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Chantal Tortoroli

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GANGS OF NEW YORK ARE TERRORISTS?
THE MISAPPLICATION OF THE NEW YORK
ANTITERRORISM STATUTE DUE TO THE
LACK OF COMPREHENSIVE GANG
LEGISLATION

CHANTAL TORTOROLI†

INTRODUCTION

On August 18, 2002, friends and family gathered for a
baptism party in a church hall on McGraw Avenue in the Bronx,
New York.1 Several members of the St. James Boys, a Mexican
gang, were attending, including twenty-year-old Edgar Morales
and gang leader Alejandro “Alex” Solis.2 During the festivities,
Morales and his fellow gang member, Enrique Sanchez,
confronted Javier Tocchimani, whom they believed to be a
member of a rival gang, the Vagabondos.3 As tensions escalated,
the group made its way out of the hall.4 Soon a fight erupted,
and the gang members fired shot.5 A bullet hit Javier Tocchimai,
paralyzing him.6 Tragically, a stray bullet also struck the head of
an innocent bystander, ten-year-old Melanny Mendez, killing her

1 J.D. Candidate, 2010, St. John’s University School of Law; B.A., 2005, McGill
University.
Office, Gang Member Found Guilty in the Death of a Ten-Year-Old Girl—Jury
Finds Fatal Shooting Was a Crime of Terrorism (October 31, 2007),
Attorney, October 31, 2007].
3 See id.; see also Sean Gardiner, Gangbanger as ‘Terrorist’: A 9/11 Anti-Terror
Law Turns out To Be Handy Against Small-Time Hoods, VILLAGE VOICE, June 27,
2007, at 11.
4 See Bronx District Attorney, October 31, 2007, supra note 1; see also Denise
21.
5 See Bronx District Attorney, October 31, 2007, supra note 1.
6 See id.

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instantly.⁷ Over eighteen gang members were charged in connection with Melanny’s death, but most, including gang leader Solis, fled to Mexico.⁸

Edgar Morales, one of the gang members involved in the fight that day, was tried and convicted as a terrorist in a New York court.⁹ Morales was charged with manslaughter in the first degree¹⁰ for the girl’s death, attempted murder in the second degree¹¹ for the shooting of Javier Tocchimai, criminal possession of a weapon in the second degree,¹² and conspiracy in the second degree.¹³ A Bronx jury found that all four of these offenses had been committed with the “intent to intimidate or coerce a civilian population” and, as such, they were “crime[s] of terrorism” under the New York Antiterrorism Act of 2001.¹⁴ The characterization of the crimes as acts of terrorism enhanced the punishment for each crime.¹⁵ Morales was sentenced as a terrorist to two consecutive prison terms of twenty years to life.¹⁶

This Note argues that the New York antiterrorism statute should not have been applied to a Mexican gang member in the Bronx given the differences in the typical motive and scope between terrorism and gang violence. The misapplication of the New York antiterrorism statute by the prosecutors in the case against Morales highlights two deficiencies in the current New York Penal Code: an overly broad antiterrorism statute and a lack of comprehensive gang statutes. The lack of gang statutes in New York, particularly those that allow for sentence

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⁷ See id.
⁸ See Gardiner, supra note 2.
¹⁰ N.Y. PENAL LAW § 125.20 (McKinney 2010).
¹¹ Id. §§ 110.00, 125.25.
¹² Id. § 265.03.
¹³ Id. § 105.15. See generally Bronx District Attorney, October 31, 2007, supra note 1.
¹⁴ Timothy Williams, New York's Post-9/11 Terrorism Law Is Used To Convict a Bronx Gang Member in a Killing, N.Y. TIMES, Nov. 1, 2007, at B1; see also N.Y. PENAL LAW § 490.25.
¹⁵ See N.Y. PENAL LAW § 490.25(2).
enhancement, and the vague language of the statute inspired prosecutors in the Bronx to improperly turn to a statute that was never intended to combat gang violence.

Part I of this Note details the background of the New York antiterrorism statute. It explains the relevant legislative history, as well as the structure and wording of the statute. Part II explores the controversial application of the New York antiterrorism statute to a gang member in the Bronx, setting out the arguments for and against its application, made by the Bronx District Attorney's Office and Morales, respectively.

Part III argues that the statute was inappropriately applied against a New York City gang member, an application which was permissible due to vague terms within the statute. By clarifying certain vague terms, such as "civilian population," and including other limiting phrases, the New York legislature could avoid similar misapplications in the future. Specifically, this Note recommends a new standard for defining an act of terrorism: political terrorism, in which the act of terrorism must be politically motivated and international in scope. This political terrorism standard will effectively exclude all local criminals, specifically gang members.

Lastly, Part IV recommends that the New York legislature create gang statues that address the prevalence of gang violence in New York State. The surprising lack of gang statutes available to law enforcement officials has encouraged prosecutors to attempt to remedy the situation by using several different statutes, including New York's antiterrorism statute.

I. THE NEW YORK ANTITERRORISM STATUTE: BACKGROUND

A. Legislative History and Intent

The New York Antiterrorism Act of 2001 was enacted in direct response to the September 11, 2001, attacks on the World Trade Center and the Pentagon. With these attacks, terrorism became a palpable, personal fear for citizens throughout the United States; passions ran high and feelings of helplessness were pervasive. The federal government immediately responded to this national sentiment with antiterrorism legislation created to improve and strengthen its policies regarding terrorism.17 At

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the same time, many state legislatures enacted antiterrorism statutes to deal directly with the threat of terrorism at a local level.\textsuperscript{18}

New York was first to enact an antiterrorism statute—a mere six days after 9/11, on September 17, 2001.\textsuperscript{19} Immediately after 9/11, Governor Pataki called a special session of the state legislature to enact a comprehensive package of antiterrorism laws.\textsuperscript{20} By September 13, 2001, the New York State legislators had signed a resolution that condemned terrorism.\textsuperscript{21} A few days later, the New York legislature passed the Antiterrorism Act of 2001 with minimal opposition.\textsuperscript{22} Legislators believed that this statute would create a powerful tool for prosecutors against terrorists.\textsuperscript{23}

After examining the legislative history of the statute, it is clear that the creation of the statute was rushed. Its proposal and enactment occurred less than one week after September 11, 2001.\textsuperscript{24} There was strong support for the statute, with very little

\begin{itemize}
\item \textsuperscript{19} See N.Y. PENAL LAW §§ 490.00–.35.
\item \textsuperscript{20} Press Release, George Pataki, Governor of N.Y., Governor Calls Special Session To Enact Antiterrorism Law (Sept. 16, 2001), http://old.911digitalarchive.org/err/documents/1087.pdf.
\item \textsuperscript{22} See Voting List: Senate Bill S70002, reprinted in NYLS LEGIS. HIST., 2001, at ch. 300. On September 17, 2001, the New York State Senate voted 53 to 1 in favor of the antiterrorism statute and the New York State Assembly voted 131 to 6 to approve the statute. See id.
\item \textsuperscript{23} Memorandum in Support, ch. 300, L. 2001, reprinted in NYLS LEGIS. HIST., 2001, at ch. 300. In the following years, however, there was a distinct lack of prosecutions under this statute. Joel Stashenko, Prosecutor's Make Widened Use of Terror Threat Law, N.Y. L.J., June 4, 2007, at 1.
\item \textsuperscript{24} See Stashenko, supra note 23 (quoting Senator Thomas Duane, a Democrat Assemblyman from Manhattan, as saying ‘We legislated in haste’); Press Release from Governor George Pataki, supra note 20; see also N.Y. PENAL LAW §§ 490.00–.35.
\end{itemize}
debate over its enactment or wording.25 The desire to enact legislation as soon as possible was seen as important.26

The legislative history of the statute reveals that political and idealistic motivations as the defining characteristics of terrorism. The Resolution passed on September 13, 2001, described the terrorist attack that had occurred two days earlier, stated that New York needed protection from similar attacks against the “very principles of American freedom,” and that those who “attempt to destroy our most sacred ideals and threaten the peace of our State and Nation will be found and brought to justice.”27 Moreover, this resolution provided that “[t]he devastating consequences of the recent, barbaric attack on the World Trade Center and the Pentagon underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism.”28

Additionally, the Governor’s Program Bill Memorandum, containing the original form of the statute, was specifically designed to establish criminal penalties for persons who commit

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25 See Press Release, WTC Response Update: Federal, State & City Officials Express Support for Antiterrorism Package, (Sept. 17, 2001), reprinted in NYLS LEGIS. HIST., 2001, at ch. 300. There was strong support on many different fronts. For example, the New York State Director of Criminal Justice Katherine N. Lapp said, “[The antiterrorism statute] will provide critical investigative tools to assist law enforcement officials and prosecutors...” Id. New York City Police Commissioner Bernard B. Kerik also expressed “full support” for the bill. Id. There were, however, a few vocal dissenters to the bill. Assembly Speaker Sheldon Silver, Democrat from Manhattan, described the antiterrorism statute “over-kill [sic],” expressing doubt that it would ever actually be used and admitting that he had voted for the statute more as a show of solidarity in a time of crisis rather than for its practical purposes. John Caher, State Legislature Approves Tough Anti-Terrorism Laws, N.Y. L.J., Sept. 18, 2001, at 1.

26 See Memorandum from the New York Civil Liberties Union (“NYCLU”), Statement in Opposition to Anti-Terrorism Legislation Now Pending in New York State Legislature (Mar. 12, 2003), http://www.nyclu.org/node/658 (“In place of a reasoned explication of the substantive issues in the legislation, there were demands for urgent action, in the face of national emergency.”). The NYCLU stressed that it did not support the antiterrorism statute package and, instead, urged that there be bipartisan hearings to permit a rigorous and searching inquiry into the appropriate response for New York State to the threat of terrorism, but this was rejected. See id. (“Requests for clarification [of language] were interpreted as both dangerous and disloyal.”).


28 Memorandum in Support, ch. 300, L. 2001, reprinted in NYLS LEGIS. HIST., 2001, at ch. 300; see also N.Y. PENAL LAW § 490.00 (containing the same language).
terrorist acts, make terrorist threats, or render assistance to terrorists in New York State. The Bill Memorandum provided that

[a] comprehensive state law is thus urgently needed in New York to complement federal counter terrorist efforts and eliminate terrorism, while bringing terrorists and their supporters to justice. The bill enacts fundamental reforms and sends a powerful message that New York will do everything possible to wipe out the evils of terrorism.

Former New York State Senator Michael Balboni, a Republican from Mineola, New York, sponsored this document. Senator Balboni explained that when he sponsored this statute, he envisioned an act of terrorism to have a "mass effect," such as instances of terrorism like the World Trade Center attack and the Oklahoma City Bombing. Other New York Senators have echoed this sentiment, stating that the statute should include Al Qaeda-like terrorism but not ordinary, local crimes.

The examples of past terrorist attacks provided in the "Legislative Findings" section of the statute bolster the view that the statute focuses on combating politically motivated terrorist attacks. Specifically, it states "that terrorism is a serious and deadly problem" in the United States and describes the need for laws that facilitate the prosecution and punishment of terrorists in state courts to better protect all citizens against terrorist acts. It gives specific examples of terrorism that fall within the intended scope of the statute: the bombings of American embassies in Kenya and Tanzania in 1998, the bombing of the federal building in Oklahoma City in 1995, the attack on Pan Am

29 Governor's Program Bill Memorandum No. 60, reprinted in 2001 N.Y. St. LEGIS. ANN. 170–72. Governor Pataki explained that the New York legislature needed to send a clear message to potential terrorists that New Yorkers would not be intimidated and that they had every intention of fighting back. See Pataki, supra note 20. His wording indicates that terrorists are not New Yorkers; therefore, it follows that they must be international or subnational actors. See id.
32 Williams, New Terrorism Statute, supra note 9.
33 See id. Assemblyman Jeffrey Dinowitz, a Bronx Democrat, who voted for the bill stated: “We were talking about Osama bin Laden, not gang members.” Id.
34 N.Y. PENAL LAW § 490.00 (McKinney 2010).
35 Id.
Flight 103 in Lockerbie in 1998, the 1997 shooting atop the Empire State building, the 1994 murder of Ari Halberstam on the Brooklyn Bridge, the 1993 bombing of the World Trade Center, and "the recent barbaric attack on the World Trade Center and the Pentagon."  

An unusual example given in the statute is the murder of Ari Halberstam, a sixteen-year-old Jewish boy, killed by a Muslim shooter on the Brooklyn Bridge. At first glance, this act seems to be a local crime; however, it contains an important international aspect: The shooter, a foreigner, was motivated by revenge for an international occurrence—the massacre of Muslims by a Brooklyn-born Jewish settler on the West Bank that occurred one week prior to his attack. Therefore, like the other examples, the crime committed by the defendant was related to anti-Semitic, anti-Zionist, or anti-American motives, which reach beyond the single act of murder, and the crime was motivated by the desire to intimidate others from supporting the same political position as the victims.  

B. The Text of the Statute

The New York antiterrorism statute created new criminal offenses for terrorism, including (1) soliciting or providing support for an act of terrorism in the second degree, (2) soliciting or providing support for an act of terrorism in the second degree, (3) soliciting or providing support for an act of terrorism in the second degree, (4) soliciting or providing support for an act of terrorism in the second degree, and (5) soliciting or providing support for an act of terrorism in the second degree.
first degree,\(^4\) (3) making a terrorist threat,\(^2\) (4) committing the crime of terrorism,\(^3\) (5) hindering prosecution of terrorism in the second degree,\(^4\) and (6) hindering prosecution of terrorism in the first degree.\(^5\) Of the six crimes within the statute, the crime of terrorism is unique and will, therefore, be the focus of this Note.\(^6\)

Terrorism, as defined by the Act, is not a new substantive crime, but rather is a sentence enhancer, which increases the possible punishment for the underlying predicate offenses already codified within the New York Penal Code. The statute provides that a crime of terrorism occurs when a person, “with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping . . . commits a specified offense.”\(^7\)

\(^{41}\) N.Y. Penal Law § 490.15. This statute contains the same language as the crime in the second degree; however, the amount of monetary support must be in excess of $1,000. Id. It is punishable as a Class C violent felony, and imposes a sentence of up to fifteen years in state prison. Id.; see also Greenberg & Yurowitz, supra note 23.

\(^{42}\) N.Y. Penal Law § 490.20. This statute provides that [a] person is guilty of making a terroristic threat when with intent to intimate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense. Id. § 490.20(1). This provision also provides that it is “no defense to a prosecution pursuant to this section that the defendant did not have the intent or capability of committing the specified offense or that the threat was not made to a person who was a subject thereof.” Id. § 490.20(2). This crime shall be punishable as a Class D violent felony, and imposes a sentence of up to seven years in state prison. Id.; see also Greenberg & Yurowitz, supra note 23.

\(^{43}\) N.Y. Penal Law § 490.25.

\(^{44}\) Id. § 490.30. This provision provides that a person is guilty of this crime “when he or she renders criminal assistance to a person who has committed an act of terrorism, knowing or believing that such person engaged in conduct constituting an act of terrorism.” Id. A person may be charged with this crime regardless of whether the act of terrorism resulted in the death of another person. It is punishable as a Class C violent felony offense, imposing a sentence of up to fifteen years in state prison. Id.; see also Greenberg & Yurowitz, supra note 23.

\(^{45}\) N.Y. Penal Law § 490.35. This statute contains similar language as hindering prosecution in the second degree, but the act of terrorism must result in the death of another. Id. This is punishable as a Class B violent felony offense, id., imposing a sentence of up to twenty-five years in state prison. Id. § 70.00(2)(b); see also Greenberg & Yurowitz, supra note 23.

\(^{46}\) See generally N.Y. Penal Law § 490.25.

\(^{47}\) Id. § 490.26(1).
If the underlying crime fits within the definition of the crime of terrorism, the crime will be considered, for sentencing purposes, to fall within a category higher than the actual crime that the defendant committed.\textsuperscript{48} For example, if a defendant is convicted of a crime of terrorism, and the underlying special offense was a Class B felony, it will be deemed a violent felony offense, and therefore, a Class A-I felony.\textsuperscript{49} Thus, a defendant will be subject to the possibility of a more severe punishment than would normally be applicable for his or her crime.\textsuperscript{50}

Terrorism, as defined in the Act, includes certain phrases that are further defined in the definition section, such as an “act of terrorism” and a “specified offense.”\textsuperscript{51} An “act of terrorism” is defined as

an act or acts constituting a specified offense...for which a person may be convicted in the criminal courts of this state...that is intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a unit of government by intimidation or coercion; or (iii) affect the conduct of a unit of government by murder, assassination or kidnapping.\textsuperscript{52}

A “specified offense” is defined as a Class A felony offense—a violent felony offense defined in section 70.02 of the Penal Law, including manslaughter, criminal tampering, criminal identity theft,
unlawful possession of personal identification information, or money laundering, and it includes an attempt or conspiracy to commit such offenses. A “specified offense” does not include an offense defined in article 220 (which are drug offenses). Several key phrases, however, such as “intimidate,” “coerce,” and “civilian population,” are not defined.

II. THE NEW YORK ANTITERRORISM STATUTE: APPLICATION V. INTENT

Despite the rushed enactment and the sense of an urgent need for an antiterrorism statute after September 11, the New York statute remained unused for years. It was not until 2007, in the case against Morales, that the statute was used at all. The Bronx District Attorney turned to the New York antiterrorism statute as a possible weapon against gang violence. As discussed previously, the definition of “an act of terrorism” under the New York statute is a “specified offense,” which is intended to: “(i) intimidate or coerce a civilian population, (ii) influence the policy of a unit of government by intimidation or coercion, or (iii) affect the conduct of a unit of government by

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53 N.Y. PENAL LAW § 490.05(3)(a). Section 70.02 defines a violent felony offense as any Class B, C, D, or E violent felony offense. Id. § 70.02. Specified offenses do not include offenses in section 490.37—criminal possession of a chemical weapon or biological weapon in the third degree; section 490.40—criminal possession of a chemical weapon or biological weapon in the second degree; section 490.45—criminal possession of a chemical weapon or biological weapon in the first degree; section 490.47—criminal use of a chemical weapon or biological weapon in the third degree; section 490.50—criminal use of a chemical weapon or biological weapon in the second degree; or section 490.55—criminal use of a chemical weapon or biological weapon in the first degree. See id. § 490.05(3)(b).

54 Id. § 490.05.

55 See id.

56 See Williams, New Terrorism Statute, supra note 9. To this day, New York’s Antiterrorism statute has never been used against political terror attacks, such as attempts or threats to bring down the government. See Stashenko, supra note 24. Meanwhile, in other states, prosecutors have had limited success using their antiterrorism statutes against local criminals. In Virginia, the antiterrorism statute was used successfully in a case against a serial sniper shooter who targeted his victims randomly in several states in the Washington, D.C. area. See generally Muhammad v. Commonwealth, 619 S.E.2d 16, 24, 34–38 (Va. 2005). The court held that the defendant, the man who orchestrated the shootings, committed acts of terrorism under the statute, which has similar wording to the New York statute. See id. at 37; see also VA. CODE ANN. § 18.2-46.4 (2009). The Ohio antiterrorism statute was used against a school shooter at Case Western Reserve University in Cleveland—though the charge of terrorism was later dropped. See McIntyre, supra note 18, at 203–04 & n.11.
murder, assassination or kidnapping. This Note focuses on the language of the first subsection of the definition, “intimidate or coerce a civilian population,” the crime for which gang member Edgar Morales was charged.

A. “Unanticipated Application”\textsuperscript{58}: The New York Antiterrorism Statute Applied to a Mexican Gang Member in the Bronx

Edgar Morales is a member of the St. James Boys, a group of one hundred recreational soccer players who formed a street gang of Mexicans and Mexican-Americans in the West Bronx.\textsuperscript{59} The St. James Boys is a local gang that does not carry out drug sales or run prostitution or gambling rings; the sole purpose of the gang is to enhance its own power and status in its small Mexican community in the West Bronx.\textsuperscript{60} Edgar Morales was present the day a gang fight erupted at a baptism in 2002, a fight that lead to the death of an innocent young girl.\textsuperscript{61} For this crime, nineteen members of the St. James Boys were charged with terrorism; however, some reached plea deals with the District Attorney’s Office and others fled back to Mexico.\textsuperscript{62} Edgar Morales, a former construction worker, was the only member of the St. James Boys who went to trial.\textsuperscript{63}

Morales was arrested four days after the shooting, charged with criminal trespassing and tampering with physical evidence, and served eleven months in jail.\textsuperscript{64} He was also charged with the murder of the young girl at the baptism after Enrique Sanchez, a fellow member of the St. James Gang who was present the day of the killing, pleaded guilty and became a cooperating witness.\textsuperscript{65} Morales was convicted of four acts of terrorism, and, as a

\textsuperscript{57} N.Y. PENAL LAW § 490.05(1)(a); see supra text accompanying notes 51–55.
\textsuperscript{58} Senator Balboni said that Bronx District Attorney Johnson’s use of the statute was an “unanticipated application” but refused to say whether he supported the use against gang members. Williams, \textit{New Terrorism Statute, supra} note 9.
\textsuperscript{59} See id. At trial, a member of the St. James Boys testified that the purpose of their existence was to be the most feared of all Mexican gangs. Bronx District Attorney, Dec. 10, 2007, supra note 16.
\textsuperscript{60} See Williams, \textit{New Terrorism Statute, supra} note 9.
\textsuperscript{61} See id.
\textsuperscript{62} See id.
\textsuperscript{63} See Gardiner, \textit{supra} note 2.
\textsuperscript{64} Id.
\textsuperscript{65} Id.; see also Resp’t Br., \textit{supra} note 39, at 12 (explaining why the charges of terrorism brought against Edgar Morales do not violate the principles of double jeopardy for the crimes committed in August 2002).
result, he was subject to enhanced sentencing for his underlying crimes. He was sentenced on December 10, 2007, to two consecutive prison terms of twenty years to life.

B. "Urban Terrorism": A Textual Argument

Prior to the trial, the defendant, Morales, argued for dismissal of the crime of terrorism charge, alleging that he was denied his due process rights; he claimed that he could not reasonably understand that his conduct fit within the statute’s prohibition. Morales argued that the concept of terrorism should be limited to acts of political motivation, commonly committed by international terrorist organizations, and therefore, it was inappropriate for him to be convicted under the statute.

The Bronx District Attorney justified the use of the statute against the local gang member by arguing that since the statute is clear in the conduct it prohibits and since Morales's conduct fits within the prohibited conduct, he could be charged as a terrorist. Moreover, the District Attorney supported his unorthodox application of the statute by arguing that the statute did not create any new prohibited behavior but merely enhanced the punishment for already criminal conduct.

The District Attorney argued that the behavior of the gang fits squarely within the statutory language for two reasons. First, the crimes Morales committed, including manslaughter and possession of a weapon, were specified offenses within the statute. Second, the gang members committed these specified

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66 See Bronx District Attorney, October 31, 2007, supra note 1.
68 See Resp't Br., supra note 39, at 3.
69 See id. at 6–9. Morales also moved to dismiss on the grounds that the prosecutor failed to properly instruct the grand jury as to some of the charges and on the grounds that the charge equated to double jeopardy because he had already been charged with other crimes relating to the incident. Id. at 1.
70 See id. at 2.
71 See id. at 2–3.
72 See id. at 4–5. The District Attorney also responded to the argument that the defendant raised with two other points: First, the statute is more than symbolic and, second, the case against Morales is not double jeopardy. See id. at 2, 12. The double jeopardy argument will not be discussed as it is beyond the scope of this Note.
73 See id. at 4–5.
offenses with the intent “to intimidate or coerce a civilian population,” thereby placing their actions under the statutory definition of a crime of terrorism.\textsuperscript{74}

Morales, however, argued that the phrase “to intimidate or coerce a civilian population” is unconstitutionally vague, and consequently, he was not on notice that he committed a crime of terrorism.\textsuperscript{75} The District Attorney responded that the words “intimidate” and “coerce” are common words, and applying principals of statutory construction—since there is no definition within the statute—the words should be given their ordinary and everyday meanings.\textsuperscript{76} The definition of intimidate is to make timid or fearful.\textsuperscript{77} Coerce has several common definitions: to restrain or dominate by force, to compel to an act or choice, and to achieve by force or threat.\textsuperscript{78}

Applying these common meanings, the Bronx District Attorney argued that the St. James Boys “intimidated” and “coerced” those living in the Bronx.\textsuperscript{79} At the time of the conviction, the St. James Boys was one of the most aggressive and violent Mexican gangs in the Bronx.\textsuperscript{80} During the trial, Detective James Shanahan of the NYPD’s Bronx Gang Unit testified about the St. James Boys’ violent actions in the Bronx over the years, including a description of how they had fired shots into a crowd of Mexicans who were on their way to a birthday at a hall in St. Nicholas of Tolentine Church on February 21, 2004.\textsuperscript{81} The gang enacted a systemic campaign of intimidation in which members preyed upon law-abiding citizens of Mexican origin.\textsuperscript{82} Morales, however, argued that the gang’s

\textsuperscript{74} See Bronx District Attorney, Oct. 31, 2007, supra note 1. District Attorney Johnson declared that the “terror perpetrated by organized gangs . . . also fits squarely within the scope of this statute.” Id.

\textsuperscript{75} See Resp’t Br., supra note 39, at 6. However, Morales failed to provide examples of phrases in other statutes that have previously been determined to be improperly vague, as the District Attorney argued. Id.

\textsuperscript{76} Id. at 6–7; see also N.Y. PENAL LAW § 5.00 (McKinney 2010) (“[T]he provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law.”).

\textsuperscript{77} See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 656 (11th ed. 2007).

\textsuperscript{78} See id. at 240.

\textsuperscript{79} Resp’t Br., supra note 39, at 6–9.

\textsuperscript{80} See Bronx District Attorney, October 31, 2007, supra note 1.

\textsuperscript{81} See id.

\textsuperscript{82} See, e.g., Williams, New Terrorism Statute, supra note 9. At Morales’s trial, the prosecution introduced evidence of at least nineteen specific prior acts of violence committed by the gang members from 1999 to 2002 as a part of this pattern of
activities were not terrorism because they lacked the necessary political and international motivations.\textsuperscript{83} While the District Attorney admitted that the motive for the gang's crimes was not political, he insisted that the St. James Boys were "not 'common street thugs'... [and w]hat they [were] engaging in [was], indeed, terrorism."\textsuperscript{84}

In addition to debating whether Morales's actions were done with intent to intimidate or coerce, the prosecution and defense argued over whether the target of the alleged intimidating and coercion was a "civilian population" as required by the statute.\textsuperscript{85} In the statute, the target of the act of terrorism is defined as a "civilian population."\textsuperscript{86} Once again, there is no statutory definition for this phrase. The Bronx District Attorney defined a civilian population as "hard working, law abiding citizens, including fellow immigrants from Mexico."\textsuperscript{87} This immigrant Mexican population is restricted to a subsection of the Bronx; the District Attorney seemed to argue that the smaller the civilian population, the better fit for the statute.\textsuperscript{88} In contrast, the defendant argued that attacks must be used to intimidate a broader civilian population, such as the Jewish population or Americans in general.\textsuperscript{89}

\section*{III. THE NEW YORK ANTITERRORISM STATUTE SHOULD NOT APPLY TO LOCAL GANG MEMBERS}

The New York antiterrorism law was inappropriately applied to a Mexican gang member in the Bronx for several reasons. First, the statute is vague and its application to
Morales violated his due process rights. Secondly, the legislature, enacting this statute immediately after 9/11, intended it to deal with international Al Qaeda-like terrorist groups. Thus, local street crime, including gang violence, should not fall within the reach of the statute. New York gang statutes must adequately address the problem of gang related crimes, like the crime that occurred in People v. Morales. This Note proposes possible solutions for the overly broad New York antiterrorism law by clarifying the text to narrow the potential reach of the statute to only politically motivated terrorism.

A. New York Terrorism: A Vague Statutory Concept

The New York antiterrorism statute is overly broad, leading to possible unconstitutional applications. Specifically, the phrase “intimidate or coerce a civilian population” is vague because it fails to clarify who constitutes a “civilian population”—the required target in the first subsection of the definition of a crime of terrorism.\(^9\) Thus the statute fails to provide notice sufficient for an ordinary person to understand what conduct is prohibited. Moreover, the vague statute creates the potential for arbitrary and discriminatory enforcement.

The New York Penal Code does allow for broad interpretations of its statutes, as explained in section 5.00, which provides that “the general rule that a penal statute is to be strictly construed does not apply to this chapter.”\(^{91}\) However, included in this provision is the caveat that the provisions herein “must be construed according to the fair import of their terms to promote justice and effects the objects of the law.”\(^{92}\)

“Civilian population” does not have a common, every day meaning, which would be helpful when interpreting this phrase to the “fair import” of its terms.\(^{93}\) Thus, this statute fails to

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\(^9\) See N.Y. PENAL LAW § 490.25(1).

\(^{91}\) Id. § 5.00.

\(^{92}\) Id.

\(^{93}\) See id. Morales provided a New York case, People v. Bright, 71 N.Y.2d 376, 520 N.E.2d 1355, 536 N.Y.S.2d 66 (1988), as binding precedent for an unconstitutionally vague statute. See Resp’t Brief, supra note 39, at 5. This case involved a loitering statute, section 240.35 of the Penal Law, which the court held unconstitutionally vague under the Due Process Clauses of both the Federal Constitution and state constitution because the statute failed to give fair notice to the ordinary citizen that the prohibited conduct was illegal; it lacked minimal legislative guidelines, thereby permitting arbitrary enforcement; and, finally, it
provide notice sufficient for ordinary people to understand what conduct it prohibits. Nowhere in the New York antiterrorism statute is the term “civilian population” defined. According to Merriam-Webster’s Collegiate Dictionary, “civilian” means “one not on active duty in the armed services or not on a police or firefighting force.” However, the more troubling term in this phrase is “population.” According to Merriam-Webster’s Collegiate Dictionary, population can mean anything from “the total of individuals occupying an area or making up a whole” to “the whole number of people or inhabitants in a country or region.” Therefore, when combined, the phrase “civilian population” has no specific single size, composition, or definition.

The phrase “civilian population” can have different meanings depending on different perspectives. A civilian population can be all the people in New York City, just those who live in the Bronx, or just those who live on a single block—it can even be argued that a civilian population can be only two people. A defendant may be unaware that his intended actions are terrorism if he does not know that he has affected a “civilian population.”

required that a citizen relinquish his constitutional right against compulsory self-discrimination to avoid arrest. Bright, 71 N.Y.2d at 378–79, 520 N.E.2d at 1356, 536 N.Y.S.2d at 68.

94 See City of Chicago v. Morales, 527 U.S. 41, 56 (1999). This case provides an example of a statute that was deemed unconstitutional because it was vague. It involved the enactment of the “Gang Congregation Ordinance” by the Chicago City Council, which prohibited criminal street gang members from loitering in a public place. Id. at 45. The Supreme Court held that this statute was unconstitutionally vague, violating the Due Process Clause of the Fourteenth Amendment because the statute lacked a clear definition of “loitering.” Id. at 56–57; see also Reuven Young, Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Domestic Legislation, 29 B.C. INT’L & COMP. L. REV. 23, 69 (2006) (explaining the importance of including a precise definition of what constitutes unlawful conduct in an antiterrorism statute).

95 See N.Y. PENAL LAW § 490.05.

96 MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 77, at 226. The civilian victims of the September 11 attacks are a good example and have been described as “innocent in the commonly accepted sense that they were civilians carrying out their day-to-day business without the intent to harm others.” Hidemi Suganami, Reflections on 11 September, in 11 SEPTEMBER 2001: WAR, TERROR AND JUDGEMENT 3–4 (Bülent Gökay & R.B.J. Walker eds., 2003) (emphasis added).

97 MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 77, at 966.

98 See McIntyre, supra note 18, at 220–21 (explaining the lack of definition of “civilian population” in the Ohio antiterrorism statute). “Therefore, absent clear standards regarding the population to be considered, the civilian population affected under the Ohio terrorism statute may constitute only two people, an entire town, the county, the state, or maybe even the entire country.” Id.
Therefore, under the present language of the statute, many criminals who commit "specified acts" could be deemed terrorists, and thus be subject to enhanced sentencing provisions without their knowledge.\footnote{Resp't Br., supra note 39, at 5. A narrow definition acts as a "gatekeeper" to invasive police power, whereas a broader definition has the effect of conferring greater powers on the police. See Young, supra note 94, at 70.}

In addition to the lack of notice, a vague statute also creates the possibility of arbitrary and discriminatory enforcement by law enforcement officials.\footnote{See N.Y. PENAL LAW §§ 490.05, 490.25.} A valid statute establishes minimum guidelines to govern law enforcement officials on the correct application of the law; in the absence of minimum guidelines, law enforcement and government officials can choose whom to prosecute based on the accused's views and politics, thus creating the possibility of abuse.\footnote{See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 45 (5th ed. 2009).} \footnote{See id. at 45–47.} The New York antiterrorism statute fails to provide minimal guidelines for what exactly can be construed as an act of terrorism because of the lack of definition of a "civilian population," which leaves it up to police, prosecutors, and juries to follow their own predilections when defining the term however broadly or narrowly they choose.\footnote{See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 942 (3d ed. 2006).}

The possibility of arbitrary enforcement of the statute is particularly problematic because an important feature of the provision is sentence enhancement.\footnote{See N.Y. PENAL LAW § 490.25(2).} Prosecutors are able to use this statute to enhance the sentence for ordinary local crimes that involve "intimidation" or "coercion" of whatever "civilian population" they see fit, diluting the definition of terrorism. Therefore, even if the crime adequately fits under another statute, the prosecutor can also attempt to apply the terrorism statute to reach the maximum sentence possible.\footnote{This could lead to potential prosecutorial abuse if the statute is applied for its sentence enhancement and not because it is actually a valid crime of terrorism. Robert Perry, the NYCLU legislative director, stated that "Extending the[se] authority [of terrorism prosecutions] to local law-enforcement will almost certainly exacerbate the injustice." Press Release, NYCLU, NYCLU Opposes State Terrorism Legislation—Charging the Law Poses New Threat to Rights and Liberties (July 21, 2004) http://www.nyclu.org/node/471.} However, the legislative purpose of the New York antiterrorism statute is to
combat politically motivated terrorist attacks, similar to the attacks on September 11. The context of the enactment of the statute and the text of the statute reflect this intent and demonstrate that this statute should not be used against local criminals.

B. Solutions for the New York Antiterrorism Statute

The statute needs to be amended to accurately reflect its intended purpose—the punishment of political terrorists—and to prevent the possibility of unjust application. To prevent future misapplications of the statute and to bring it in line with its intended purpose, textual clarifications are necessary. First, the target in the first prong of an act of terrorism, a “civilian population,” must be clarified to prevent further unintended and unconstitutional applications.\(^{106}\) Second, an international aspect must be added to the definition of an act of terrorism, which will prevent the inclusion of local street crimes. Ultimately, an act of terrorism should be an act of political terrorism—one in which the ultimate target is the government and the actions are international in scope. This new political, international standard will reach Al Qaeda but exclude local street criminals, such as gang members, murderers, and mobsters.

To focus the statute on political terrorism, the terms “to intimidate or coerce a civilian population” must be clarified in two ways. First, it must be clear that there is an ultimate political goal in undertaking the acts against the civilian population. Second, the civilian population must be defined in a manner that reflects the legislative intent that the act target a sufficiently broad range of people, not a small, specific subsection.

The attack against the civilians must have a broader political goal than terror for personal gain or terror in and of itself. This Note discusses the vagueness of the first prong of the definition, to “intimidate or coerce a civilian population.”\(^{107}\) The other two alternative prongs of the definition of crime of terrorism avoid vagueness by having a political target and motive in their definitions. The second prong provides that one commits a crime of terrorism when one “influence[s] the policy of

\(^{106}\) N.Y. PENAL LAW § 490.05(1)(a)(i).

\(^{107}\) Id.
a unit of government by intimidation or coercion” and the third is when one “affect[s] the conduct of a unit of government by murder, assassination or kidnapping.”108 Both are clearly political in nature. Conversely, the first prong of the definition uses the phrase “civilian population” as a target and does not include any mention of a political motive or target.109 Therefore, this prong must include some reference to a political motive to avoid misapplications of the statute, perhaps with the inclusion of “a unit of government” as the ultimate target. Thus, a more valid wording would provide that an act of terrorism is an act intended to “intimidate or coerce a civilian population with the intent to influence or affect a unit of government.” This brings a necessary political motive to the first prong of the definition of an act of terrorism.

Additionally, the phrase “civilian population” must not be construed to mean a very narrowly defined group of people, which would allow for an overly broad application of the statute. A “civilian population” cannot be a small subsection of a community and cannot be too limited in terms of geography or ethnicity. Instead, the preferred definition of a civilian population would be a “community rather than a narrowly defined group of people,” as defined by the Virginia Supreme Court when applying its antiterrorism statute to a sniper shooter.110 A community must be a large enough group of people that the act of terrorism inflicts “mass violence” and has psychological effects that go beyond a local, isolated incident.111

Finally, there must be an international aspect to the crime committed; it must “transcend national boundaries in terms of

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108 Id. § 490.05(1)(a)(ii)–(iii) (emphasis added).

109 Id. § 490.05(1)(a)(i).

110 See Muhammad v. Virginia, 619 S.E.2d 16, 43 (Va. 2005). The court interpreted the Virginia antiterrorism statute’s intended target—“population at large”—which is comparable to “civilian population” in the New York antiterrorism statute. See id.

the means by which [the acts] are accomplished" or the actors involved. This international aspect would be an important but not a determinative, factor in classifying the defendant as a terrorist.

Using a political standard in defining an act of terrorism captures the terrorist's fundamental political aims: either to overthrow or change dominant political systems. Even if the civilians are the immediate targets of violence, the ultimate target is the nation’s very existence. The New York legislature recognized this when it described the 9/11 attacks, the catalyst for creating the statute, as attacking “[t]he very principles of American freedom” and attempting to destroy American’s “most sacred ideals” and “threaten the peace.” Deeper political motives run through every act of terrorism, even those that affect primarily innocent civilians. Therefore, for an act to be considered terrorism under this new standard of political terrorism, the act of terrorism must have a political motive, affect a civilian population that is sufficiently broad, and transcend national borders.

C. Test of the Political Terrorism Standard

The clarified standard of political terrorism will help to prevent some local, specific crimes from being classified as acts of terrorism, while still capturing those intended by the legislature. Below are illustrations of the application of the political standard of terrorism.

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112 USA PATRIOT Act of 2001, 18 U.S.C. § 2331(1)(C) (2006). The definition of terrorism in this Act is very similar to the New York antiterrorism statute. See id. This provision provides that an act of terrorism must “appear to be intended[:] (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping . . . .” Id. § 2331(1)(B). The definition of domestic terrorism is closer to what the New York legislature adopted, but this Note suggests the adoption of a definition of international terrorism, even for local terrorism acts. See id. § 2331(5).


114 John Alan Cohan, Formulation of a State's Response to Terrorism and State-Sponsored Terrorism, 14 PACE INT’L L. REV. 77, 84–85 (2002); see also HENDERSON, supra note 111, at 4.

1. A Member of Al Qaeda

A man is working for Al Qaeda, a group that is vocally anti-American and prone to violence.\(^{116}\) An active member of the group, this man agrees to aid in an attack on a subway in New York City during rush hour in the morning. He places a bag in the subway with a bomb, and it explodes after he retreats to safety. The attack kills hundreds of people and causes extensive damage to the subway system. Is the bomber a terrorist?

This act has political motives because of the desire to attack and destroy American political, social, and economic ideals. The actor achieved these goals by harming innocent civilians. The target of this crime, New Yorkers who are commuting on the subway, is a valid civilian population because it is large enough and not too specific. This crime is international because the Al Qaeda terrorist structure is international.\(^{117}\) Al Qaeda has been responsible for many attacks against the United States, here and around the world, including on September 11.\(^{118}\) Given these factors, this act would be considered a traditional act of terrorism and would be considered terrorism under the political terrorism standard.

2. School Shooter\(^{119}\)

A high school student is continually bullied and wants revenge on the students who have been tormenting him at school. One day, he comes to school with a gun and opens fire on his classmates, killing several and wounding others. Is the school shooter a terrorist?

This crime does not have a political motive; the shooter was motivated by a desire for revenge and does not have any deeper political motives. While tragic, his crime only affected a small,

\(^{116}\) Al Qaeda was established in Afghanistan, by Osama bin Laden, a Saudi Arabian millionaire, around 1990, with an anti-American platform. See Henderson, supra note 111, at 50–51. For example, bin Laden regularly broadcasted his hatred for America and its people, calling for Muslims to unite to kill U.S. citizens around the world. See id. at 50.

\(^{117}\) See id.

\(^{118}\) The U.S. government declared Al Qaeda, and specifically bin Laden, the “prime suspect” for the attacks against the World Trade Center and the Pentagon, as well as for attacks on the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. See id.

\(^{119}\) See generally McIntyre, supra note 18 (examining the Ohio antiterrorism statute and its application to a school shooter).
localized group, not a civilian population. The population affected must be more than just a small, specific subsection of society in order to be classified as terrorism under the political terrorism standard. Finally, this would not be an international crime because the student worked alone in a local manner. Under the new clarified language of the political terrorism standard, this school shooter would not be considered a terrorist. The school shooter, however, could be considered a terrorist under the current statutory definition if the court held that a “civilian population” included the people present in the school that day.

3. The St. James Boys

Under the current statutory definition of terrorism, a Bronx Court held that the St. James Boys were terrorists.\(^\text{120}\) These gang members, however, would not be considered terrorists under the political terror standard.

First, the gang’s acts are not politically motivated. While gangs may attempt to control a particular community, the scope of the gang members’ crimes is small and tends to affect only a partial subsection of society, not the community at large or the government. Also, gang members, along with other local criminals, usually have selfish goals, such as the acquisition of power or material goods; gang crimes do not have larger political purposes.\(^\text{121}\) In contrast, terrorists tend to see themselves as altruists, working for the greater good—a distinction often separating terrorist activity from everyday local criminal activity.\(^\text{122}\) There must remain a difference between criminals who, motivated by ego or other malignant personal desires, “terrorize,” and actual “terrorists.”\(^\text{123}\) Intertwining the two trivializes terrorism and leads to unconstitutional applications of the statute.\(^\text{124}\)

Second, the St. James Boys did not target a civilian population within the meaning of the statute. In the Morales

\(^{120}\) See generally Bronx District Attorney, October 31, 2007, supra note 1.

\(^{121}\) See LaFree & Dugan, supra note 113, at 59.

\(^{122}\) See id. at 59–60.


\(^{124}\) See id.
case, the gang targeted only people of Mexican descent in a very specific area of the West Bronx—north of Yankee Stadium. This target is too small and too specific to be a "civilian population" in the statutorily intended sense of the phrase, which envisions a numerically larger interpretation of "civilian population." For example, if the St. James Boys had targeted any and all civilians in the Bronx, this would more validly fit within the definition of "civilian population."

Finally, the crimes of the St. James Boys did not “transcend national boundaries in terms of the means by which they [were] accomplished.” Their crimes were local, affecting Mexicans in their neighborhood only; they did not even venture to other parts of the Bronx or New York City. Although many gang members fled to Mexico, the flights were based on personal ties and did not help with the actual commission of the street crimes. Therefore, under the political terrorism standard, the St. James gang would not be terrorists.

IV. GANGS OF NEW YORK: NO CURRENT EFFECTIVE STATUTORY SOLUTION

The solution to the increasing gang violence in New York is to strengthen gang statutes, not increase the use of the statute. Currently, New York does not have laws specifically designed to effectively combat gang crimes. For example, there are no

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125 See Williams, New Terrorism Statute, supra note 9. Only those identifiable as being of Mexican origin were targeted; everyone else was left alone. Id.

126 See N.Y. PENAL LAW § 490.05 (McKinney 2010). In contrast to what this Note contends, the Bronx District Attorney argued that because the St. James Boys defined their targets so narrowly, the targets were definitely within the “civilian population” statutory framework. See Resp’t Br., supra note 39, at 11.

[T]he proof established that the victims of the defendants’ actions, specifically and exclusively, were Mexicans or Mexican-Americans. Moreover, it was not even the Mexican population of the entire state, city, nor even the Mexican population of the entire Bronx; the defendants restricted their victims to Mexicans who were within the geographic limitations of that area of the Bronx which the defendant[s] attempted to claim as their area of domain.

Id.


sentence enhancement penalties for gang-related crimes in New
York that would allow a defendant who commits a crime as a
gang member to be sentenced more harshly than a nongang
member who commits a similar crime. Moreover, the lack of
uniform laws in New York for gang crimes leads to unreliable
statistical information regarding gang-related crimes because the
cri mes do not get recorded distinctly as "gang crimes." This
creates misleading information about the frequency of gang
violence in New York. Furthermore, the laws that prosecutors
use to punish gang members are not specific to gang violence,
and therefore, do not address specific issues relating to gangs,
such as solicitation or recruitment of gang members. Recently,
New York has seen an increase in violent street gangs of all
nationalities in all parts of the state, which validates the need for
gang-specific statutes.

A. The Lack of Comprehensive Gang-Related Statutes in New
York

New York lacks comprehensive legislation addressing gang-
related activity. The New York Penal Law has only two statutes
addressing gang violence, and these deal only with gang
assault. Additionally, the only definition of gang activity in

http://www.worldcat.org/arcviewer/1/AO%23/2009/04/02/H1238693215513/viewer/file
37.pdf.

129 See, e.g., CAL. PENAL CODE § 186.22 (West 2010) (providing that when a
"pattern of criminal gang activity" has been proven, the defendant will be punished
for the underlying crime if it is enumerated in the statute subject to enhanced
sentencing).

us/leg/?default_fld=&bn=A05637&Memo=Y.

131 See id.

132 See id. As of 2007, there were approximately 15,000 gang members in New
York, with the number of Mexican gang members on the rise. See Brad Hamilton,
Gangs of New York—A Breakdown of Gotham's Most Nefarious Street Gangs and
Their Turfs, N.Y. POST, Oct. 28, 2007, at 22. Other gangs in New York, along with
their ethnic groups, include the Crips—mostly African-American; MS-13—mostly
Salvadoran, but also Honduran, Guatemalan, Ecuadorian, and Mexican; Vatos
Locos—Mexican; Latin Kings—mostly Puerto Rican, but includes Hispanics of all
kinds; the Bloods—African-American; Netas—mostly Puerto Rican; Niños Malos—
Mexican; Dominicans Don't Play—Dominican; the Trinitarios—mostly Dominican;
and the Flying Dragons—Chinese. Id.

133 See N.Y. PENAL LAW §§ 120.06-.07 (McKinney 2010).
New York law is found outside of the Penal Code, in an administrative code—the New York Compilation of Codes, Rules and Regulations. The New York Penal Law contains gang assault provisions in sections 120.07 and 120.06—gang assault in the first and second degree, respectively. Both statutes contain similar language: The statutes provide that “A person is guilty of gang assault when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person.” While indirectly addressing gang activity, these statutes do not use the terms “gang member” or “gang activity” and, consequently, do not address gang violence directly. Rather, these statutes are generally applicable to any group of people, meaning more than one person, who collectively commit the crime of assault.

These statutes do not adequately address gang violence. First, the statutes do not define “gang” or “gang member,” which leads to uneven application by prosecutors against gang members. Second, the prosecutor must prove that there was serious physical injury to the victim and must prove that the intent to commit serious physical injury was present, which narrows the reach of the statute. Third, because at least three people must participate in the assault, the statute’s applicability is further narrowed. Finally, because these statutes only deal with assault, the New York Penal Code neglects to address many other crimes—including violent felonies—that gang members commit.

The Official Compilation of Codes, Rules & Regulations of the State of New York contains definitions for some gang-related terminology as part of its “Executive Department Title,” in a section regarding the use of state property. This provision lists

134 N.Y.C.R.R. tit. 9, ch. IV, § 301.3 (2010).
135 N.Y. PENAL LAW §§ 120.06—07.
136 Id. § 120.06 (emphasis added) (second degree gang assault). To be guilty of gang assault in the first degree, one must intend serious physical harm. Id. § 120.07.
137 See id. § 120.07.
138 See Bart H. Rubin, Note, Hail, Hail, The Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute, 66 FORDHAM L. REV. 2033, 2043 (1998). “In sum, if only two actors commit gang assault, [or] if only physical injury is caused, . . . the gang assault statute loses its bite.” Id. at 2044.
139 N.Y.C.R.R. tit. 9, ch. IV, § 301.3.
activities, including "gang activity," that are not allowed on state property. "Gang activity" is defined as "the commission by a gang member, in a singular commission, attempt to commit, conspiring to commit, or the solicitation of a criminal act, on State property in the presence of two or more other gang members." A "gang" is defined as "any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more criminal acts . . . and whose members individually or collectively engage in or have engaged in a pattern of gang activity." The term "gang member" is defined as one "who is part of, associated with, or otherwise affiliated with a gang."] Helpful as these definitions may be, they exist solely in this administrative document—referencing prohibited activity on state property—and are not useful to a prosecutor charging a gang member with a felony.

B. Example of a Comprehensive Gang-Related Statute: California

In contrast to New York, many states have statutes in their criminal law codes that relate specifically to gang-related activities and define key terms; California is such a state. California enacted the Street Terrorism Enforcement and Prevention Act of 1988 to deal with its extensive gang population. The definition for "participation in a criminal street gang," one of the crimes created under this act, provides that:

140 Id.
141 Id. § 301.3(d)(3).
142 Id. § 301.3(d)(1).
143 Id. § 301.3(d)(2).
145 See id. at 11, 22–23. In Los Angeles alone, gang membership is estimated to be at least 150,000—compared to 15,000 in New York City. See Hamilton, supra note 132, at 22.
Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.\footnote{Id. § 186.22(a).}

This California statute provides definitions for both “pattern of criminal gang activity” and “criminal street gang.”\footnote{Id. § 186.22(e)–(f). The statute defines a “pattern of criminal gang activity” as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, . . . and the offenses were committed on separate occasions, or by two or more persons.” Id. § 186.22(e). These offenses are enumerated in the statute and include, for example, assault with a deadly weapon. Id. The statute defines “criminal street gang” as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated[,] . . . having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. Id. § 186.22(f).}

Furthermore, there is a detailed sentencing enhancement scheme for punishing defendants who satisfy each of the elements of this crime and are convicted of participation in a criminal street gang, potentially enhancing their sentences by an additional ten years.\footnote{See id. § 186.22(b)(1).} California, therefore, provides an example of a sentence enhancing gang statute that is lacking in New York.

C. Non-Gang-Specific New York Statutes Used Against Gang Members

Lacking comprehensive gang statutes, prosecutors in New York have turned to other statutes that apply in an attempt to punish gang-related activities adequately. Prosecutors in New York have used several statutes against gang members for the purpose of sentence enhancement by increasing the number of crimes that are charged to a defendant for specific crimes.
For example, prosecutors can charge gang members with “enterprise corruption,” under section 460.20 of the New York Penal Code. 150 A person is guilty of enterprise corruption when having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he: (a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or (b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or (c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise. 151

This statute focuses on organized criminal activity and can, therefore, be applied to gang members who participate in drug rings or prostitution rings. 152 However, when applied to smaller, less organized gangs striving to gain power and not money, the enterprise corruption statute is not helpful because these gangs do not form any type of enterprise that is punishable under this statute.

Prosecutors can also charge gang members with conspiracy. 153 A person is guilty of conspiracy when, “with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of

150 N.Y. PENAL LAW § 460.20 (McKinney 2010). Enterprise corruption is a Class B felony. Id. This is the state version of the federal racketeering act—the Racketeering Influenced Corrupt Organizations Act (“RICO”). See William C. Donnino, Practice Commentaries, N.Y. Penal Law § 460.20, at 173 (McKinney 2008).

151 N.Y. PENAL LAW § 460.20(1). This statute gives specific guidelines for when a defendant has participated in a pattern of criminal activity; it occurs when, with intent to participate in or advance the affairs of the criminal enterprise, [the defendant] engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that: (a) [t]wo of his acts are felonies other than conspiracy; (b) [t]wo of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and (c) [e]ach of his acts occurred within three years of a prior act. Id. § 460.20(1).

152 See Karen Freifeld, Alleged Drug Boss' Trial: Arguments Today in the Case of the Rockaways 'Regulators', NEWSDAY, Jan. 10, 2000, at A17. The kingpin of the Regulators, a violent gang in New York, was charged with enterprise corruption for the gang's extensive drug activity. Id. It was estimated that the Regulators made one million dollars per year in the 1990s selling cocaine. Id.

153 See N.Y. PENAL LAW §§ 105.00–.35.
such conduct." Additionally, gang members can be charged with accomplice liability, which relates to group gang-related activity. A person is criminally liable for the conduct of another under this statute if, "acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids [another] person to engage in such conduct."

These three statutes are examples of Penal Code provisions that, when applied to gang members, increased the number of crimes that a gang member can be charged with for the commission of a single act. However, these statutes do not escalate the sentence of one crime because they are actually separate crimes, each imposing its own sentence.

D. Current Legislation in New York: Possible Statutory Solutions

Currently, there is a bill in the New York Assembly that addresses gang-related crimes called the Criminal Street Gang Abatement Act. This bill provides new and specific laws that

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154 Id. § 105.00. There are six degrees of the crime of conspiracy in New York State, with conspiracy in the first degree as the most severe crime, which is classified as an A-I felony. Id. § 105.17. This provides that conspiracy be committed "with intent that conduct constituting a class A felony be performed, he, being over eighteen years of age, agrees with one or more persons under sixteen years of age to engage in or cause the performance of such conduct." Id.; see, e.g., People v. Faccio, 33 A.D.3d 1041, 822 N.Y.S.2d 329 (3d Dep't 2006). Here, the defendant, a gang member, was convicted of conspiracy in the second degree because he had "intended" a murder to happen—Class A felony crime—and had agreed with his co-defendants to "engage in or cause the performance of" conduct constituting such felony, although he did not actually commit the murder. Id. at 1042–44, 822 N.Y.S.2d at 330–32. Edgar Morales, the gang member charged as a terrorist under the New York antiterrorism statute, was also charged with conspiracy in the second degree as a predicate, specified offense. See Bronx District Attorney, October 31, 2007, supra note 1.

155 See N.Y. PENAL LAW §§ 20.00–25.

156 Id. § 20.00. This is different from conspiracy because it involves an action on the part of the defendant whether it be to solicit, request, command, importune, or intentionally aid the other person in the commission of their crime. See Faccio, 33 A.D.3d at 1044, 822 N.Y.S.2d at 332 (explaining that the defendant's conduct in the death of the victim was conspiracy but that there was not sufficient evidence of accomplice liability).

157 The current version of this bill has yet to be passed by the New York Legislature and was last revised on January 6, 2010. See N.Y.A. 5637, 231st Sess. (2010), available at http://assembly.state.ny.us/leg/?bn=A05637. This law was originally enacted in 2004 because of the increase in gang related slayings—up eighty percent from 2002–2003 according to NYPD reports. See Press Release,
adequately address gang-related crimes.  It codifies the definitions of “criminal street gang,” “pattern of street gang activity,” and “criminal act,” and it also provides for enhanced penalties for criminal acts committed by a criminal street gang.

This Act creates important crimes specifically related to gang activity such as the crimes of gang solicitation, recruitment or retention, the crime of gang solicitation, recruitment or retention of minors, and the crime of gang solicitation, recruitment or retention of minors on school grounds. Moreover, this Act appropriates funds for schools to initiate gang prevention programs. This Act would also establish a gang violence database and create witness protection programs. Because of the elevated level of punishment and the sentence enhancing provision, this Act has the potential to reduce and deter gang violence and will ultimately be helpful in prosecuting gang members in New York state.

The Bronx District Attorney would have been better served by similar gang violence related statutes when prosecuting the St. James Boys. Instead, the Bronx prosecutors were forced to look outside of the box and creatively turned to the New York antiterrorism statute to enhance the punishment of gang members, fitting their crimes within the overly broad language of the current statute. This New York “urban terrorism” interpretation of the New York antiterrorism statute, however, leaves a troubling precedent—encouraging application of the statute to completely unintended crimes. This underscores the need to revise the statute to avoid additional unconstitutional applications.

Senator Charles E. Schumer, New York, With Gang Killings Skyrocketing in NY, Schumer and Long Island Gang-Slay Widow Unveil Tough New Tools To Fight Gangs (Mar. 21, 2004), http://schumer.senate.gov/new_website/record_print.cfm?id=265501. This law was also spurred by the increasing presence of gang violence in the suburbs. See id. The legislation was also sponsored by Caryn Battaglia, whose husband, Anthony Battaglia, was randomly targeted for robbery and killed by four Latin King members while coming home from work in Long Island. See id.  158 See N.Y.A. 5637, 231st Sess. (2010), available at http://assembly.state.ny.us/leg/?bn=A05637.  159 Id. § 2.  160 Id. This crime would be a Class E felony. Id.  161 Id. This crime would be a Class D felony. Id.  162 Id. This crime would be a Class C felony. Id.  163 Id. § 5.  164 Id. § 2.  165 See id.
The New York antiterrorism statute is unconstitutionally vague and was unjustly applied against a Mexican gang member in the Bronx. The legislative intent and history of the statute, enacted in the aftermath of 9/11, illustrate that the true purpose of the statute is to fight politically motivated terrorism attacks against American ideals and freedoms. What emerged from the rushed legislative process, however, was a statute that has little more than symbolic power due to its latent ambiguities. The statute should be modified to address only acts of political terrorism. Such a clarification will ensure that the statute is used for its intended purpose and not unconstitutionally applied to local street crime, such as gang violence. In addition to improving the statute, New York should focus on passing detailed gang-related legislation, instead of allowing creative and dangerously unconstitutional applications of this current overly broad statute.