sup> See *POTA review panel’s recommendations binding on Gujarat: Supreme Court*, thehindu.com, Oct. 22, 2008, available at <http://www.thehindu.com/todays-paper/tp-national/pota-review-panels-recommendation-binding-on-gujarat-supreme-court/article1361671.ece>.

<sup>90</sup> See Human Rights Watch, *We Have No Orders to Save You: State Participation and Complicity in Communal Violence in Gujarat*, April 2002, available at <http://www.hrw.org/reports/2002/india/>.

<sup>91</sup> See *id.*

<sup>92</sup> See Gardiner Harris & Hari Kumar, *Stiff Sentence for Former Gujarat Minister*, nytimes.com, Aug. 31, 2012, available at <http://india.blogs.nytimes.com/2012/08/31/stiff-sentence-for-former-gujarat-minister/> (describing the decades-long sentences for 32 Gujarat government officials in conjunction with the 2002 riots).

<sup>93</sup> See Ellen Barry, *U.S. Reaches Out to Indian Opposition Leader It Once Rebuked*, nytimes.com, Feb. 10, 2014, available at <http://www.nytimes.com/2014/02/11/world/asia/us-reaches-out-to-indian-opposition-leader-it-once-rebuked.html> (describing the diplomatic chill between the United States and Narendra Modi as a result of Modi’s governance of Gujarat during the 2002 riots).

amendments to the Unlawful Activities (Prevention) Act (UAPA) adopted the POTA definition in its entirety.<sup>94</sup>

b. The UAPA definition of terrorism

This expansive Indian definition of terrorism was entrenched further in 2008 after the Mumbai terrorist attacks that left over 160 people dead and hundreds more wounded.<sup>95</sup> When combined with a lack of meaningful judicial scrutiny, the broad UAPA definition of terrorism exacerbated the potential for abuse in the government's decision as to whether to treat suspects as ordinary criminals or terrorists.<sup>96</sup> The difference in potential consequences between an ordinary criminal prosecution and that of a UAPA case is stark: for example, a UAPA prosecution against a prominent Communist Party leader accused of impersonation, cheating, forgery and criminal conspiracy for assuming a fake identity and forging documents was dismissed because of a failure to follow proper procedures to authorize prosecution. As a result, a court ordered the terrorism-related charges against the defendant dropped; instead of facing a potential life imprisonment under the sentencing framework of the UAPA, the defendant faced a maximum of seven years' imprisonment for the same acts under the Indian Penal Code.<sup>97</sup>

Nonetheless, the UAPA was amended in 2012 such that the definition of terrorism is now even broader. First, the predicate definition of "security" includes "economic security," which in turn includes "financial, monetary and fiscal stability, security of means of production and distribution, food security, livelihood security, energy security, ecological and environmental security."<sup>98</sup> Second, the "person" who can be viewed under the UAPA as engaging in terrorist activity not only includes natural persons, but also can be "a company; a firm; an organization or an association of persons or a body of individuals, whether incorporated or not; every artificial juridical person...; and any agency, office or branch owned or controlled by any person falling within any of the preceding sub-clauses."<sup>99</sup> Third, the "production or smuggling or circulation"

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<sup>94</sup> See Unlawful Activities (Prevention) Amendment Ordinance, 2004, No. 2, § 15, Acts of Parliament, 2004 (India).

<sup>95</sup> See Somini Sengupta & Keith Bradsher, *India Faces a Reckoning as Terror Toll Eclipses 170*, N.Y. Times, Nov. 30, 2008, at A1 (questioning whether Indian authorities could have better anticipated the terrorist attack and ensured heightened security). Shortly after this attack and with little parliamentary debate, the government passed two pieces of counterterrorism legislation: further amendments to the UAPA, and the National Investigation Agency Act. See Human Rights Watch, *Back to the Future: India's 2008 Counterterrorism Laws* 1 (2010). Both statutes increased the amount of power conferred on the central government for investigating and prosecuting terrorist acts, with the latter act also establishing the National Investigation Agency.

<sup>96</sup> See Repeating the Mistakes of the Past, Human Rights Documentation Center (Jan. 22, 2009), <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm> (noting that the UAPA definition institutionalizes the worst overreaching and missteps from TADA and POTA because it relates not only to counterterrorism policy, but to other "disruptive" activities).

<sup>97</sup> See Jiby Katakayyam, *Cops Goofed Up, Ghandy Cleared*, thehindu.com, Mar. 30, 2012, available at <http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/cops-goofed-up-ghandy-cleared/article3260527.ece>.

<sup>98</sup> The Unlawful Activities (Prevention) Amendment Act, 2012 (No. 3 of 2013), §2(i).

<sup>99</sup> *Id.* at §2(ii).

of “high quality” counterfeit Indian currency is defined as a terrorist act.<sup>100</sup>

This repeated expansion of the definition of “terrorism” is particularly noteworthy given the history and political platform of the BJP, the current ruling party in the Indian government, and the prime minister, Narendra Modi. In 2014, the BJP gained control of the Lok Sabha, the lower chamber of the Indian parliament, based in part on voter perceptions that terrorism remains a major problem for India,<sup>101</sup> and that the BJP was better suited to combat terrorism than the Congress Party-led government that passed the UAPA amendments in 2008 and 2012.<sup>102</sup> Modi’s possible role in the 2002 riots in Gujarat and his alienation of Muslims were campaign issues that ultimately did not gain much traction.<sup>103</sup> In fact, the current BJP platform on national security calls for increasing the counterterrorism powers that it claims were “dismantled” under the previous government.<sup>104</sup>

Although it’s not yet apparent if or how the BJP plans to increase the government’s counterterrorism powers, Modi and the BJP now have the possibility of expanding the reach of counterterrorism powers that are already quite broad given the UAPA’s sweeping definition of terrorism. Unlike the international working definitions discussed in Part 1 and the most commonly used U.S. federal definitions discussed in Part 2, the UAPA definition is not tethered to the commonly understood elements of terrorism, such as political violence meant to intimidate a group of civilians, and often involving serious injury or killing, hostage-taking or large-scale destruction. Not only does the UAPA definition allow for investigation and prosecution of acts like gang-related violence and animal rights-related violence—the two unconventional U.S. contexts examined in Part 2—as terrorist acts, but it would also allow for many other acts already criminalized under the Indian Penal Code to be legally treated as “terrorism.” These factors not only allow for unconventional applications of the “terrorism” label in India, they virtually encourage it, as well as the concomitant abuse of power that has historically plagued such applications.

## Conclusion

The international community has emphasized the need to label terrorism accurately for a number of reasons: to emphasize the gravitas of the security threat posed by a group, to ensure accurate

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<sup>100</sup> *Id.* at §4(ii). These acts have long been criminalized under British colonial and Indian law. See Indian Penal Code (1860), §§ 465, 468, 489D.

<sup>101</sup> A 2013-2014 Pew Research Survey found that 88% of Indians surveyed believed that terrorism is a “very big problem,” with another 17% describing it as a “moderately big problem.” See Pew Research Center, *Indians Reflect on Their Country and the World*, at 29 (March 31, 2014).

<sup>102</sup> *Id.* at 12 (56% of respondents favored the BJP to combat terrorism, whereas only 20% favored the rival Congress party).

<sup>103</sup> *Id.* at 13 (78% of respondents had a favorable view of Modi).

<sup>104</sup> See Bharatiya Janata Party, Election Manifesto 2014, at 38, available at [http://www.bjp.org/images/pdf\\_2014/full\\_manifesto\\_english\\_07.04.2014.pdf](http://www.bjp.org/images/pdf_2014/full_manifesto_english_07.04.2014.pdf).

allocation of resources to combatting those groups, to protect against the improper stigmatization of those inappropriately labeled as “terrorists,” and to combat the propensity of governments to abuse counterterrorism powers to the detriment of groups and individuals without political clout.<sup>105</sup> Broadening the label of “terrorism” to include additional societal and criminal issues to which fewer resources and less public attention are often given is tempting. After all, such labeling would arguably mean that politicians and the public would allocate more resources toward counterterrorism, that law enforcement could marshal additional powers to investigate and prosecute these crimes, and that undesirable criminal behavior is further stigmatized.

However, it is precisely for those reasons that we should be cautious about unconventional applications of the label of terrorism. The use (or misuse) of a terrorism statute for a gang-related prosecution, the labeling of vandalism by animal rights activists as terrorism, or the prolonged terrorism-related detentions of one religious group for violent acts that are ultimately deemed to be non-terrorist acts are exemplars of the potential problems that may occur as the definition of terrorism is stretched toward new contexts. Further, to label gang violence, vandalism, arson, assault, murder, sex trafficking and other violent acts that are already criminalized as terrorism is not only a misnomer and a substantive due process violation, but it also dilutes efforts to combat actual terrorism.<sup>106</sup> As the appellate court in *Morales* opined, “the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act.”<sup>107</sup>

To the extent that advocates seek to increase the penalties or stigma associated with these criminal activities or to convince politicians and policy-makers to prioritize those issues, they should address those deficits directly, not by bootstrapping other issues onto vague, overly broad and amorphous definitions of terrorism that have already been misused to the detriment of politically less powerful groups and the rule of law more generally.

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<sup>105</sup> United Nations Commission on Human Rights, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, E/CN.4/2006/98, December 28, 2005, at ¶42 (“It is essential to ensure that the term “terrorism” is confined in its use to conduct that is of a genuinely terrorist nature”).

<sup>106</sup> See Odette J. Wilkens, *The Animal Enterprise Act: An Unjust Law and the Case for Repeal*, 54 S. Tex. L. Rev. 535, 557-58 (Spring 2013) (arguing that the overbreadth of the AETA runs afoul of the “true threats” doctrine that distinguishes particularized crime (non-terrorism) from crimes with public impact (terrorism)).

<sup>107</sup> *People v. Morales*, 20 N.Y. 3d at 249.