

RESETTING SCALES: AN EXAMINATION OF DUE PROCESS RIGHTS IN MATERIAL SUPPORT PROSECUTIONS

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One of the tools the Department of Justice has used in the War on Terror is 18 U.S.C. § 2339B, which makes it a crime to donate material support knowingly to Foreign Terrorist Organizations. The statute has raised several constitutional questions, including whether it violates the Due Process Clause's principle of "personal guilt"—a principle the Supreme Court announced nearly fifty years ago in Scales v. United States—because it does not require the government to prove a defendant's specific intent. Thus far, there has been little analysis of this due process question; this Note aims to help fill that gap. First, this Note argues that although issues of personal guilt are similar to those found in First Amendment expressive association cases, the due process test is an independent analysis. Yet, cleaving the due process and First Amendment questions leaves a problem: how to give content to the Scales principle of personal guilt. Second, this Note argues that courts should look to extant substantive criminal law—in particular, the doctrines of conspiracy and complicity—for analogies that shed light on just how Scales bears on § 2339B.

INTRODUCTION

Since 1996 it has been illegal under federal law to give money, food, clothes, training, and other services to groups the State Department has designated as Foreign Terrorist Organizations (FTOs). This set of restrictions, found in 18 U.S.C. § 2339B and referred to as a “material support” statute,¹ has become a fixture of terrorism prosecutions since September 11, 2001² and has been

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¹ See, e.g., STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 824–25 (4th ed. 2007) (discussing “material support crimes”); David Cole, *Anti-Terrorism on Trial; Why the Government Loses Funding Cases*, WASH. POST, Oct. 24, 2007, at A19 (defining “[m]aterial support” laws as those that “make it a crime to give anything of value, including humanitarian aid or one’s own volunteer services, to an organization the government has labeled a ‘terrorist’ group”).

² See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 20 (2005) (“Prosecutors have made extensive use of the terrorism-support laws since 9/11.”); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9 (2003) (“Virtually every criminal ‘terrorism’ case that the government has filed since

deemed “critical . . . [to] law enforcement[’s] approach” to combating terrorism domestically.³ Section 2339B employs criminal law to eliminate fundraising sources for organizations engaged in terrorist activity, thus depriving these organizations of access to the means necessary to achieve destructive ends.⁴

Despite its laudable purpose, § 2339B poses significant constitutional questions, which criminal defendants⁵ have raised repeatedly. Challenges to the statute’s validity are generally framed according to two narratives. First, FTOs serving both legitimate and illegitimate functions— Hamas is perhaps the most resonant example today⁶— may not receive any material support from individuals without donors risking prosecution.⁷ For example, a direct contributor of money,

September 11th has included a charge that the defendant provided material support to a terrorist organization.”); Eric Lichtblau, *1996 Statute Becomes the Justice Department’s Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15 (“In several dozen cases both high profile and little noticed, [§ 2339B] has become the Justice Department’s main weapon in pursuing people it contends are linked to terrorists.”); *Torturing Alberto: The Domestic War on Terror*, ECONOMIST, Jan. 22, 2005, at 48 (reporting that as of January 2005, 113 of Department of Justice’s terrorism cases and fifty-seven of its convictions or guilty pleas were prosecuted under § 2339B); cf. CTR. ON LAW AND SEC., TERRORIST TRIAL REPORT CARD: UPDATE JANUARY 1, 2008, at 1, available at <http://www.lawandsecurity.org/publications/TTRCUupdateJan084.pdf> (reporting that between September 11, 2001 and December 31, 2007, there have been 202 people charged with, and 80 people convicted of, “terrorism charges,” including § 2339B and three other terrorism statutes). *But see* Adam Liptak & Leslie Eaton, *Financing Mistrial Adds to U.S. Missteps in Terror Prosecutions*, N.Y. TIMES, Oct. 24, 2007, at A16 (describing recent failures of government to secure convictions in material support prosecutions).

³ *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Comm. on the Judiciary*, 109th Cong. 45 (2005) (statement of Daniel Meron, Principal Deputy Assistant Att’y Gen., Civil Division, and Barry Sabin, Chief, Counterterrorism Section, Criminal Division).

⁴ See H.R. REP. NO. 104-383, at 42–43 (1995) (describing material support statute as part of effort to “provide the necessary tools to law enforcement to successfully deter terrorism, or when it takes place, to prosecute and punish such crimes”); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 436 (2007) (describing § 2339B as “designed to achieve prevention indirectly by reducing the flow of resources to FTOs” and as serving “the goal of prevention more directly because [it] provide[s] a readily available charge in circumstances involving potentially dangerous persons whom the government wishes to incapacitate”).

⁵ The same can be said for would-be Foreign Terrorist Organization (FTO) donors seeking civil injunctions.

⁶ See Press Release, U.S. Dep’t of State, U.S. Designates Foreign Terrorist Organizations (Apr. 30, 2007), available at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=April&x=20070425112939idybeekcm0.9128382> (listing Hamas as FTO).

⁷ See, e.g., *Humanitarian Law Project v. U.S. Dep’t of Justice (Humanitarian II)*, 352 F.3d 382, 385 (9th Cir. 2003) (describing litigation by organizations seeking to donate to “non-violent humanitarian and political activities of Kurdish and Tamil organizations” designated as FTOs), *aff’d in part and vacated in part*, 393 F.3d 902 (9th Cir. 2004) (en banc).

goods, or services to an FTO with the sole purpose of supporting the organization's political or charitable efforts could be prosecuted and convicted for her donations, even if she specifically earmarked them for peaceful uses. This illustrates the potential clash between the statute and the First Amendment because it threatens associational activity.

Alternatively, a person who in the course of her employment provides a meal, car ride, or some indirect form of support to a known member of an FTO can still be prosecuted for giving material support under the statute.⁸ This latter narrative is perhaps more troubling because unlike a defendant who intends to further some of the FTO's goals, this provider of material support has no interest in advancing any of the organization's efforts. Nonetheless, she would be just as liable under § 2339B's expansive language. Here, the statute potentially clashes with the Fifth Amendment's Due Process Clause because it threatens the punishment of blameless individuals.

These two constitutional challenges stem from a common concern that § 2339B engenders "guilt by association"—the punishment of an individual for the company she keeps.⁹ But lower court decisions considering the validity of § 2339B have not made clear the exact contours of guilt by association or how it is rendered null by the First and Fifth Amendments. Much of this ambiguity arises from the Supreme Court's decision in *Scales v. United States*, which has been the primary legal basis for constitutional challenges to the material support statute.¹⁰ *Scales* held that the First and Fifth Amendments forbid criminalizing membership in a group without proof that a defendant was an active member with the specific intent of furthering the group's unlawful activities.¹¹ Yet questions about *Scales* linger. How either the First or Fifth Amendment applies to § 2339B, and whether the two protect the same conduct in the same way, remain unresolved.

This Note seeks to clarify this discussion by examining the Fifth Amendment due process rights at stake in material support prosecutions and how they differ from the interests guarded by the First Amendment. This Note argues that under *Scales*, defendants' Fifth Amendment due process rights in material support prosecutions must be considered separately from their First Amendment rights of associ-

⁸ See *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1337 (M.D. Fla. 2004) (describing hypothetical taxi driver subject to prosecution for providing service to FTO member even without intent of furthering FTO's illegal objectives), *modification denied*, 329 F. Supp. 2d 1294 (M.D. Fla. 2004).

⁹ See Cole, *supra* note 2, at 8–15 (describing guilt by association critique of § 2339B).

¹⁰ 367 U.S. 203 (1961).

¹¹ *Id.* at 224–30.

ation. *Scales*, however, provides little guidance on how its due process test should be administered. This Note therefore sketches a solution by proposing that courts analogize to substantive criminal law when analyzing a due process challenge to § 2339B. Specifically, it suggests that courts should consider extant conspiracy and complicity doctrines. These two sets of criminal law, both historically well founded and constitutional under *Scales*, share similar aims with the material support statute and provide a useful model for assessing whether the application of § 2339B yields results that are acceptable under *Scales*'s due process test.

Part I of this Note discusses *Scales* and the due process principle of "personal guilt" it established. Next, Part II describes the text and history of § 2339B and sets forth how litigants have used *Scales* to object to the validity of material support prosecutions. This Part pays special attention to the split among courts as to how *Scales*'s due process test should be applied. Part III assesses the merits on each side of this split and concludes that, under *Scales*, the First and Fifth Amendment need not be coextensive and could protect different conduct. The courts, however, have yet to announce a sound means for determining the scope of *Scales*'s Fifth Amendment test. Finally, Part IV recommends that courts look to extant criminal law targeting associational conduct to determine whether the mental state required under § 2339B is sufficient to comply with due process requirements.

I

SCALES, PERSONAL GUILT, AND THE DUE PROCESS CLAUSE

It is axiomatic in American criminal law that punishment is reserved for those who are individually culpable.¹² As the Supreme Court has said, "[i]n our jurisprudence guilt is personal."¹³ Retribution is appropriate only for those individuals who, in addition to engaging in an actus reus, or the criminal conduct, are also personally culpable for their acts.¹⁴ This element of personal culpability is gener-

¹² See 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 6.1(f), at 433 (2d ed. 2003) ("It is a general principle of criminal law that one is not criminally liable for how someone else acts, unless of course he directs or encourages or aids the other so to act.").

¹³ *Scales*, 367 U.S. at 224.

¹⁴ See *Morissette v. United States*, 342 U.S. 246, 251–52 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil."); 1 LAFAYE, *supra* note 12, § 5.1(a), at 332–33 ("[I]n more recent times (i.e., since about 1600), the judges have generally defined common law crimes in terms which require, in addition to prescribed action or omission, some prescribed bad state of mind . . .").

ally measured by an individual's mental state and is what the criminal law recognizes as *scienter* or *mens rea*.¹⁵

This personal guilt requirement is perhaps most important in the context of laws like § 2339B that threaten punishment of an individual for her proximity to, or participation with, others personally engaged in the commission of a crime. Consider, for instance, the doctrine of complicity or accomplice liability, which holds that an individual can be punished for a crime committed by a second actor but facilitated somehow by the individual.¹⁶ Under the Model Penal Code, accomplice liability avoids the possibility of guilt by association by requiring proof that the accomplice was sufficiently conscious of the unlawful conduct she aided and abetted.¹⁷ The second subset of associational crimes is conspiracy, the proscription of agreeing with others to plan and ultimately commit a crime.¹⁸ In conspiracy prosecutions, the charged offense is wholly independent of the crime that the parties agree to commit.¹⁹ As with complicity, conspiracy requires proof of a

¹⁵ See *id.* at 333 (discussing *scienter* and *mens rea* in criminal law and noting that “[t]he basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus non facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty)”).

¹⁶ See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 337 (1985) (defining complicity as “derivative, which is to say, it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed”).

¹⁷ See MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) (defining “accomplice” as person acting “with the purpose of promoting or facilitating the commission of the offense” who “aids or agrees or attempts to aid [another] person in planning or committing it”). The federal accomplice liability statute, 18 U.S.C. § 2 (2000), does not include a *mens rea* requirement. Courts interpreting it, however, have generally concluded that a defendant is guilty of aiding and abetting only when she shares the principal's purpose in committing the crime. See, e.g., *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (describing historical lineage of accessory crimes as “hav[ing] nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct” and stating that guilt as accessory requires that defendant “participate in [the crime] as in something that he wishes to bring about, that he seek[s] by his action to make it succeed”). *But see United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985) (holding that defendant who supplied murder weapon could be convicted as accomplice based on knowledge of purpose for which deadly weapon would be used).

¹⁸ See *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (“The Court has repeatedly said that the essence of a conspiracy is ‘an agreement to commit an unlawful act.’” (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975))); MODEL PENAL CODE § 5.03(1) (1962) (defining “conspiracy” as agreeing to engage in or plan crime).

¹⁹ See *United States v. Rabinowich*, 238 U.S. 78, 85 (1915) (“It is apparent . . . and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.”). The planned crime may therefore be incomplete. See *Salinas v. United States*, 522 U.S. 52, 65 (1997) (“It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.”). In the case in which the crime is actually committed, the act of conspiracy

heightened mens rea. For a defendant to be found guilty and punished for this act of association, she must have intended to further the agreement's planned offense.²⁰

The Supreme Court has not explicitly stated that a personal culpability requirement is necessary for the aforementioned crimes to pass constitutional muster. On the contrary, the inclusion of a mens rea element in these offenses is a continuation of common-law tradition—the result of history rather than of a definitive constitutional rule.²¹ Because of this tradition, the Court routinely presumes as a matter of statutory construction that Congress intends to include a mens rea element in its criminal statutes.²² The Court has also held that proof of personal culpability may be necessary for some criminal laws to survive constitutional scrutiny. When confronted with ambiguous criminal statutes, for example, the Court may interpret them to include a mens rea element in order to avoid difficult constitutional questions.²³

In order to avoid conflicts with the Due Process Clause,²⁴ the Supreme Court in *Scales* interpreted the criminal statute at issue to include a mens rea element.²⁵ The statute was the Smith Act, a fed-

constitutes an independent offense deserving of a separate punishment. *See Sneed v. United States*, 298 F. 911, 913 (5th Cir. 1924) (“If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.”).

²⁰ *See United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995) (“There can be no doubt, therefore, that conspiracy is a specific intent crime.”); MODEL PENAL CODE § 5.03(1) (1962) (defining conspiracy to require agreement to engage in, or to plan, commission of crime); 2 LAFAYETTE, *supra* note 12, § 12.2(c)(1), at 275 (describing conspiracy as containing two forms of intent—intent to agree and intent to achieve conspiracy’s objective).

²¹ *See Morissette v. United States*, 342 U.S. 246, 251–52 (1952) (describing common-law tradition of requiring mens rea elements in definitions of crimes).

²² *See Staples v. United States*, 511 U.S. 600, 606 (1994) (“Relying on the strength of the traditional rule [of including mens rea in a criminal statute], we have stated that offenses that require no mens rea generally are disfavored and have suggested that some indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime.” (citation omitted)).

²³ *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (interpreting child pornography statute to include scienter requirement for both of law’s elements in order to avoid constitutional problem). The constitutional avoidance canon holds that when a court faces a statute yielding two possible interpretations, the first of which poses no constitutional questions and the second of which poses difficult constitutional questions, the court should choose the former. *See INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.” (citation and internal quotation marks omitted)).

²⁴ U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

²⁵ 367 U.S. 203, 224–28 (1961).

eral law that proscribed membership in the Communist Party.²⁶ The Court analyzed two distinct challenges to the statute: (1) whether the statute infringed Party members' First Amendment rights of association,²⁷ and (2) whether the statute violated the Due Process Clause by punishing inculpable individuals.²⁸

In assessing the law's validity under the latter charge, the Court reached two holdings. First, it interpreted the statute to include a mens rea element of specific intent.²⁹ Under this construction of the Smith Act, the Government had to prove that the defendant joined the Party with the purpose of furthering its illicit ends—in this case, the overthrow of the United States government.³⁰

The Court's second holding was more expansive. After *Scales*, membership statutes must be structured to assure that the charged defendant is personally guilty for the illegal ends to which she contributed as a member of the prohibited group.³¹ As the Court described:

[W]hen the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.³²

The *Scales* Court was concerned that a statute like the Smith Act, if interpreted too broadly, would permit individuals to be convicted for "what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action."³³ Stated differently, the Court's fear was that the Smith Act could be interpreted to punish inculpable individuals who made the mistake of naively associating with others engaged in illegal activity.

To ensure that the government was not punishing inculpable individuals, the Court created a test for determining whether a defendant's relationship to the illegal organization is sufficiently close to

²⁶ *Id.* at 205; see also Alien Registration (Smith) Act, 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. §§ 2385, 2387 (2000 & Supp. V 2005)).

²⁷ *Scales*, 367 U.S. at 228–30.

²⁸ *Id.* at 224–28.

²⁹ *Id.* at 222.

³⁰ *Id.* at 220.

³¹ See Chesney, *supra* note 2, at 69 (describing *Scales*'s due process test and noting that, in application to material support statute, "courts must ask whether that relationship is sufficiently strong if based just on the donor's knowledge of the identity of the recipient and its unlawful activities, or if instead the relationship must also be supported by proof of the donor's intent to further the unlawful ends of the organization").

³² *Scales*, 367 U.S. at 224–25.

³³ *Id.* at 228.

warrant punishment for furthering the organization's illegal activity. This test examines the "quantum of [the defendant's] participation in the organization's alleged criminal activity."³⁴ The "quantum" is a measurement of two factors: the actus reus and the corresponding mens rea of the offense.³⁵ In *Scales*, proof that the defendant was an active member of the organization and that she maintained her membership with the specific intent of furthering the group's illegal goals satisfied this test.³⁶ The Court sanctioned this membership-plus-specific-intent form of liability because of its similarity to conspiracy law, which the Court explicitly described as "familiar" and implicitly recognized as constitutional.³⁷

Scales is a significant case for several reasons. First, it establishes a baseline rule that the government may not criminalize group membership unless that membership is accompanied by specific intent to aid the group's criminal purposes. In other words, the decision stands for the proposition that the Constitution forbids guilt by association.³⁸ Second, *Scales* recognizes a constitutional principle, rooted in the Fifth Amendment, that the government may punish an individual only when she is personally culpable of an alleged crime.

Despite the clarity of these two points, *Scales* also poses a set of as yet unresolved questions. First, it leaves unanswered the relationship between the Fifth Amendment's prohibition of guilt by association and the First Amendment's protection of the freedom to associate.³⁹ Like the Fifth Amendment, the First Amendment also prohibits the state from using criminal law to deter certain associations.⁴⁰ Under the First Amendment, a membership statute like the one contested in *Scales* would be invalid if it proscribed membership

³⁴ *Id.* at 227.

³⁵ *Id.* at 227–28.

³⁶ *Id.* at 228.

³⁷ *Id.* at 225; *see also id.* at 226 n.18 (“[T]here is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy . . .”).

³⁸ *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982) (discussing constitutional problem of “impos[ing] liability on an individual solely because of his association with another” (citing *Scales*, 367 U.S. at 229)).

³⁹ *See* U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by . . . [the] freedom of speech.”).

⁴⁰ *See Claiborne Hardware*, 458 U.S. at 918–19 (describing First Amendment's aversion to guilt by association); *Healy v. James*, 408 U.S. 169, 185–86 (1972) (“[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization.”); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (“A law which applies to membership without the ‘specific intent’ to further the illegal aims of the organization infringes unne-

in organizations engaged in constitutionally protected expression.⁴¹ The *Scales* Court upheld the Smith Act, however, because the statute, when construed to apply only to active members intending to promote the Communist Party's illegal activity, was narrowly tailored to prohibit only illegal and unprotected advocacy.⁴² A specific-intent element was sufficient to establish the Act's validity under both the First and Fifth Amendments.⁴³ This symmetrical result may not hold true for all criminal statutes, however. Indeed, as this Note will demonstrate, it may not hold true for material support prosecutions.⁴⁴

A second unresolved issue is the scope of *Scales* with respect to the Fifth Amendment. It remains unclear whether the Due Process Clause's requirement of a specific-intent scienter is limited to statutes criminalizing membership in a group, or whether it could reach other statutes in which liability hinges on an individual's activity with—if not membership in—a group engaged in illegal conduct.⁴⁵ In short, it remains unclear how far *Scales* extends.

Most recently, the lower courts have grappled with these questions when weighing the constitutionality of prosecutions under 18 U.S.C. § 2339B, the material support statute. The following Part describes the structure and operation of § 2339B and how the courts have decided the First and Fifth Amendment questions that the statute presents. In particular, it focuses on aspects of § 2339B that distinguish it from the Smith Act and explains how these differences have led lower courts to reach conclusions arguably at odds with *Scales*.

essarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here. Such a law cannot stand." (citations omitted)).

⁴¹ See *Scales*, 367 U.S. at 229 ("If there were a . . . blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired . . .").

⁴² See *id.* ("The [membership] clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961) (alteration in original))).

⁴³ See *id.* at 224–30 (finding that active membership with "guilty knowledge and intent" satisfies concept of personal guilt under Fifth Amendment Due Process clause and is not protected by First Amendment).

⁴⁴ See *infra* Part II.A (arguing that *Scales*'s due process and First Amendment tests are not necessarily coextensive).

⁴⁵ See *infra* Part III.B (discussing reach of *Scales*'s due process test).

II THE STRUCTURE OF § 2339B AND ITS CONSTITUTIONAL CHALLENGES

There are two primary material support statutes, codified at 18 U.S.C. §§ 2339A and 2339B, each of which prohibits discrete offenses and has distinct burdens of proof.⁴⁶ This Part discusses these statutes and the distinct criminal liability that each creates. It focuses particularly on the features of § 2339B that give rise to the statute's distinct constitutional quandaries. It then discusses the constitutional challenges to § 2339B and how courts have generally resolved them.

A. The Text and Structure of § 2339B

Congress passed the first material support statute, 18 U.S.C. § 2339A, in 1994.⁴⁷ Section 2339A makes it illegal to provide “material support or resources” or to conceal the “location, source, or ownership” of material support for the preparation or commission of acts of terrorism.⁴⁸ Under the statute, “material support or resources” is defined as:

[A]ny 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 materials⁴⁹

The statute criminalizes the provision of material support to would-be terrorists only if the defendant “know[s] or intend[s]” that the provision or concealment of material support will be put toward terrorist ends.⁵⁰

⁴⁶ There is also a third material support statute, 18 U.S.C. § 2339C (Supp. V 2005). See *infra* note 50 for a brief discussion of this law and how it relates to the other material support statutes.

⁴⁷ See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005(a), 108 Stat. 1796, 2022–23 (codified as amended at 18 U.S.C. § 2339A (Supp. V 2005)).

⁴⁸ § 120005(a), 108 Stat. at 2022. The statute also criminalizes the act of helping a terrorist escape from law enforcement. *Id.* Congress later amended the statute to prohibit “attempt[ing] or conspir[ing]” to commit these acts. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 811(f), 115 Stat. 272, 381.

⁴⁹ 18 U.S.C. § 2339A(b)(1).

⁵⁰ *Id.* § 2339A(a). As a supplement to § 2339A, Congress passed 18 U.S.C. § 2339C after the attacks of September 11, 2001. See Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, § 202(a), 116 Stat. 724, 724–27 (codified as amended at 18 U.S.C. § 2339C (Supp. V 2005)). This statute prohibits

Two years later, in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA),⁵¹ which included two provisions, 8 U.S.C. § 1189 and 18 U.S.C. § 2339B, that work in tandem to further the prohibition on material support to terrorists.⁵² These provisions limit the ability of FTOs, groups “so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,” to receive material support from U.S. donors.⁵³ First, under § 1189, the AEDPA establishes a process by which the Secretary of State designates organizations as FTOs.⁵⁴ To do so, the Secretary must make three findings: (1) that the group is a “foreign organization”; (2) that it engages in “terrorist activity . . . or terrorism” or has the intent and capacity to engage in such actions; and (3) that it threatens national security or the security of U.S. nationals.⁵⁵ Upon designation as an FTO, an organization is subject to several restrictions, including the freezing of its domestic assets⁵⁶ and the barring of its representatives from entering the United States.⁵⁷

For the purposes of this Note, the most pertinent restriction is § 2339B, which makes it a crime to “knowingly provide,” “attempt,”

the raising and collecting of funds ultimately to be used, whether directly or indirectly, for the commission of terrorism. 18 U.S.C. § 2339C(a)(1). It also prohibits the knowing concealment of “the nature, location, source, ownership, or control of any material support or resources” when the defendant knows or intends that the material support will be put toward terrorist ends. *Id.* § 2339C(c)(2). Ostensibly, § 2339C fills a gap left by § 2339A. The statute prevents fundraisers from insulating themselves from criminal liability by distributing their money to terrorists through middlemen, front organizations, or other indirect means. Section 2339C accomplishes this goal by criminalizing the raising of funds for the purpose of facilitating terrorism, rather than criminalizing the act of distribution itself. In keeping with § 2339A, § 2339C requires the government to prove that the fundraiser “willfully” collected money for the purpose of committing harmful terrorist acts. *Id.* § 2339C(a)(1).

There is also a fourth material support statute, 18 U.S.C. § 2339D(a) (Supp. V 2005), that makes it a crime to receive “military-type training” from an FTO.

⁵¹ Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

⁵² See Chesney, *supra* note 2, at 13–18 & 18 n.112 (describing legislative history of § 2339B as “[c]losing the [l]oophole” left by § 2339A by broadening mens rea requirement to prohibit aid irrespective of provider’s knowledge or intent as to how recipient will use it and narrowing prohibition to donations of support given to FTOs, which are defined under 8 U.S.C. § 1189 as codified in AEDPA).

⁵³ § 301(a)(7), 110 Stat. at 1247.

⁵⁴ *Id.* at 1248–50 (codified as amended at 8 U.S.C. § 1189 (2000 & Supp. V 2005)).

⁵⁵ 8 U.S.C. § 1189(a)(1)(A)–(C). For a fuller description of the AEDPA’s FTO designation process, see *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 196–97 (D.C. Cir. 2001) and Chesney, *supra* note 2, at 48–49.

⁵⁶ 8 U.S.C. § 1189(a)(2)(C).

⁵⁷ *Id.* § 1182(a)(3)(B)(i)(IV) (Supp. V 2005).

or “conspire” to “provide[] material support or resources to a foreign terrorist organization.”⁵⁸

Congress drafted § 2339B to prohibit the giving of material support as the term is defined in § 2339A.⁵⁹ Violations of either law subject offenders to punishments of up to fifteen years in prison.⁶⁰ Furthermore, if the government can prove that the defendant’s material support resulted in the death of another person, the maximum punishment is life imprisonment.⁶¹

Section 2339B differs from § 2339A in two key respects, however. First, § 2339B is narrower: Whereas § 2339A restricts aid to perpetrators of terrorism in general, § 2339B prohibits only material support to FTOs.⁶²

The second distinction is the source of arguments that each section is unconstitutional. Unlike § 2339A, § 2339B does not require proof that the donor specifically intended that her material support would further the recipient FTO’s terrorist activities. Section 2339B only requires the government to prove that the defendant knew (1) that she was giving material support and (2) that the recipient organization “is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.”⁶³ Under § 2339B, the gov-

⁵⁸ 18 U.S.C. § 2339B(a)(1) (Supp. V 2005).

⁵⁹ *Id.* § 2339B(g)(4); see also *supra* note 49 and accompanying text (setting forth definition of “material support” in § 2339A).

⁶⁰ 18 U.S.C. §§ 2339A(a), 2339B(a)(1) (Supp. V 2005).

⁶¹ *Id.*

⁶² *Id.* § 2339B(a)(1).

⁶³ *Id.* When it was first passed, § 2339B’s scienter requirement was relatively minimal; initially, all that was necessary to convict a defendant under the statute was proof that she “knowingly provide[d] material support or resources to a foreign terrorist organization.” Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (codified at 18 U.S.C. § 2339B (Supp. V 2005)). Under the strictest reading of this version of the law, a prosecutor only had to prove that the defendant knew that she gave material support; the defendant’s knowledge of the organization’s status as an FTO was unnecessary. See *Humanitarian Law Project v. Reno* (*Humanitarian I*), 205 F.3d 1130, 1138 n.5 (9th Cir. 2000) (“[T]he only scienter requirement here is that the accused violator have knowledge of the fact that he has provided something . . .”).

This initial version of § 2339B’s scienter requirement was attacked before the Ninth Circuit in *Humanitarian Law Project v. United States Department of Justice*, (*Humanitarian II*), 352 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004) (en banc). In that case, the court held that § 2339B required proof that the defendant knew she was giving material support and that she knew the recipient was an FTO or an organization engaged in terrorism. *Id.* at 402–03. The court said: “Read without a requirement that a defendant knew of the organization’s designation or knew of the unlawful activities that caused it to be so designated, the statute could be used to punish moral innocents.” *Id.* at 400. But the court did not go so far as to require prosecutors to prove that the donors had a specific intent to further the organization’s illegal activity. In response to the *Humanitarian II* opinion, Congress amended the statute to clarify § 2339B’s scienter requirement. See

ernment never has to prove that a defendant believed in the FTO's terrorist causes or intended that her donations would contribute to them. The result is that individuals who donate material support to FTOs but lack any unlawful intent may still be subject to criminal punishment.

B. *The Constitutional Challenges to § 2339B*

Section 2339B has elicited two “interwoven” constitutional questions⁶⁴ mirroring the same issues the *Scales* Court considered with respect to the Smith Act:⁶⁵ whether § 2339B imposes guilt by association under the First Amendment, the Fifth Amendment, or both.

I. *Associational Rights*

Defendants in material support prosecutions have argued that § 2339B permits the prosecution and punishment of individuals for their association with an FTO, in violation of the First Amendment. Challengers have made two types of arguments. First, they argue that the definition of material support reaches First Amendment activity such that the absence of a specific-intent requirement may permit prosecution of constitutionally protected conduct.⁶⁶ Second, they argue that giving material support is often a necessary condition for meaningful association and that it should therefore be constitutionally protected. As Professor David Cole, who has represented parties challenging the constitutionality of § 2339B,⁶⁷ explains: “Groups cannot exist without the material support of their members and associates. If the right of association meant only that one had the right to join organizations but not to support them, the right would be empty.”⁶⁸

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(c), 118 Stat. 3638, 3762–63 (codified at 18 U.S.C. § 2339B (Supp. V 2005)).

⁶⁴ *United States v. Hammoud*, 381 F.3d 316, 374 & n.7 (4th Cir. 2004) (Gregory, J., dissenting), *vacated and remanded on other grounds*, 543 U.S. 1097 (2005).

⁶⁵ *See supra* notes 25–43 and accompanying text (discussing constitutional challenges to Smith Act).

⁶⁶ *See Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026 (7th Cir. 2002) (rejecting claim that conduct determined to be material support is constitutionally protected association); *Humanitarian I*, 205 F.3d at 1133 (“Plaintiffs try hard to characterize the statute as imposing guilt by association . . . where people are punished by reason of association alone” (internal quotation marks omitted)).

⁶⁷ Cole, *supra* note 2, at n.*.

⁶⁸ *Id.* at 11; *see also* David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 233 (“[A]ssociation would be an empty formality without the conduct that brings people together—meeting, raising funds, engaging in volunteer work, and the like—and therefore to limit the right of association to the formal act of joining a group would eviscerate the right.”).

With near unanimity, courts have been skeptical of both claims. Although § 2339B's definition of material support is broad, it does not criminalize association per se. Instead, courts have emphasized that the statute creates a set of offenses distinct from being a member of, associating with, or advocating on behalf of an FTO.⁶⁹ The courts' approach echoes Congress's opinion that "[§ 2339B] does not attempt to restrict a person's right to join an organization" and that "[t]he prohibition is on the act of donation" exclusively.⁷⁰ These arguments rest on the premise that donating is substantively different from constitutionally-shielded association. From this distinction, Congress and the courts have concluded that giving material support does not deserve the same constitutional protection afforded to expressive associational relationships: "[T]here is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions."⁷¹

However, such distinctions between the provision of material support and association are questionable. There is no reason why, for example, paying membership dues (undoubtedly a form of material support) cannot also be understood as an expressive associational act. In fact, for many legitimate associations, dues are required for membership.⁷²

The courts have responded to this argument by stating that what determines an association's protection under the First Amendment is the expressiveness of associational activity rather than its mere existence.⁷³ For instance, the Ninth Circuit held that the First Amendment insulates only that association on par with "membership

⁶⁹ See, e.g., *Hammoud*, 381 F.3d at 329 ("[Section] 2339B does not prohibit mere association; it prohibits the *conduct* of providing material support to a designated FTO."); *Boim*, 291 F.3d at 1026 ("Conduct giving rise to liability under section 2339B, of course, does not implicate associational or speech rights."); *Humanitarian I*, 205 F.3d at 1133 ("The statute does not prohibit being a member of one of the designated groups What [§ 2339B] prohibits is the act of giving material support").

⁷⁰ H.R. REP. NO. 104-383, at 44 (1995).

⁷¹ *Humanitarian I*, 205 F.3d at 1133; see also H.R. REP. NO. 104-383, at 44 ("The First Amendment's protection of the right of association does not carry with it the 'right' to finance terrorist, criminal activities.").

⁷² Numerous legal advocacy organizations, for example, require members to pay dues as a condition of membership. See, e.g., ACLU, Join the ACLU, http://action.aclu.org/site/PageServer?pagename=FJ_donationhome (last visited Sept. 3, 2008); The Federalist Society, Membership, <https://www.fed-soc.org/membership/> (last visited Sept. 3, 2008).

⁷³ Cf. Cole, *supra* note 68, at 211 (describing First Amendment association jurisprudence as "categorical" and involving line drawing between forms of association so as to "delimit the range of protected association at the threshold").

in a group or . . . espousing its views.”⁷⁴ This kind of protected association includes activities that are themselves expressive, like marches⁷⁵ or parades,⁷⁶ or participation in groups that facilitate expression or have a lawful expressive element, like a political party⁷⁷ or even the Boy Scouts.⁷⁸ Conversely, unprotected association lacks these expressive features and is, at best, a mixture of speech and conduct.⁷⁹ Nonexpressive association includes political fundraising and giving campaign contributions.⁸⁰ Material support, the courts have held, falls into this latter, unprotected category because it is neither speech nor conduct necessary for enabling speech.⁸¹

In sum, courts have reached two conclusions on the question of expressive association and its relation to material support statutes. First, they have disallowed criminal liability based on membership or group expression⁸² but have tolerated criminal liability based on conduct that is less expressive in nature.⁸³ Second, courts have found that

⁷⁴ *Humanitarian I*, 205 F.3d at 1133; *see also* People’s Mojahedin Org. of Iran v. Dep’t of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (“It is conduct and not communication that the statute controls.”).

⁷⁵ *See, e.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (holding peaceful and orderly march to be constitutionally protected); *Vill. of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 23 (Ill. 1978) (holding march, as form of symbolic expression, to be constitutionally protected).

⁷⁶ *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569–70 (1995) (holding parade to be form of constitutionally protected expression).

⁷⁷ *See, e.g.*, *Cal. Dem. Party v. Jones*, 530 U.S. 567, 572–82 (2000) (holding that state blanket primary violated political parties’ First Amendment rights because forcing parties to include nonmembers would alter party’s eventual nominee and platform).

⁷⁸ *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that First Amendment forbids State from forcing Boy Scouts to include gay scoutmaster because it would interfere with organization’s expressive message).

⁷⁹ *See United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”).

⁸⁰ *See McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 137–42 (2003) (upholding federal regulation of soft money campaign contributions). The courts have compared § 2339B to campaign finance law and have analogized the government’s restrictions on material support to restrictions on contributions that voters may give to candidates. *E.g.*, *Humanitarian Law Project v. Reno (Humanitarian I)*, 205 F.3d 1130, 1134–35 & 1134 n.2 (9th Cir. 2000) (citing *Buckley v. Valeo*, 424 U.S. 1, 12–13, 21 (1976)). Professor David Cole has countered by saying that the courts have failed to implement *Buckley*’s strict scrutiny test when reviewing the constitutionality of § 2339B. Cole, *supra* note 2, at 11.

⁸¹ *See, e.g.*, *Humanitarian I*, 205 F.3d at 1134–35 (saying that § 2339B is subject to less scrutiny than pure restrictions on speech because it regulates expressive conduct).

⁸² *Scales v. United States*, 367 U.S. 203 (1961).

⁸³ *See supra* notes 79–80 and accompanying text (providing examples of nonexpressive conduct).

giving material support falls into this latter, less expressive category.⁸⁴ For the sake of argument, this Note will assume that this First Amendment analysis is settled and sound.⁸⁵ Cabining these First Amendment issues will help to spotlight the central issue of this Note—the due process rights at stake in material support prosecutions.

2. *Personal Guilt*

Because providing material support is separate from an FTO's actual commission of terrorism, challengers of § 2339B have invoked *Scales* to argue that the statute requires a specific-intent provision to satisfy the Due Process Clause's standard of personal guilt.⁸⁶ Courts faced with this issue have split along two lines. The vast majority have held that there is no *Scales* problem because the prohibited conduct consists of substantive acts distinct from membership or other activity protected by the First Amendment.⁸⁷ In other words, these courts have limited *Scales*'s requirement of specific intent to the precise facts of that case: a statute that criminalizes membership, understood narrowly as a form of expressive association. A statute like § 2339B,

⁸⁴ See *supra* note 81 and accompanying text (noting that material support is neither speech nor conduct necessary for enabling speech).

⁸⁵ The courts' current consensus is not unimpeachable, however. Questions remain about whether—and, if so, how precisely—the federal government should proscribe associational conduct, like payment of dues or volunteering of time, that a private organization might independently define as a requirement of membership. See Cole, *supra* note 2, at 10–11 (arguing in favor of richer definition of association that includes not only affiliation but also certain forms of material support); cf. Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 188–96, 225 (2003) (proposing “institutional theory” of private governance that would give private organizations preemptive power to make decisions within their social spheres). These questions, however, are beyond the scope of this Note.

⁸⁶ See, e.g., Humanitarian Law Project v. Mukasey (*Humanitarian IV*), 509 F.3d 1122, 1131–32 (9th Cir. 2007) (describing argument that *Scales* compels court to require proof of specific intent in material support prosecutions).

⁸⁷ See, e.g., United States v. Assi, 414 F. Supp. 2d 707, 721 (E.D. Mich. 2006) (“Such a heightened showing of mens rea was deemed necessary in *Scales* because the statutory provision at issue otherwise could have been read as prohibiting mere association with, or passive membership in, an organization that pursued illegal objectives. . . . [Section] 2339B is not such a statute. . . .”); United States v. Marzook, 383 F. Supp. 2d 1056, 1067 (N.D. Ill. 2005) (holding that “[i]n line with unanimous precedent on point,” *Scales* only protects First Amendment activity, which “is not the case” with § 2339B, and that statute’s absence of specific intent affronts no constitutional provision); Humanitarian Law Project v. Gonzalez (*Humanitarian III*), 380 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) (“[A] close reading of *Scales* reveals that at heart, it was concerned with criminalizing associational membership in violation of the First Amendment.”).

which is aimed at conduct related to association but lacking an expressive component, falls outside this limited conception.⁸⁸

Standing in opposition to this bloc of case law is a single district court case, *United States v. Al-Arian*.⁸⁹ There, the court held that § 2339B required a specific-intent element to pass constitutional muster under *Scales*.⁹⁰ The *Al-Arian* court was concerned that mere knowledge about the terrorist nature of an organization would subject innocent activity to criminal liability.⁹¹ The court postulated a hypothetical case of a cab driver giving a known FTO member a ride to the United Nations. Under § 2339B, the court reasoned, the government could prosecute the driver for providing a form of transportation to the FTO member even though she had no intent to further the FTO's agenda.⁹² According to the court, the statute's broad definition of material support led to a clearly unconstitutional result. This could only be cured by requiring the government to prove that the defendant gave an FTO material support, specifically intending that it be put toward illegal ends.⁹³

In response to the argument that *Scales* was inapplicable because § 2339B does not criminalize membership protected by the First Amendment, the court stated that "*Scales* is not so narrowly worded . . . to be limited to just membership statutes."⁹⁴ Instead, the *Al-Arian* court emphasized *Scales*'s description of "our jurisprudence" as one where "guilt is personal, [such that] imposition of punishment on a status *or on conduct* can only be justified by reference to the relationship of that status *or conduct* to other concededly criminal activity."⁹⁵ Thus, the very text of the *Scales* opinion seems to indicate that it reaches forms of association otherwise unprotected by the First Amendment.⁹⁶ The *Al-Arian* court found that the giving of any sup-

⁸⁸ See *supra* Part II.B.1 (explaining why courts have held that § 2339B poses no First Amendment problem).

⁸⁹ 308 F. Supp. 2d 1322 (M.D. Fla. 2004), *modification denied*, 329 F. Supp. 2d 1294 (2004). The court initially did not refer to the *Scales* decision, focusing instead on a different case in which the scienter requirements of a child pornography statute were challenged. *Al-Arian*, 308 F. Supp. 2d at 1335, 1337 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)). It was not until a subsequent opinion, in which the court denied the government's motion to modify the previous *Al-Arian* holding, that the Middle District held that *Scales* would compel it to reach the same decision to impose a specific-intent requirement for § 2339B prosecutions. *Al-Arian*, 329 F. Supp. 2d at 1299–1300.

⁹⁰ *Al-Arian*, 308 F. Supp. 2d at 1339.

⁹¹ *Id.* at 1337–38.

⁹² *Id.*

⁹³ *Id.* at 1338.

⁹⁴ *Al-Arian*, 329 F. Supp. 2d at 1299.

⁹⁵ *Id.* (quoting *Scales v. United States*, 367 U.S. 203, 224–25 (1961)).

⁹⁶ *Id.* at 1299–1300.

port was not sufficiently substantial to warrant punishment without proof of a donor's specific intent.⁹⁷

This disagreement between the lower courts is ultimately about the reach of *Scales*. The majority of courts have held that the *Scales* standard of personal guilt, which would require heightened scienter, governs only when a statute criminalizes membership or other association protected by the First Amendment.⁹⁸ So long as the statute does not target expressive association, there is no concern about punishing individuals who are not personally liable. Because § 2339B limits its reach to discrete acts distinguishable from expressive association, even if related to such association, it is arguably beyond *Scales*'s scope. Therefore, a specific-intent requirement would be unnecessary for § 2339B, given that the underlying activity is not within the First Amendment's ambit.

On the other hand, *Al-Arian* holds that *Scales* should be interpreted more broadly to reach other conduct—like paying dues or contributing service or time—that is associational but not necessarily expressive. *Al-Arian* thus views the question of a defendant's personal guilt as an inquiry independent of the First Amendment analysis. When framed this way, the statute still might not satisfy the *Scales* personal guilt test, even if the First Amendment-protected association is not the basis for criminal sanction. This is because expressive association is not the only kind of conduct for which a defendant can be punished without being personally culpable. Rather, there may be other criminalized conduct outside the First Amendment's bounds that fails the Fifth Amendment's personal guilt principle.

⁹⁷ *Id.* at 1300. The Court also argued that § 2339B warranted a requirement of specific intent under *Scales* in light of the severity of the statute's punishment. *Id.* In construing the Smith Act in *Scales*, the Court had stated that “[i]t is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act,” including a sentence of up to ten years. 367 U.S. at 222 & n.14. Section 2339B, which can carry a sentence of up to fifteen years—or a life sentence if the material support resulted in the death of any person—was, likewise, too severe not to require the government to prove *Al-Arian*'s specific intent. *Al-Arian*, 329 F. Supp. 2d at 1300; *see also supra* notes 60–61 and accompanying text (describing punishment for violating § 2339B).

⁹⁸ Most recently, the Ninth Circuit held that the current mens rea included in § 2339B does not offend *Scales*'s due process test, in agreement with the general sentiment of district courts that have considered this challenge. *Humanitarian Law Project v. Mukasey (Humanitarian IV)*, 509 F.3d 1122, 1131–33 (9th Cir. 2007). *See supra* note 87 (listing district court cases holding that no heightened mens rea is necessary for material support convictions).

III RECONSIDERING BOTH SIDES OF THE PERSONAL GUILT DEBATE

The debate over whether personal guilt should be regarded as an independent inquiry has yet to be resolved conclusively. Nevertheless, lower courts generally have not extended *Scales* to require a heightened mens rea in material support prosecutions. Yet, the underlying reasoning for this consensus is not entirely persuasive. The U.S. District Court for the Central District of California, for example, cited little authority when it declined to interpret *Scales* as mandating the presence of a specific-intent requirement. The court admitted that “[w]hile *Scales* discussed the concept of personal guilt in relation to ‘status or conduct,’” the decision, upon “a close reading,” went no further than membership statutes like the Smith Act.⁹⁹ Notwithstanding this conclusory assertion, other lower courts have followed the Central District of California’s logic and eventual conclusion.¹⁰⁰

Likewise, the opposing view in *Al-Arian* is underdeveloped. *Al-Arian* points to a single sentence in the *Scales* opinion in holding that *Scales* applies to more than membership statutes.¹⁰¹ According to the *Al-Arian* court, “[i]f *Scales* only applied to membership statutes, the Supreme Court would not have needed to use the phrases ‘or on conduct’ or ‘or conduct’ because ‘status’ would have been sufficient to cover membership statutes.”¹⁰² This may be a fair reading of *Scales*’s text. But the words “or on conduct” by themselves amount to a less-than-stable foundation for the *Al-Arian* decision. Thus, both sides in this debate have defended their positions rather cryptically, with the slimmest of support from the text of the *Scales* opinion.

A. *The Problems with Limiting Scales to First Amendment–Protected Conduct*

This section describes the weaknesses of court decisions that have limited *Scales* to its facts and challenges them on two grounds. First, the text and structure of *Scales* suggest that the First and Fifth Amendments might protect different activity. Second, the claim that the First and Fifth Amendments might protect separate activity under *Scales* is bolstered by the distinct interests that the two amendments safeguard.

⁹⁹ Humanitarian Law Project v. Gonzalez (*Humanitarian III*), 380 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005).

¹⁰⁰ See *supra* note 87 for cases that similarly rejected the argument that the statute requires heightened mens rea.

¹⁰¹ *Al-Arian*, 329 F. Supp. 2d at 1299–1300 (quoting *Scales*, 367 U.S. at 224–35).

¹⁰² *Id.* at 1300.

In *Scales*, the Supreme Court deliberately bifurcated its opinion, examining the Fifth and First Amendment claims separately.¹⁰³ In weighing the defendant's due process argument, the Court did not specifically mention the First Amendment, but rather considered the nature of membership with the Communist Party in terms of whether "[the] relationship is indeed too tenuous to permit its use as the basis of criminal liability."¹⁰⁴ The Court's concern, then, was whether the proscribed relationship defined in the Smith Act clearly indicated that the defendant was personally culpable for the organization's actions.¹⁰⁵ Nothing in the *Scales* opinion suggests that the due process discussion hinged on answering a preliminary question of whether the outlawed activity deserved heightened scrutiny under the First Amendment. Rather, from the very structure of the *Scales* opinion, the question of culpability under the Fifth Amendment is separate from the freedom of association issue in *Scales*'s subsequent First Amendment analysis.

Deliberately splitting *Scales* into two independent inquiries reflected the separate interests that the First and Fifth Amendments safeguard. Although the exact purposes of the First Amendment's guarantee of the right to associate are too manifold and debatable to summarize fully here,¹⁰⁶ a few key interests can be gleaned from the Court's opinions. To begin, the First Amendment's protection of association rests on the premise that association is a necessary predicate to the exercise of free expression.¹⁰⁷ Without the freedom to associate, any liberty to express one's ideas would be weak; the right to associate enhances the power of expression, enabling individual speakers to join together in concerted protest.¹⁰⁸ The right to associate is also necessary as a defense against government restriction. An organization of people expressing themselves en masse is more difficult to suppress than a single actor.¹⁰⁹

¹⁰³ See *Scales*, 367 U.S. at 225 ("[The Fifth Amendment] claim stands, and we shall examine it, independently of the claim made under the First Amendment.").

¹⁰⁴ *Id.* at 226.

¹⁰⁵ *Id.* at 228.

¹⁰⁶ See Cole, *supra* note 68, at 207–11 (describing theories of right to associate).

¹⁰⁷ See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

¹⁰⁸ See Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981) ("[B]y collective efforts individuals can make their views known, when, individually, their voices would be faint or lost.").

¹⁰⁹ See Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not

The Fifth Amendment's mandate that the government must prove a defendant's personal guilt, on the other hand, is divorced from the First Amendment's concern about the bond between association and free expression. The Fifth Amendment bars the government from depriving a person of "life, liberty, or property, without due process of law."¹¹⁰ This due process, the Court held, requires individual culpability to be proven as a preventative measure against punishment for a person's proximity to an organization engaged in criminal activity without a showing that she has a "sufficiently substantial" relationship to that group.¹¹¹ The Fifth Amendment thus bars the punishment of a moral innocent, but it has nothing to say about the punishment of a person for his or her speech.

Perhaps distinguishing the respective interests of the First and Fifth Amendments seems obvious, if not trite. Nevertheless, the distinction becomes confusing in *Scales* because both the First and Fifth Amendments are said to protect against what appears to be a common evil: what the Court has described as guilt by association.¹¹² Guilt by association is a tidy, but ultimately ambiguous, phrase explaining what *Scales* aims to prevent. As Professor Robert Chesney explains, guilt by association may mean either "criminalized association" (finding a defendant guilty for the act of associating with another) or "vicarious punishment" (finding a defendant guilty for acts committed by another).¹¹³

Both of these definitions diverge along *Scales*'s First and Fifth Amendment lines. In the case of criminalized association, *Scales* aimed to prevent the punishment of expressive association and the accompanying "real danger that legitimate political expression or association would be impaired."¹¹⁴ In keeping with the purpose of the First Amendment's protection of association—that association must be safeguarded as a necessary corollary of the freedom of speech—*Scales*'s First Amendment test is designed to ferret out those proscriptions that would inhibit protected expressive activity.¹¹⁵

be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”).

¹¹⁰ U.S. CONST. amend. V.

¹¹¹ *Scales v. United States*, 367 U.S. 203, 225 (1961).

¹¹² See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) (describing *Scales* and other cases as prohibiting guilt by association).

¹¹³ Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1434 (2003).

¹¹⁴ *Scales*, 367 U.S. at 229; see also *Claiborne Hardware Co.*, 458 U.S. at 918–19 (arguing that attaching civil liability to individuals for participating in economic boycott would deter legitimate expression and association).

¹¹⁵ See Chesney, *supra* note 113, at 1437 (explaining that *Scales* and subsequent decisions prevent laws from “sweep[ing] within [their] grasp too much innocent association”);

“Vicarious punishment,” by contrast, raises the Fifth Amendment due process problem that a defendant may be punished for acts either she did not commit or for which she is not culpable.¹¹⁶ In particular, vicarious punishment threatens condemning one individual for the criminal activity of another person or organization.¹¹⁷ In response to this threat, *Scales*’s due process test prohibits punishment of a defendant for “the relationship of [her] status or conduct to [another’s] concededly criminal activity” when that relationship is less than substantial.¹¹⁸ Whether that relationship is expressive, meaningful, or deserving of First Amendment protection for any other reason is irrelevant for Fifth Amendment purposes. Rather, the touchstone is simply the nature of the defendant’s conduct and her mental state, and whether these amount to a finding that, indeed, the defendant was personally culpable for the illegal acts an associate committed.¹¹⁹ The question of culpability under the Due Process Clause, therefore, should be cleaved from the inquiry of whether the underlying criminal activity is protected under the First Amendment or any other part of the Constitution.

In light of this analysis of *Scales*, which emphasizes the bifurcated structure of the opinion and the separate interests served by the First and Fifth Amendments, it is questionable whether, on close reading, *Scales* is concerned only with statutes “criminalizing associational membership in violation of the First Amendment.”¹²⁰ Rather, the Fifth Amendment principle of personal guilt is of a different scope and purpose than the First Amendment’s protection of the right to associate. The opposite conclusion, moreover, reduces the Fifth Amendment test of *Scales* to a redundancy—a test to be applied only when the First Amendment already would have rendered the statute unconstitutional. This surplusage is at odds with the Court’s framing

Cole, *supra* note 68, at 209–10 (describing Court’s “labeling” jurisprudence where association must be “expressive” or “intimate” to be constitutionally protected and lamenting limitation of First Amendment test to expressive association).

¹¹⁶ See Chesney, *supra* note 113, at 1434–35 (explaining “vicarious punishment” and describing it as “clash[ing] sharply with our commitments to due process of law and freedom of association”).

¹¹⁷ Professor Robert Chesney has compared this to *Pinkerton* liability, the doctrine under which a defendant coconspirator may be found guilty for a crime committed in furtherance of a conspiracy, though she neither took part in it nor even knew about it. Chesney, *supra* note 113, at 1435; see also Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 120–46 (2005) (describing application of reasonable foreseeability test after *Pinkerton*).

¹¹⁸ *Scales*, 367 U.S. at 224–25.

¹¹⁹ *Id.*

¹²⁰ *Humanitarian Law Project v. Gonzalez (Humanitarian III)*, 380 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005).

of its *Scales* opinion and the separate interests these constitutional provisions serve.

B. The Problems with Interpreting Scales To Require Specific Intent in § 2339B

As illustrated in the previous part, there is a compelling argument that the *Scales* personal guilt standard should not be limited to cases in which the First Amendment already protects the prohibited conduct. This would tend to support the *Al-Arian* decision, insofar as it recognized that the personal guilt standard encompasses more than membership statutes. Yet, *Al-Arian* remains a problematic opinion.

The *Al-Arian* court argued that the government must prove a defendant's specific intent to further an FTO's illegal aims—thus grafting a new scienter requirement onto the statute—based on the following argument. First, the court recognized that *Scales* need not be limited to membership statutes but can stretch to include other laws under which “criminal liability and punishment is being justified and tied to the criminal activities of others.”¹²¹ Next, the court stated that one need “look no further than the text of [§ 2339B]” to determine that it is a statute that imputes the culpability of others to the individual donor of material support,¹²² thus making the statute a clear example of vicarious punishment. From this conclusion, the court reasoned that in order to avoid an unconstitutional result, the statute should be construed to require specific intent, just as the Supreme Court interpreted the Smith Act in *Scales*.¹²³

This argument is straightforward but is not convincing. First, *Al-Arian*'s description of the material support statute as imposing vicarious punishment is contestable.¹²⁴ Giving material support does not make one liable for independent crimes committed by the FTO. In fact, no proof is necessary to show that the material support actually was put toward illegal ends. Rather, § 2339B assumes that FTOs are so tainted by their wrongdoing that any support given to them is

¹²¹ United States v. Al-Arian, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ The Ninth Circuit has recently disagreed with the *Al-Arian* position about vicarious liability. Humanitarian Law Project v. Mukasey (*Humanitarian IV*), 509 F.3d 1122, 1132 (9th Cir. 2007) (holding that § 2339B does not impose vicarious guilt); see also Chesney, *supra* note 113, at 1435 (“[Section] 2339B is not a vicarious punishment statute; it does not authorize punishment of one person for the conduct of someone else.”). Professor Chesney argues instead that the material support statute can be attacked on the criminalized association conception of *Scales*. *Id.*

presumptively employed for criminal purposes.¹²⁵ Thus, the government is never obligated to demonstrate that the recipient FTO used any material support in the commission of acts of terrorism.¹²⁶ The act of giving is the only conduct that § 2339B criminalizes.¹²⁷ It is therefore inaccurate to describe § 2339B as a vicarious liability statute.

Second, and more strongly, the *Al-Arian* decision threatens to prove too much. Under *Scales*, the legal test for personal guilt requires the court to make an independent examination of the conduct giving rise to liability and to pay special attention to both the mental state of the defendant and the nature of her participation in the organization's criminal activity.¹²⁸ As Professor Chesney has stated, “[w]ith respect to the non-membership applications of the support statutes, *Scales* suggests that courts must consider the nature of the relationship between the banned activity—providing funding, equipment, etc.—along with the harm that might be inflicted by the recipient organizations.”¹²⁹ The *Al-Arian* court did not consider this relationship but instead issued a broad holding compelling the government to prove the defendant's specific intent in every material support prosecution, irrespective of the magnitude of, or potential harm caused by, the support given.¹³⁰ The scope of the *Al-Arian* decision is thus potentially breathtaking. The decision suggests no reason why a specific-intent element should only be required in material support prosecutions. Rather, whenever “conduct” between a defendant and an individual or group is the basis for liability, the government would,

¹²⁵ See *supra* notes 51–53 and accompanying text (discussing provisions of AEDPA that prohibit material support to FTOs).

¹²⁶ See *Humanitarian Law Project v. Reno (Humanitarian I)*, 205 F.3d 1130, 1136 (9th Cir. 2000) (“[A]ll material support given to [FTOs] aids their unlawful goals. . . . More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.”); *United States v. Marzook*, 383 F. Supp. 2d 1056, 1068 (N.D. Ill. 2005) (arguing that fact that FTO “may engage in humanitarian or lawful activity does not affect the Court's analysis” because FTOs use their funds in any manner they wish).

¹²⁷ See *Humanitarian IV*, 509 F.3d at 1132 (“Donor defendants are penalized for the criminal act of support. Donor defendants cannot be penalized under section 2339B(a) for the illegal conduct of the donee organization.”).

¹²⁸ See *supra* notes 35–36 and accompanying text (describing *Scales*'s due process test as requiring analysis of both *actus reus* and *mens rea* of underlying offense).

¹²⁹ Chesney, *supra* note 2, at 69.

¹³⁰ See *id.* at 69–70; David Henrik Pendle, Comment, *Charity of the Heart and Sword: The Material Support Offense and Personal Guilt*, 30 SEATTLE U. L. REV. 777, 797 (2007) (“*Scales* requires a court to analyze the substantiality of the relationship between A's apparently innocuous conduct and B's concededly illegal activities. The *Al-Arian* court did not examine this relationship; instead, the court skipped the required analysis.”).

under *Al-Arian*'s logic, will be obligated to prove the defendant's specific intent.¹³¹ This result threatens to "stretch[] *Scales* too far."¹³²

IV

ARGUING FROM ANALOGY: THE RELEVANCE OF EXTANT CRIMINAL LAW TO § 2339B

Both sides of the § 2339B debate are thus less than compelling. The *Scales* due process test, on the one hand, need not be coextensive with its First Amendment test. How far this due process test strays from *Scales*'s First Amendment analysis, though, remains unclear. The difficulty in resolving this problem is that the facts of *Scales* are *sui generis*: There has yet to be another membership statute akin to the Smith Act that has had to withstand *Scales*'s constitutional principle of personal guilt.¹³³ By extension, there is no case law, aside from recent lower court decisions about § 2339B, examining *Scales*'s due process test.¹³⁴

This Part sketches an approach for analyzing *Scales*'s due process test in future challenges to § 2339B. Courts should analogize to extant criminal law that targets associational conduct and that remains constitutional after *Scales*. Two such examples are the doctrines of conspiracy and complicity—both of which the Court used as reference points in its *Scales* decision.¹³⁵ These doctrines help clarify the constitutional boundaries set by *Scales*, as they have remained valid, without question, since *Scales* was decided. Although this Part does not give a comprehensive set of analogies it will provide a more fruitful starting point for courts considering due process challenges to § 2339B.

¹³¹ Professor Chesney has made a similar point about the breadth of the *Al-Arian* decision. See Chesney, *supra* note 2, at 69 (arguing that, contrary to *Al-Arian*, *Scales*'s rule of specific intent need not "appl[y] automatically to all laws that aim to suppress conduct that could lead to harmful consequences from other sources").

¹³² *Id.*

¹³³ However, there have been some statutes focused on criminalizing membership in a group. Anti-gang statutes, for example, have been challenged for imposing guilt by association. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (considering First Amendment and vagueness challenges to municipal anti-loitering statute aimed at gang activities). These cases, however, have tended to be decided on First Amendment grounds exclusively, without any consideration of *Scales*'s due process analysis. See generally Cole, *supra* note 68 (discussing First Amendment problems emerging from these laws).

¹³⁴ See *supra* note 87 (citing federal court rulings that have found that under *Scales*, § 2339B does not require specific-intent provision).

¹³⁵ See *Scales v. United States*, 367 U.S. 203, 225 (1961) ("Any thought that due process puts beyond the reach of the criminal law all individual associational relationships . . . is dispelled by familiar concepts of the law of conspiracy and complicity.").

A. *Conspiracy Law: When Knowledge Can Be Used to Prove Intent*

On first impression, conspiracy might seem like an odd lens through which to assess § 2339B. After all, conspiracy generally requires proof of specific intent,¹³⁶ the mens rea notably absent in § 2339B.¹³⁷ Furthermore, conspiracy decisions tend not to address conspiracy's constitutionality but whether prosecutors have met conspiracy law's statutory burdens.¹³⁸ Conspiracy and material support statutes share similar aims and functions, however. In addition, conspiracy is a useful comparison for assessing the validity of § 2339B when one looks to the narrow body of case law in which a defendant's knowledge has been held sufficient to prove conspiratorial intent.¹³⁹ This collection of case law is helpful because it represents a set of decisions in which the prosecution's proof of defendant's knowledge led to a conspiracy conviction. Although this line of conspiracy cases does not provide a complete answer to whether knowledge is a sufficient mens rea for § 2339B—these cases presuppose that intent is necessary—they do suggest that the gap between knowledge and intent in material support prosecutions may be more a crack than a chasm.¹⁴⁰

In *Scales*, the Supreme Court upheld the Smith Act's prohibition of active membership in the Communist Party by analogizing the

¹³⁶ See *supra* note 20 and accompanying text (defining conspiracy as specific-intent crime).

¹³⁷ See *supra* note 63 and accompanying text (setting forth mens rea of § 2339B).

¹³⁸ See Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777, 793–803 (2001) (describing defenses raised in conspiracy prosecutions as including both insufficient evidence and failure to prove statutory elements claims but not mentioning constitutional challenges).

¹³⁹ It is worth emphasizing here that knowledge alone will not satisfy the mens rea requirement of a conspiracy charge. See *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (holding that “concert of purpose” rather than knowledge is necessary for conspiracy conviction). Instead, the point of these cases is that proof of knowledge is sufficient because the defendant's specific intent can be inferred from it immediately. For a discussion of the distinction between cases in which knowledge leads to an inference of specific intent and cases in which it does not, see *United States v. Michelena-Orovio*, 719 F.2d 738, 747–52 (5th Cir. 1983).

¹⁴⁰ This is a conclusion with which even the *Al-Arian* court agreed. See *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004) (“Often, such an intent will be easily inferred.”). Moreover, the easy inference from knowledge to intent may explain why the U.S. Court of Appeals for the Ninth Circuit, which has expressed concern over this due process question, believed that knowledge was sufficient to withstand attack under *Scales*. See *Humanitarian Law Project v. U.S. Dep’t of Justice (Humanitarian II)*, 352 F.3d 382, 402–03 (9th Cir. 2003) (interpreting § 2339B to require proof of knowledge of organization's designation or its unlawful activities); *Humanitarian Law Project v. Gonzalez (Humanitarian III)*, 380 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) (rejecting argument that *Scales* created constitutional requirement of specific intent).

statute to conspiracy.¹⁴¹ The legal framework for prohibiting membership in a group was quite consistent with that of conspiracy.¹⁴² Like a conspiracy agreement, membership may be conduct that evidences a contribution to, and complicity with, the crimes of the larger group.¹⁴³ Furthermore, the purposes of material support statutes and conspiracy law are similar. Section 2339B is designed to prevent terrorism plots from actualizing by depriving FTOs of the means necessary to commit them.¹⁴⁴ This is entirely consistent with the motivation behind conspiracy law, which prohibits agreements to commit crimes in order to prevent their realization.¹⁴⁵

In addition, the risks of punishing an inculpable defendant are similar in material support and conspiracy prosecutions. The *Al-Arian* court expressed concern that § 2339B prosecutions threaten punishment of inculpable defendants because the list of offenses included as material support is broad and the mens rea required is, by comparison, relatively small.¹⁴⁶ So, too, does this specter of punishing moral innocents appear in conspiracy prosecutions. Conspiracy liability hinges on the existence of some relationship—namely, an agreement to engage in criminal conduct—between the defendant and at least one other confederate.¹⁴⁷ A potential problem for conspiracy

¹⁴¹ See *Scales v. United States*, 367 U.S. 203, 226 n.18 (1961) (“[T]here is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court.”).

¹⁴² This is a point that Mark Noferi has explored in depth. See Noferi, *supra* note 117, at 117 (“Essentially, the *Scales* Court analogized to conspiracy law in framing Due Process limits on ‘personal guilt.’”).

¹⁴³ See *Scales*, 367 U.S. at 226–27 (“[W]e can perceive no reason why one who actively and knowingly works in the ranks of that [criminal] organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he . . . [who carries out] the substantive criminal act.”).

¹⁴⁴ See H.R. REP. NO. 104-383, at 42 (1995) (“[L]aw enforcement at all levels must be given reasonable and legitimate investigative tools to enhance their capability of thwarting, frustrating, and preventing terrorist acts before they result in death and destruction.”); *supra* note 4 and accompanying text (describing this purpose of § 2339B).

¹⁴⁵ See *Scales*, 367 U.S. at 225 (stating that conspiracy “manifest[s] the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior”); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1375–76 (2003) (“Because groups are not only more likely to engage in crime . . . but are also faster at accomplishing them . . . preventative steps must be commensurate. Conspiracy law does this by attacking the group at the moment it is formed and not waiting until the group comes too close to success” (footnote omitted)).

¹⁴⁶ See *supra* notes 89–97 and accompanying text (describing *Al-Arian* decision).

¹⁴⁷ See *supra* notes 18–20 and accompanying text (defining crime of conspiracy).

prosecutions is determining whether an individual intends, in fact, to be a party to the agreement.¹⁴⁸

In both § 2339B and conspiracy law, this risk of punishing inculpable defendants is remedied by the additional burden on the government to prove the defendant's culpable mental state. In the case of material support prosecutions, the government must prove a defendant's knowledge that she gave material support and that the recipient was an FTO or an organization engaged in terrorism.¹⁴⁹ Similarly, to prosecute a defendant for conspiracy, the government must prove that she has some degree of personal culpability.¹⁵⁰ Although there is disagreement about what degree of personal culpability is necessary,¹⁵¹ some showing of intent usually is required.¹⁵² This burden of proving the defendant's intent ensures that only bona fide conspirators are punished for the act of conspiring. As Judge Learned Hand wrote nearly seventy years ago, requiring proof of a defendant's intent is crucial to prevent prosecutors from "sweep[ing] within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders."¹⁵³

Though conspiracy is a specific-intent crime, courts have, in narrow circumstances, allowed prosecutors to demonstrate this mental state with only proof of knowledge. The primary decision in this line

¹⁴⁸ See, e.g., *United States v. Freeman*, 660 F.2d 1030, 1036 (5th Cir. 1981) (holding that crew members on shrimp boat used by captain to transport twenty tons of marijuana were guilty of conspiracy, in part, because of "the large quantity of marijuana on board, which made it indisputable that [defendants] had knowledge of the marijuana, and the necessarily close relationship between the captain . . . and his two man crew"). The fact that conspiracy is often proven with circumstantial evidence—in the form of parallel or common action in furtherance of the alleged wrongful goal—compounds this problem. See *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975) ("The agreement need not be shown to have been explicit. It can be inferred from the facts and circumstances of the case.").

¹⁴⁹ 18 U.S.C. § 2339B(a)(1) (Supp. V 2005).

¹⁵⁰ See *United States v. Feola*, 420 U.S. 671, 686 (1975) ("Our decisions establish that in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.").

¹⁵¹ Compare *id.* at 688–90 (holding that statute does not require greater scienter element than that of underlying offense), with *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) (holding that proof of some conspiracies will require heightened scienter element in order to satisfy threshold showing that defendant agreed to commit crime in first instance). See also 2 LAFAVE, *supra* note 12, § 12.2(c), at 275 ("Although the crime of conspiracy is 'predominantly mental in composition,' there has nonetheless always existed considerable confusion and uncertainty about precisely what mental state is required for the crime." (citations omitted)).

¹⁵² See 2 LAFAVE, *supra* note 12, § 12.2(c), at 277 (acknowledging that degree of intent in conspiracy is unclear but concluding that "it is fair to say that conspiracy is a specific intent crime").

¹⁵³ *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940).

of cases is *Direct Sales Co. v. United States*.¹⁵⁴ In *Direct Sales*, the Supreme Court held that participation in a conspiracy to distribute narcotics illegally can be based on knowledge—albeit on the theory that specific intent could be readily inferred from what the defendant knew—because narcotics were subject to an extensive regulatory regime under civil and criminal codes.¹⁵⁵ This regulation was key to the Court’s decision:

The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latter’s inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. . . . Knowledge, equivocal and uncertain as to one, becomes sure as to the other. So far as knowledge is the foundation of intent, the latter thereby also becomes the more secure.¹⁵⁶

This extensive regulation led the Court to conclude that proof that a seller distributes abnormally large or frequent quantities of narcotics may be sufficient to demonstrate her knowledge of “the buyer’s intended illegal use.”¹⁵⁷ Furthermore, proof of a suspicious sale was enough to demonstrate the seller’s intent “to further, promote and cooperate” in the ongoing conspiracy.¹⁵⁸

After *Direct Sales*, conspiracy convictions can be obtained against suppliers of restricted or regulated goods and services because the act of knowingly supplying the good can establish the defendant’s specific intent to meet the conspiracy’s ends.¹⁵⁹ In these instances, the *Direct Sales* Court held, the defendant’s knowledge will be “more than suspicion” and will be evidence of the provider’s “informed and interested cooperation, stimulation, [and] instigation” in the conspiracy and of her “stake in the venture.”¹⁶⁰

Direct Sales is helpful in understanding § 2339B because it provides a set of guidelines for when knowledge, the mental state required to be guilty of giving material support, is sufficient to convict

¹⁵⁴ 319 U.S. 703 (1943).

¹⁵⁵ *Id.* at 710.

¹⁵⁶ *Id.* at 711–12.

¹⁵⁷ *Id.* at 711.

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.,* *United States v. Mollier*, 853 F.2d 1169, 1172–74 (5th Cir. 1988) (holding evidence of activity in marijuana-smuggling scheme sufficient for jury to infer intent from defendant’s knowledge); *United States v. Lopac*, 411 F. Supp. 2d 350, 362–68 (S.D.N.Y. 2006) (ordering new trial for conspiracy charge against defendant because government failed to prove that her knowledge, combined with her minimal active participation, amounted to specific intent).

¹⁶⁰ *Direct Sales*, 319 U.S. at 713 (internal quotation marks omitted).

an individual for a specific-intent crime. First, there must be some regulation of the giving of material support for *Direct Sales* to have any bearing on the constitutionality of § 2339B under the Due Process Clause. Of course, the statute is phrased to proscribe “any” donation of material support.¹⁶¹ Therefore, both regulated and unregulated articles of commerce fall within the statute’s scope. What is regulated in § 2339B, however, is the recipient of material support. Any § 2339B prosecution is premised on the Secretary of State’s designation of the recipient as an FTO.¹⁶²

Federal designation and regulation of FTOs is consistent with the regulation of goods in *Direct Sales*. Congress prescribed the Secretary of State’s designation process and the regulations of FTO designees.¹⁶³ The Secretary of State may designate a group as an FTO only if the group is foreign, engaged in terrorism, and threatens national security.¹⁶⁴ This designation is like the regulation in *Direct Sales* because it indicates that an individual’s donation of material support has a “susceptibility to harmful and illegal use.”¹⁶⁵ FTO designation also puts a donor on notice that the recipient is likely to use the material support for illegal purposes¹⁶⁶—or, more generally, that the material support will always free up resources for the FTO to commit its unlawful acts.¹⁶⁷

This first point about FTO regulation is an argument for why an individual’s knowing donation of material support can safely be assumed to constitute specific intent, thus satisfying the strictest readings of *Scales*.¹⁶⁸ Yet this point should not be taken too far. *Direct*

¹⁶¹ 18 U.S.C. § 2339A(b)(1) (Supp. V 2005); *see also supra* text accompanying note 49 (setting forth definition of “material support” for § 2339B).

¹⁶² *See* 8 U.S.C. § 1189 (2000 & Supp. V 2005) (establishing process by which Secretary of State designates groups as FTOs).

¹⁶³ *See supra* notes 54–57 and accompanying text (describing designation process and restrictions on FTOs).

¹⁶⁴ 8 U.S.C. § 1189.

¹⁶⁵ *Direct Sales*, 319 U.S. at 710.

¹⁶⁶ *See id.* (“Nor, by the same token, do all [articles of commerce] embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns.”).

¹⁶⁷ *See supra* note 126 (describing argument that support is fungible and therefore any provision of material support should be outlawed).

¹⁶⁸ Of course, this argument would be undercut if the Secretary of State’s designation process failed to target genuine terrorism organizations or was arbitrary in its application. Lower courts have been critical of the FTO designation process on several grounds. *See* *United States v. Afshari*, 446 F.3d 915, 915–22 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that FTO designation process fails to comply with First Amendment and threatens suppression of legitimate political activity); *Nat’l Council of Resistance of Iran v. Dep’t of State*, 251 F.3d 192, 208–09 (D.C. Cir. 2001) (holding that to afford due process, Secretary of State must give designated group notice of its FTO

Sales does not hold that knowingly supplying a restricted good will always be enough to prove a defendant's specific intent to further a conspiracy.¹⁶⁹ Rather, the *Direct Sales* Court emphasized that an inference of specific intent can be made only when knowingly dealing in a restricted good or service is combined with evidence of the supplier's "prolonged cooperation" or "stake in the venture" with the recipient.¹⁷⁰ Thus, when donations of support have been of such significant quantity¹⁷¹ or such inherently suspicious or nefarious character¹⁷² to suggest the donor's cooperation with, or stake in, the organization's terrorist activities, proof of the defendant's knowledge would be sufficient even under a strong interpretation of *Scales*. To invoke *Direct Sales*'s language, in these cases the material support, "which would be wholly innocuous or not more than ground for suspicion" if the recipient were not an FTO, "furnish[es] conclusive evidence" to infer specific intent.¹⁷³

B. *Complicity Law: When Knowledge May Be Sufficient*

Of course, conspiracy law does not answer the fundamental question of whether knowledge is sufficient for all material support cases. At best, it suggests that a number of material support prosecutions could already satisfy a specific-intent requirement. But not all material support prosecutions would meet this threshold. Rather, there remain material support donations unlikely to satisfy an analogous conspiracy charge because there is insufficient evidence to establish that the donor has a stake in the recipient FTO's venture.¹⁷⁴ Consider again *Al-Arian*'s hypothetical taxi driver. Were the driver prosecuted

designation, notice of unclassified information relevant to Secretary's decision, and opportunity to rebut designation).

¹⁶⁹ See *Direct Sales*, 319 U.S. at 712 ("Concededly, not every instance of sale of restricted goods, . . . in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.").

¹⁷⁰ *Id.* at 713.

¹⁷¹ See, e.g., Michael Grabell, *Holy Land Group's Co-Founder Sentenced*, DALLAS MORNING NEWS, Oct. 12, 2006, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/101306dnmetelashi.302f898f.html> (reporting that defendant allegedly gave \$250,000 to front company that funneled money to FTO).

¹⁷² See, e.g., *United States v. Assi*, 414 F. Supp. 2d 707, 710 (E.D. Mich. 2006) (describing defendant's material support to Hezbollah as including "two Boeing global positioning satellite modules . . . night vision goggles and a thermal imaging camera").

¹⁷³ See *Direct Sales*, 319 U.S. at 711.

¹⁷⁴ See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 30 (2005) ("Cases in which a § 2339B prosecution is likely to be successful, but a conspiracy charge might not [be], include those where the defendant's involvement was quite remote from specific terrorist activity and an inference of purpose with respect to the commission of specific offenses might be difficult to draw.").

in an ordinary conspiracy trial, she would never be convicted on mere knowledge of the FTO member's identity because her knowing provision of a routine service would be insufficient to demonstrate specific intent.¹⁷⁵ Returning to the language of *Scales*, the "quantum of [the driver's] participation in the organization's alleged criminal activity" would arguably be too minimal to warrant § 2339B's severe punishment.¹⁷⁶

The law of complicity, or accomplice liability, helps to explain when knowledge may be sufficient and does so without any recourse to an inference of specific intent. Granted, complicity does not share as many similarities with the material support offense as conspiracy law does. For instance, complicity is not a substantive offense distinct from the underlying crime. Instead, it is "derivative" of the principal offense.¹⁷⁷ Complicity can be invoked only when a crime is completed, thus depriving it of the same preventative value as in that of conspiracy and material support offenses.¹⁷⁸ Furthermore, as in conspiracy, intent is generally required to sustain a conviction for being an accessory.¹⁷⁹ Yet accomplice liability does not necessarily require proof of a defendant's intent.¹⁸⁰ On the contrary, in some cases of complicity, knowledge may be sufficient to convict a defendant.

Two such formulations of complicity may prove useful for assessing when a knowing donation of material support comports with *Scales*. First, there is a theory of complicity found in *Scales*'s dicta: When an accomplice knowingly and "substantially facilitate[s]" a principal engaged in criminal conduct, she may be found liable for complicity consistent with the Due Process Clause.¹⁸¹ On this account of complicity, knowledge is sufficient only when an individual's facilita-

¹⁷⁵ See *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (holding that "[i]t is not enough that [an alleged conspirator] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use," as prosecution must also prove that he "must in some sense promote [the] venture"), *aff'd*, 311 U.S. 205 (1940).

¹⁷⁶ *Scales v. United States*, 367 U.S. 203, 227 (1961); see also *supra* notes 35–36 and accompanying text (setting forth *Scales*'s due process test).

¹⁷⁷ Kadish, *supra* note 16, at 337.

¹⁷⁸ See *id.* ("[J]ust as causation doctrine requires that the prohibited result occur before there can be an issue of the actor having caused it, so in complicity doctrine there must be a violation of law by the principal before there can be an issue of the secondary party's liability for it.").

¹⁷⁹ See *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (holding that accomplice liability requires proof that individual somehow "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed").

¹⁸⁰ See *supra* note 17 (discussing variation in mens rea for accomplice liability).

¹⁸¹ Baruch Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1408 (2002) (citing *Scales*, 367 U.S. at 225 n.17); see also *Abrams*, *supra* note 174, at 16–20 (discussing history

tion of a crime is “substantial”—a questionable determination, which, as one commentator has noted, would usually be left “to a jury’s sense of justice.”¹⁸² This formulation of complicity is not historically well founded.¹⁸³ There is likely little difference between analogizing § 2339B to this conception of complicity and analogizing the statute to conspiracy law. As Baruch Weiss has stated, “[r]ight now, the substantiality of the assistance is merely a means of determining desire: One may infer the existence of desire or purposeful intent when the aider and abettor knowingly renders assistance that is substantial.”¹⁸⁴ Thus, knowledge combined with substantial facilitation is but one more way to infer the defendant’s intent—precisely what an analogy to conspiracy would accomplish.

A second formulation of complicity arises when courts hold knowledge sufficient to sustain an accessory’s conviction. This occurs when the principal crime is “particularly grave.”¹⁸⁵ In *United States v. Fountain*, a case concerning a prisoner’s murder of a correctional officer, the Seventh Circuit held that a defendant who knowingly gave the murder weapon to the principal could be convicted as an accessory without any proof of his intent.¹⁸⁶ In the court’s opinion, two factors supported the conclusion that a lesser mens rea was required. First, the gravity of the crime distinguished it from other complicity cases in which proof of the accomplice’s purpose was necessary.¹⁸⁷ Second, and related to the principal offense’s gravity, was the relative deterrent value of knowledge in minor and major offenses. In the court’s opinion, a minor offense—the court’s example was prostitution—“would be but trivially deterred” by criminalizing knowing facilitation because someone else could easily serve as an unknowing accomplice.¹⁸⁸ By contrast, knowledge would serve a greater deterrent purpose for assisting the commission of a major offense because the harm prevented is much greater, thus warranting the stronger deterrent measure of a lesser mens rea.¹⁸⁹ In addition, it is arguable that a

of early Model Penal Code’s definition of complicity in terms of “substantial aid” and “knowledge”).

¹⁸² Abrams, *supra* note 174, at 19.

¹⁸³ See *id.* at 16–21 (associating conception with “early” first draft of Model Penal Code); Weiss, *supra* note 181, at 1408–09 (noting that Seventh Circuit has come close to adopting substantial act approach).

¹⁸⁴ Weiss, *supra* note 181, at 1409.

¹⁸⁵ *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir. 1985); Weiss, *supra* note 181, at 1401–07.

¹⁸⁶ *Fountain*, 768 F.2d at 798.

¹⁸⁷ *Id.*; see also *People v. Lauria*, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967) (holding knowledge insufficient in accessory to misdemeanor prosecutions).

¹⁸⁸ *Fountain*, 768 F.2d at 798.

¹⁸⁹ *Id.*

deterrence rationale is better served in some major crimes because the act of facilitating—that is, providing the good or service to enable the principal—is more likely to be regulated, unique, or otherwise less available in the open market.¹⁹⁰

Although somewhat anomalous,¹⁹¹ *Fountain* supports the conclusion that the definition of the material support offense in § 2339B is valid under *Scales*'s due process test. Any act of terrorism is likely to be considered “particularly grave” under *Fountain*'s test.¹⁹² As a result, by *Fountain*'s logic, § 2339B should lend added deterrence value, as it helps to prevent the enormous harm terrorism wreaks. Countervailing against this conclusion, however, is the fact that the material support statute makes no distinction among the kinds of prohibited knowing aid. Instead, by regulating the recipient of support rather than the forms of support given, § 2339B arguably erases the distinction *Fountain* draws between innocuous and harmful donations. In other words, it makes an accomplice to terrorism out of the otherwise knowing but innocent shopkeeper or cab driver—the exact result that *Fountain* seems to resist under the federal accomplice liability statute.¹⁹³ At the very least, however, a case like *Fountain*, in which knowledge satisfied a complicity prosecution, provides courts with a helpful clue for whether *Scales*'s personal guilt principle is ever offended by § 2339B.

CONCLUSION

How to resolve this analogy to *Fountain*—or, for that matter, developing a definitive analogy to substantive criminal law—is left for another day. Instead, this Note aims to provide a starting point for courts to invoke current criminal law when weighing due process challenges to § 2339B.

This Note has argued for two propositions. First, *Scales*'s due process principle of personal guilt need not be confined to statutes targeting First Amendment activity. On the contrary, *Scales*'s Fifth Amendment due process test should have force in § 2339B prosecu-

¹⁹⁰ See *id.* (comparing ease of obtaining clothing necessary to commit prostitution with difficulty of obtaining gun necessary for committing murder).

¹⁹¹ See Weiss, *supra* note 181, at 1404–07 (discussing *Fountain*'s unclear legacy in Seventh Circuit's case law).

¹⁹² This was a conclusion Congress reached when it passed the first material support law, 18 U.S.C. § 2339A, well before September 11, 2001. See H.R. REP. NO. 104-383, at 41 (1995) (“Terrorism potentially affects all Americans, both at home and abroad. It threatens our public safety, restricts the freedom to travel, and reduces our sense of personal security. *Nothing is more potentially threatening or destructive.*” (emphasis added)).

¹⁹³ See *Fountain*, 768 F.2d at 798 (contrasting knowing accomplice to prostitute with knowing accomplice to murderer).

tions, even though the First Amendment's protections are often weak or even nonexistent in those cases. The problem, however, is determining the scope of *Scales*'s due process test and whether specific intent must be required when other nonexpressive associational activity is prohibited.

This leads to the Note's second point: Extant criminal law can help give content to *Scales*'s principle of requiring personal guilt in material support contexts. Conspiracy law, for example, helps to show that in a number of material support prosecutions, proof of the defendant's knowledge could likely be used to demonstrate intent to facilitate the FTO's illegal affairs. This suggests that the difference between knowledge and intent may not be great. Alternatively, the doctrine of complicity provides examples of when, without mention of *Scales*'s due process test, knowingly assisting a principal to commit a crime has been upheld as a crime.

This latter contribution is not intended to be comprehensive. Other analogies in current criminal law certainly remain to be explored, and the examples provided here can be examined in greater depth. But this Note provides a new launching point for future analysis in due process challenges to § 2339B that should provide courts with a surer footing about the application of *Scales* to material support prosecutions.

