2010

"Over-Kill": The Ramifications of Applying New York's Anti-Terrorism Statute Too Broadly

Louis Jim
St. John's University School of Law

"OVER-KILL": THE RAMIFICATIONS OF APPLYING NEW YORK'S ANTI-TERRORISM STATUTE TOO BROADLY

Louis Jim†

CONTENTS

INTRODUCTION

On October 31, 2007, a jury in Bronx County, New York convicted Edgar Morales, a gang member, of manslaughter in the first degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, and conspiracy in the second degree.[1]

---

† J.D. Candidate, 2010, Syracuse University College of Law; M.P.A., 2005, B.A. Political Science, 2004, American University. My sincerest appreciation to Visiting Professor William C. Snyder for his guidance throughout the writing process. I would also like to thank my family for their support throughout my law school career.

1. Press Release, Office of the District Attorney, Bronx County, New York, Gang Member Found Guilty in the Death of a Ten-Year-Old Girl—Jury Finds Fatal Shooting Was a Crime of Terrorism (Oct. 31, 2007), *available at*

Those convictions arose out of a shooting that occurred on August 18, 2002.[2] That night, Mr. Morales and a group of his friends "showed up uninvited at a christening party at St. Paul's Lutheran Church" in New York City.[3] Sometime that evening, "several people commandeered the disc jockey's microphone, and before long a fight broke out, [and gunshots] followed."[4] In the end, Malenny Mendez, a 10-year-old girl, was shot and killed, and Javier Tocchimani, Morales's intended target, was shot and paralyzed.[5]

A gang member being convicted of murder and manslaughter would be nothing new in New York City, but this case was different. This time, the jury found all four offenses to be "crimes of terrorism,"[6] in violation of New York's anti-terrorism statute.[7] This marked the first use of that statute "against members of an organized gang who sought to dominate a neighborhood through their criminal acts."[8] But Mr. Morales is not a member of Al Qaeda or Hamas.[9] Rather, he belongs to the St. James Boys, a street gang accused of robbery, firing shots into crowds, beating and harassing strangers, and harassing rivals with knives.[10]

New York's anti-terrorism statute, codified in article 490 of the state's Penal Law, was enacted on September 17, 2001 in response to the 9/11 terrorist attacks that had occurred just six days earlier.[11] Article 490 created six new offenses and expanded the scope of the death penalty.[12]

Those outside New York may be most familiar with the use of a state-level anti-terrorism statute against John Allen Muhammad, the "Beltway Sniper," who was convicted under Virginia's anti-terrorism statute, which also was enacted after the 9/11 terrorist attacks.[13] The

---

http://bronxda.nyc.gov/information/2007/case59.htm [hereinafter *Gang Member Found Guilty*].

2. *Id.*

3. Timothy Williams, *In Bronx Murder Case, Use of Terrorism Statute Fuels Debate*, N.Y. TIMES, July 8, 2006, at B1 [hereinafter *Bronx Murder Case*].

4. *Id.*

5. *Id.*

6. *Id.*

7. N.Y. PENAL LAW § 490.25 (McKinney 2008).

8. *Gang Member Found Guilty*, *supra* note 1.

9. *Bronx Murder Case*, *supra* note 3.

10. *Id.*; *Gang Member Found Guilty*, *supra* note 1.

11. John Caher, *State Legislature Approves Tough Anti-Terrorism Laws*, N.Y.L.J., Sept. 18, 2001, at 3.

12. *Id.*

13. *See generally* VA. CODE ANN. §§ 18.2-31(13), 18.2-46.4 (2009); Carol Morello,

Supreme Court of Virginia upheld the statute and affirmed Muhammad's death penalty conviction after he challenged the statute as unconstitutionally vague.[14] But New York and Virginia are not the only states to have anti-terrorism statutes; in fact, after the 9/11 attacks, thirty-three states enacted legislation "amend[ing] criminal codes related to acts of terrorism."[15]

Enacted less than a week after the 9/11 attacks committed by fundamentalist Islamic terrorists, it would appear that New York's anti-terrorism statute was not intended to address gang violence. Michael Balboni, the then-New York State Senator who sponsored the legislation, said that he "envisioned 'mass effect' cases of terrorism like the World Trade Center attack and the Oklahoma City bombing in 1995 when he submitted the bill."[16] Some in the Legislature questioned whether article 490 was even necessary at all. State Senator Thomas Duane, who voted against the law, said that these "matters [are] better left to federal authorities."[17] State Assembly Speaker Sheldon Silver called the statute "over-kill."[18] He also called its passage "largely symbolic," and said that he did not expect any prosecutions under the act.[19]

Bronx District Attorney Robert Johnson, when announcing the indictment of Mr. Morales, acknowledged that the "obvious need for this statute is to protect society against acts of political terror," adding that "the terror perpetrated by gangs which all too often occurs on the streets of New York, also fits squarely within the scope of this statute."[20] Senator Balboni called District Attorney Johnson's use of the statute in this way an "unanticipated application."[21]

This Note will examine the potential for the over-application and misuse of New York's anti-terrorism statute. Part I provides some

---

Va. Court Upholds Muhammad Sentences; Sniper Could Be Sent to Another State, WASH. POST, Apr. 23, 2005, at B01.

14. Muhammad v. Commonwealth, 611 S.E.2d 537, 563 (Va. 2005).

15. DONNA LYONS, NAT'L CONFERENCE OF STATE LEGISLATURES, STATES ENACT NEW TERRORISM CRIMES AND PENALTIES 1 (Nov. 2002), *available at* http://www.ncsl.org/Portals/1/documents/cj/terrorismcrimes.pdf.

16. *Bronx Murder Case*, *supra* note 3.

17. Caher, *supra* note 11.

18. *Id.*

19. *Id.*

20. Press Release, Office of the District Attorney, Bronx County, New York, Gang Members Charged with Terrorism for Murder, Assault, and Other Offenses in Effort to Control a Bronx Neighborhood (May 13, 2004), *available at* http://bronxda.nyc.gov/information/2004/case44.htm [hereinafter *Gang Members Charged with Terrorism*].

21. *Bronx Murder Case*, *supra* note 3.

helpful background information, including an overview of the statute and how it has been applied to Mr. Morales and others. Part II discusses the difficulties in defining "terrorism" and how the ambiguous nature of the "definition" may lead to the potential for misusing the statute. Part III analyzes recent cases addressing article 490. Finally, Part IV discusses the ramifications for using the statute too broadly. This Note will conclude by recommending that the Legislature amend the statute to rectify the unintended consequences of the New York anti-terrorism law.

I. OVERVIEW OF ARTICLE 490: THE NEW YORK ANTI-TERRORISM ACT

A. Legislative Findings

In enacting article 490, the New York State Legislature noted that terrorism is "inconsistent with civilized society and cannot be tolerated."[22] The legislative findings mention the 9/11 attacks that destroyed the World Trade Center and badly damaged the Pentagon; the 1998 bombings of the American Embassies in Kenya and Tanzania; the 1995 car bombing of the federal building in Oklahoma City; the 1988 bombing of Pan Am Flight Number 103 over Scotland; the 1997 shooting at the top of the Empire State Building; the 1994 murder of a Hasidic student on the Brooklyn Bridge; and the 1993 bombing of the World Trade Center.[23]

Moreover, the findings acknowledge that, "[a]lthough certain federal laws seek to curb the incidence of terrorism, there are no corresponding state laws that facilitate the prosecution and punishment of terrorists in state courts."[24] The legislative findings further underscore the need in New York for an anti-terrorism law because

> there is . . . no criminal penalty in this state for a person who solicits or raises funds for, or provides other material support or resources to, those who commit or encourage the commission of horrific and cowardly acts of terrorism. Nor do our criminal laws proscribe the making of terrorist threats or punish with appropriate severity those who hinder the prosecution of terrorists.[25]

Further, the Legislature found that the state's "death penalty statute must be strengthened so that the cold-blooded execution of an

22. N.Y. PENAL LAW § 490.00 (McKinney 2008).
23. *Id.*
24. *Id.*
25. *Id.*

individual for terrorist purposes is a capital offense."[26] Finally, the Legislature concluded by stating that a "comprehensive state law is urgently needed to complement federal laws in the fight against terrorism and to better protect all citizens against terrorist acts."[27]

B. Definitions

New York Penal Law section 490.05 defines seventeen terms as they are used in the statute.[28] But only the definitions that are relevant to this Note are mentioned here. Section 490.05 of the New York Penal Law defines an "act of terrorism" as:

> (a) . . . an act or acts constituting a specified offense . . . 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.[29]

Further, for the purposes of the state's murder in the first degree statute,[30] an "act of terrorism" is any activity that

> involve[s] a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are 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.[31]

C. Crime of Terrorism

Section 490.25 of the New York Penal Law defines a "crime of terrorism" as any "specified offense" committed "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."[32] For the purposes of the anti-terrorism statute, a "specified offense" is any class A controlled substances felony offense;[33] any violent felony offense;[34]

---

26. *Id.*
27. N.Y. PENAL LAW § 490.00 (McKinney 2008).
28. *Id.* § 490.05.
29. *Id.* § 490.05(1).
30. *Id.* § 125.27 (McKinney 2009).
31. *Id.* § 490.05(1)(b) (McKinney 2008).
32. N.Y. PENAL LAW § 490.25 (McKinney 2008).
33. *See id.* §§ 220.18, 220.21, 220.41, 220.43 (McKinney 2008).
34. *See id.* § 70.02 (McKinney 2009).

manslaughter in the second degree;[35] criminal tampering in the first degree;[36] identity theft in the first and second degrees;[37] unlawful possession of personal identification information in the first and second degrees;[38] money laundering in support of terrorism in the first, second, third and fourth degrees;[39] and the attempt or conspiracy to commit any of the specified offenses.[40]

Further, under section 490.25, the "gravity" of the new "crime of terrorism" depends on the "nature of the predicate 'specified offense.'"[41] For example, "when the predicate 'specified' offense is a class B, C, D or E felony, the crime of terrorism is classified a violent felony offense." [42] Moreover, the statute increased the penalties of the "specified offenses," when terrorism is involved.[43] The increased penalties are discussed in Part III of this Note.

Bronx District Attorney Robert Johnson, in announcing Edgar Morales's indictment for the "crime of terrorism," alleged that Morales and his gang, the St. James Boys, "conspired to 'intimidate or coerce a civilian population.'"[44] District Attorney Johnson added:

> This indictment paints a picture of an ongoing and systematic campaign of intimidation in which gang members preyed upon hard working, law abiding citizens, including fellow immigrants from Mexico. The purpose of this wanton violence by these defendants was to enhance their status. It is alleged that the defendants attempted to flex the gang's collective muscle by targeting private parties, restaurants and other business establishments.[45]

D. Making a Terroristic Threat

While the primary focus of this Note is on the crime of terrorism, section 490.25 of the Penal Law, a discussion of the portion of the law regarding making a terroristic threat, section 490.20, is useful because it is this section that has received the most attention by New York

---

35. *See id.* § 125.15.

36. *See id.* § 145.20 (McKinney 1999).

37. *See* N.Y. PENAL LAW §§ 190.79-.80 (McKinney 1999).

38. *See id.* §§ 190.82-.83.

39. *See id.* §§ 470.21-.24 (McKinney 2008).

40. *See id.* § 490.25(2)(b).

41. Richard A. Greenberg & Steven Y. Yurowitz, *Analyzing New York's Anti-Terrorism Statute*, N.Y.L.J., May 13, 2002, at 1 [hereinafter *Analyzing New York's Anti-Terrorism Statute*].

42. *Id.*

43. N.Y. PENAL LAW § 490.25(2) (McKinney 2008).

44. *Gang Members Charged with Terrorism*, *supra* note 20.

45. *Id.*

courts.[46] The opinions analyzing this section of the statute provide guidance on how New York courts are likely to apply and interpret article 490. Under section 490.20:

> A person is guilty of making a terroristic threat when 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, 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.[47]

Further, in a prosecution under this section, it is no defense 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."[48]

E. Other Crimes

Finally, article 490 codifies other terrorism-related offenses, including soliciting or providing support for an act of terrorism in the first and second degrees;[49] hindering prosecution of terrorism in the first and second degrees;[50] criminal possession of a chemical weapon in the first, second, or third degrees;[51] and criminal use of a chemical or biological weapon in the first, second, and third degrees.[52]

II. THE POTENTIAL FOR MISUSE

A. The Difficulties in Defining "Terrorism"

A major shortfall in any anti-terrorism legislation is the difficulty in defining terrorism. Many have compared the search for a definition to the quest for the Holy Grail.[53] Most definitions have focused on the

---

46. *See infra* notes 107 and 121 and accompanying text.

47. N.Y. PENAL LAW § 490.20(1) (McKinney 2008).

48. *Id.* § 490.20(2).

49. *Id.* §§ 490.10, 490.15.

50. *Id.* §§ 490.30, 490.35.

51. *Id.* §§ 490.37, 490.40, 490.45.

52. N.Y. PENAL LAW §§ 490.47, 490.50, 490.55 (McKinney 2008).

53. *See* Geoffrey Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986) ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others have failed."); James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L L. & POL'Y 1, 10 (2002) ("[A] . . . definition [of terrorism] remains the Holy Grail of the Terrorism debate."); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 119 (1996)

intent of those labeled terrorists. For example, in 1985, President Ronald Reagan said that terrorists use or threaten violence against innocent persons "to achieve a political objective through coercion or intimidation of an audience beyond the immediate victims."[54] The U.S. Department of State, relying on 22 U.S.C. § 2656f(d)(2), defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[55]

But that definition found in Title XXII of the U.S. Code is just one of many of the definitions of terrorism found throughout federal statutes.[56] These numerous definitions do not all have the same focus. For example, the definitions found in Titles VI (Domestic Security) and XVIII (Crimes and Criminal Procedure) of the U.S. Code, like Title XXII, include a political component, by defining terrorism as "any criminal act" that "appears 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 government by mass destruction, assassination, or kidnapping."[57]

Title VIII (Aliens and Nationality) of the U.S. Code, however, ignores any intent by the "terrorist" to effect political change, and focuses on the type of activity instead.[58] Under Title VIII, a "terrorist activity" is any unlawful act that involves "hijacking or sabotage of any conveyance"; kidnapping and demanding ransom; a "violent attack upon an internationally protected person"; assassination; the use of a biological, chemical, or nuclear weapon or device, or the use of an explosive, firearm, or dangerous device (other than for monetary gain), "with intent to endanger . . . the safety of one or more individuals or to cause substantial damage to property"; or any "threat, attempt or

---

("Adequately defining 'political terrorism,' however, is the Holy Grail of political violence scholarship."). *See generally* Gabriel Soll, *Terrorism: The Known Element No One Can Define*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 123 (2004) (providing an overview of various international, federal, and state attempts at defining "terrorism").

54. National Security Decision Directive No. 207 (Jan. 20, 1986) (partly classified), *reprinted in* CHRISTOPHER SIMPSON, NATIONAL SECURITY DIRECTIVES OF THE REAGAN & BUSH ADMINISTRATIONS 656 (1995).

55. U.S. DEPT. OF STATE, COUNTRY REPORTS ON TERRORISM 311 (2005); *see also* 22 U.S.C. § 2656f(d)(2) (2006).

56. *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 249-50 (2004); *see also* ELIZABETH MARTIN, "TERRORISM" AND RELATED TERMS IN STATUTE AND REGULATION: SELECTED LANGUAGE, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, REPORT NO. RS21021 (2006).

57. 6 U.S.C. § 101(16)(B)(i)-(iii) (2007); 18 U.S.C. § 2331(1)(B)(i)-(iii) (2006).

58. 8 U.S.C. § 1182(a)(3)(B) (2006).

conspiracy to do the foregoing."[59]

"A comprehensive definition of terrorism is inherently difficult because it is such a highly politicized issue."[60] This is especially true in the international community which has struggled to provide one coherent definition of terrorism.[61] In 1994, the United Nations General Assembly described "terrorism" as:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them[.][62]

While international law scholar Antonio Cassese has called that description an "acceptable definition of terrorism,"[63] the United Nations has still not reached a consensus definition.[64] In the summer of 2005, after negotiating for ten years, many thought that the United Nations would finally define the term in expectation of adopting the Comprehensive Convention on International Terrorism.[65] But some governments "sought to exclude from the definition of 'terrorism' actions taken in 'resistance to occupation' and to add language that would reach collateral damage caused by military action."[66] When government leaders, however, met in September 2005 to approve an agenda-setting document, they "avoided these controversies by simply

---

59. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

60. Wayne McCormack & Jeffrey Breinholt, *Defining Terrorism: Perfection as Enemy of the Possible*, INT'L ASSESSMENT AND STRATEGY CENTER, Jan. 17, 2007, http://www.strategycenter.net/research/pubID.141/pub_detail.asp.

61. *See* Levitt, *supra* note 53, at 97-103; *see also* United States v. Yousef, 327 F.3d 56, 106 (2d Cir. 2003) ("We regrettably are no closer . . . to an international consensus on the definition of terrorism or even its proscription."); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L & COMP. L. 391, 391 (2001) ("The problem of defining 'terrorism' has vexed the international community for years.").

62. Measures to Eliminate International Terrorism, G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

63. ANTONIO CASSESE, INTERNATIONAL LAW 259 (2001) ("Three main elements seem to be required: (1) The acts must constitute a criminal offence under most national legal systems (for example, murder, kidnapping, arson, etc.); (2) They must be aimed at spreading terror among the public; (3) They must be politically motivated.").

64. STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 6 (2007).

65. *Id.*

66. *Id.*; *see* Revised Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly (Advanced Unedited Version), U.N. Doc. A/59/HLPM/CRP.1/Rev.2 (Aug. 5, 2005), *available at* http://www.un.org/ga/59/hlpm_rev.2.pdf.

deleting all of the definitional language."[67] And in 2006, a "General Assembly resolution aimed at promoting adoption of a comprehensive convention still lacked a definition of the contentious term."[68]

The struggle to develop an international consensus on the definition of "terrorism" has put Western countries against nations "affiliated with the Organization of the Islamic Conference . . . [who] are looking to carve out of the definition of terrorism activities of armed resistance groups involved in 'struggles against colonial domination and foreign occupation.'"[69]

B. The Definition(s) of Terrorism as Applied to Mr. Morales

As stated in Part I of this Note, New York's anti-terrorism statute defines "terrorism" as a criminal act "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."[70] While one definition found within the statute permits a finding of a terrorist act where the actor's intent was to "intimidate or coerce a civilian population," the legislative findings accompanying the statute appear to focus on the intent of the terrorist to effect political change.[71]

The legislative findings accompanying New York's anti-terrorism statute provide examples of the ambiguities in defining "terrorism."[72] For example, of the seven prior instances of "terrorist attacks" mentioned in the legislative findings,

> at least two of them—"the 1997 shooting atop the Empire State Building" and "the 1994 murder of Ari Halberstam on the Brooklyn Bridge"—were committed by lone gunmen acting spontaneously or opportunistically, perhaps out of anti-Semitic, anti-Zionist or anti-American motives, but neither one would constitute an "act of terrorism" within the meaning [of the statute].[73]

---

67. DYCUS ET AL., *supra* note 64, at 6; *see* General Assembly Draft Outcome Document (Sept. 13, 2005), *available at* http://www.un.org/summit2005/Draft_Outcome130905.pdf.

68. DYCUS ET AL., *supra* note 64, at 6; *see* The United Nations Global Counter-Terrorism Strategy, G.A. RES. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006), *available at* http://www.un.org/terrorism/strategy-counter-terrorism.shtml.

69. McCormack & Breinholt, *supra* note 60.

70. N.Y. PENAL LAW § 490.05(1) (McKinney 2008).

71. *Id.* § 490.00; *see, e.g.*, BRUCE HOFFMAN, INSIDE TERRORISM 40 (2d ed. 2006).

72. *Analyzing New York's Anti-Terrorism Statute*, *supra* note 41. *See generally,* John P. Ludington, Annotation, *Validity and Construction of Terroristic Threat Statutes*, 45 A.L.R.4th 949 (1986).

73. *Analyzing New York's Anti-Terrorism Statute*, *supra* note 41.

Although the Empire State Building shooting and the murder of Ari Halberstam may fall outside the meaning of an "act of terrorism" in the state's statute, those two incidents do evince a "political motive" on the part of the perpetrators. For example, Ali Abu Kamal, the Empire State Building gunman, carried a letter in his pocket stating that he "planned his attack as revenge for the treatment of Palestinians by the United States, Israel and other countries."[74] Further, the U.S. Attorney for the Southern District of New York acknowledged that the actions of Halberstam's murderer were the "'the crimes of a terrorist . . . ,' indicating that the killer had been motivated by political views."[75] Thus, despite the Legislature's inclusion of two incidents that may not ordinarily be classified as "political terror," the fact that that the two shooters in those incidents appeared to have been politically motivated may permit their inclusion in the anti-terrorism statute.

Bronx District Attorney Robert Johnson acknowledged that this statute was meant "to protect society against acts of political terror."[76] But his use of the statute appears to adopt a definition that characterizes terrorism by the level of threat it instills in civilians, and not by the intent to achieve a political goal. Such a definition would be consistent with the definition proposed by counterterrorism experts Wayne McCormack and Jeffrey Breinholt:

> The early American experience with terrorism—the post-Civil War phenomenon of the Ku Klux Klan—indicates that the most salient defining characteristic of terrorism is not the purpose of the terrorist but the threat level represented by the terrorist. It is the level of threat, and the organized nature of the perpetrators, rather than their political motive, that should drive the distinction between terrorism and more common violence.[77]

The jury that convicted Mr. Morales appeared to have accepted this definition—ignoring the political element of the definition—as well. For example, one juror said, "[w]hen you fire a gun into a crowd, whether you hit your intended victim or not, you scare people, you make them fearful for their lives, and that's why, in my opinion, the terrorism charges applied."[78] Another juror who "had been hesitant

---

74. Matthew Purdy, *Empire State Gunman's Note: Kill 'Zionists,'* N.Y. TIMES, Feb. 26, 1997, at A1.

75. *See* Shaila Dewan, *U.S. Decides '94 Attack on Hasidim Was Lone Act*, N.Y. TIMES, Dec. 6, 2000, at B9.

76. *Gang Members Charged with Terrorism*, *supra* note 20.

77. *See* McCormack & Breinholt, *supra* note 60.

78. 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 [hereinafter *Terrorism*

about using the terrorism statute against Mr. Morales when prosecutors presented [the] evidence" changed her mind when Justice Michael A. Gross told them that "terrorism was defined as an act meant to 'intimidate or coerce a civilian population.'"[79] And another juror said, "When we think of terrorism, we think of Sept[ember] 11th, so I was skeptical at first, but when we heard the definition of terrorism—to inflict fear and to dominate—from the get-go we agreed." [80]

C. Prosecutorial Discretion and the Potential for Abuse

A prosecutor's "mission is not so much to convict as it is to achieve a just result."[81]

> [T]o enable a public prosecutor to carry out his heavy responsibility in a fair and impartial manner, we . . . have come to grant the office wide latitude in the allocation of its resources . . . [n]ot the least feature of this flexibility is a discretion to investigate, initiate, prosecute and discontinue broad enough, conceptually and practically, to merit the observation that, overall, more control over individuals' liberty and reputation may thus be vested than in perhaps any other public official.[82]

But prosecutorial discretion, statutory vagueness, and the pressure to prosecute terrorism cases leads to the potential for prosecutorial abuse.[83]

There are already indications that this is occurring with New York's anti-terrorism statute. Although Mr. Morales's conviction marked the first use for section 490.25 (Crime of Terrorism) of the Penal Law, there have been four convictions under section 490.20 (Making a Terroristic Threat) as of April 2007.[84] Moreover, between

---

Law Is Used to Convict Bronx Gang Member].

79. *Id.*

80. *Id.*

81. People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. App. Div. 1980).

82. *Id.*

83. *See* Jackie Lu, Note, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 14 J.L. & POL'Y 377, 385 (2006) ("The pressure to prosecute terrorism cases and the greater prosecutorial discretion tests the safeguards against prosecutorial misconduct."); *see also* Greg Toppo, *Teenagers Who Plot Violence Being Charged as Terrorists*, USA TODAY, June 5, 2006, at 7D (quoting law professor Michael Greenberger who argues that using state-level anti-terrorism statutes against teenagers who plot school shootings achieves nothing other than making it look "like a prosecutor is doing a wonderful job" because "[i]n the end of the year, when [prosecutors] tote up what they've done for terrorism, they include these kinds of cases in it").

84. Joel Stashenko, *Prosecutors Make Widened Use of Terror Threat Law*, N.Y.L.J., June 4, 2007, at 5.

the law's enactment in September 2001 and June 2007 there have been fifty-two arrests "in which making a terroristic threat was the top charge."[85] Of those fifty-two arrests, "[t]hirty-four convictions have been secured in terroristic threat cases but most have been for lesser charges," such as aggravated harassment, disorderly conduct, and falsely reporting an incident.[86]

Critics of the statute argue that it "has been used against ill-tempered people with a gripe against a particular agency or official, defendants who in other times might have been charged with harassment, disorderly conduct or other offenses."[87] Jonathan Gradess, Executive Director of the New York State Defenders Association, an opponent of the using this section too broadly, said, "These are not the guys flying into the World Trade Center . . . . These charges make these cases that are really meaningless into something seemingly far more important than they are. I think we're seeing a pattern of serious charges resulting in de minimis outcomes."[88] He "suspects the terroristic threat charge is sometimes being brought by authorities seeking to 'make a splash' or in hopes of using the charge as leverage to induce a plea to a lesser charge."[89]

Further, Robert Perry, Legislative Director of the New York Civil Liberties Union, warned the state legislature and then-Governor George Pataki in 2001 that the "anti-terrorism package contained excessive penalties and vague definitions of criminal conduct that would allow its misapplication against some defendants."[90] With regard to its use by New York prosecutors, Mr. Perry said, "There are certainly indications . . . that the concerns we raised are real, that in prosecuting a crime that involves intimidation or coercion, prosecutors are bringing terrorism charges for criminal conduct that is often low-level conduct that would usually be charged as a misdemeanor or low-level offense."[91]

D. Statutory Interpretation

In New York, the "primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. Stashenko, *supra* note 84.
90. *Id.*
91. *Id.*; *see infra* Part III.B.

the Legislature."[92] Further, the "primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature. In finding such purpose, one should look to the entire statute, its legislative history and the statutes of which it is made a part."[93]

Since New York's anti-terrorism statute was enacted just six days after the 9/11 terrorist attacks,[94] and since the legislative findings accompanying the statute appear to focus on terrorist attacks perpetrated by those seeking to achieve political goals,[95] it would appear that the statute was aimed at political terror, and not gang violence, despite defining "terrorism" as violence intended to "intimidate or coerce a civilian population."[96]

As stated in Part I of this Note,[97] section 490.20 has received the most use by New York's district attorneys.[98] The legislative memorandum supporting anti-terrorism law states:

> In response to and [sic] insidious trend that is disrupting our institutions and everyday lives, the bill establishes the crime "making terrorist threats". . . . [T]he offense punishes anyone who in furtherance of terrorism threatens to commit or cause to be committed one of the enumerated, serious felonies. To ensure that only conduct which truly terrorizes or alarms civilians is punished, a person is guilty of this offense when he or she causes a reasonable expectation or fear of the imminent commission of a serious felony.[99]

Legal scholars Richard A. Greenberg and Stephen Y. Yurowitz submit that with this provision and the legislative memorandum in support of the provision, the "Legislature has made clear that it intended to punish prank terroristic threats as seriously as real ones."[100] Mr. Greenberg and Mr. Yurowitz note that the "'insidious trend' mentioned in the legislative memorandum undoubtedly refers to the numerous prank threats made in the wake of the World Trade Center attack and similar terrorist actions, threats which have caused severe social

92. N.Y. STAT. § 92 (McKinney 1971).
93. Rankin *ex rel.* Bd. of Educ. v. Shanker, 242 N.E.2d 802, 804 (N.Y. 1968).
94. Caher, *supra* note 11.
95. N.Y. PENAL LAW § 490.00 (McKinney 2008).
96. *Id.* § 490.05 (1)(a)(i).
97. *See supra* Part I.A.4.
98. Stashenko, *supra* note 84.
99. 2001 N.Y. Sess. Laws page nos. 1492, 1494 (McKinney).
100. Richard A. Greenberg & Stephen Y. Yurowitz, *Terrorism-Article 490*, *in* NEW YORK CRIMINAL LAW 1489, 1496 (Richard A. Greenberg ed., 2002) [hereinafter *Terrorism-Article 490*].

dislocation, including the evacuation of numerous office buildings."[101]

If the Legislature's intent was to punish those who threaten, as a prank or otherwise, a terrorist attack on a massive scale, then it would appear that the statute is being used against those whom the Legislature did not intend to punish. For example, Joseph Gaudrault, a forty-four year old man from Saratoga County, was indicted under section 490.20 of the Penal Law after he left a message on an answering machine in Skidmore College where he threatened to kill people.[102] Saratoga County District Attorney James A. Murphy III said that section 490.20 "gave him the option of bringing a felony count against Mr. Gaudrault," implying that he would not have this option without the statute.[103] This is an example of where a district attorney is using the statute against a person who the district attorney does not necessarily believe is the type of "terrorist" that the Legislature envisioned:

> My belief is [Mr. Gaudrault] is *not a terrorist in terms of Al Qaeda, Sept[ember] 11-type of terrorist*. . . . He is quote-unquote a terrorist in terms of a Virginia Tech-type of terrorist. He made reference to Virginia Tech in an implied way in his voice mail. I think anyone who alleges multiple shootings on a college campus should be treated very seriously. *Whether it falls under the definition of a terrorist or not doesn't matter.*[104]

III. RECENT CASES INTERPRETING ARTICLE 490

Commentators have said that "[i]n view of the speed with which it was enacted, New York's new legislation contains ambiguities and raises potential constitutional issues which the New York courts will have to sort out."[105] The only cases thus far that have analyzed any provision of New York anti-terrorism statute focus on section 490.20 (Making a Terroristic Threat). Section 490.20 is the subject of two reported decisions from the Appellate Division of the New York State Unified Court System.[106]

---

101. *Id.* at 1497 n.3.

102. Stashenko, *supra* note 84.

103. *Id.*

104. *Id.* (emphasis added); *see also* Nathaniel Stewart, *Ohio's Statutory and Common Law History with "Terrorism": A Study in Domestic Terrorism Law*, 32 J. LEGIS. 93 (2005) (providing an overview of Ohio's attempt at prosecuting a shooter who engaged in deadly rampage through Case Western Reserve University and a sniper who fired indiscriminately at drivers on an Ohio freeway throughout a four-month period).

105. *Terrorism-Article 490*, *supra* note 100, at 1490.

106. *See infra* notes 107 and 121.

A. People v. Jenner

In *People v. Jenner*, the defendant was convicted of making a terrorist threat, violating New York Penal Law section 490, after threatening the lives of two caseworkers from the Madison County Department of Social Services (DSS).[107] There, DSS employees informed the defendant's girlfriend that they would not reunite her with her biological son because she was cohabitating with the defendant, a convicted sex offender, unless the defendant provided proof that he completed a sex offender treatment program.[108] During an unannounced DSS visit, DSS employees repeated to the girlfriend the DSS policy.[109] The defendant, who overheard the conversation, "became irate," and said,

> I'm sick of [DSS] telling me what to do . . . I'll solve this problem. I'll walk right into . . . DSS. I'll get a gun. And I'll take care of that f***ing b**** . . . once and for all, and I'm not kidding. . . . [Y]ou think Columbine was something, I've got nothing to lose.[110]

The DSS employees notified the police of the defendant's threats.[111] The next day, the defendant told the district attorney that he was "upset with the [DSS] caseworkers," and that "he would carry through with his intentions from the previous day."[112] Subsequently, the defendant was convicted for making a terroristic threat in violation of section 490.20 of the Penal Law.[113]

The Third Department of New York State Supreme Court's Appellate Division rejected the argument that the statute was unconstitutional as it applied to the defendant.[114] The court held that the "defendant failed to overcome the strong presumption that this legislative enactment is valid."[115] Further, the court held that section 490.20 "survives the test for constitutional vagueness because the statutory language sufficiently apprises persons of ordinary intelligence of the type of conduct that is forbidden and provides law enforcement officials with clear standards for enforcement."[116] Further, the court

---

107. 835 N.Y.S.2d 501, 504 (N.Y. App. Div. 2007), *appeal denied*, 872 N.E.2d 885 (N.Y. 2007).

108. *Jenner*, 835 N.Y.S.2d at 503.

109. *Id.*

110. *Id.* (internal quotation marks omitted).

111. *Id.* at 504.

112. *Id.*

113. *Jenner*, 835 N.Y.S.2d at 504.

114. *Id.*

115. *Id.*

116. *Id.*

rejected the defendant's argument that "his conduct was not what the Legislature had in mind when it enacted this statute after the terroristic attacks of September 11, 2001 and [that] he should not be labeled a terrorist."[117] But the court held that "[r]egardless of the Legislature's intent, the plain words of Penal Law [section] 490.20 clearly inform the public and law enforcement officials of the conduct forbidden by the statute."[118] Finally, the court held that the evidence

> Sufficiently established that defendant threatened to kill DSS employees, this threat was intended to intimidate or coerce public employees to influence DSS's policy regarding contact between children and sex offenders, defendant intended through such a murder to interfere with DSS's conduct of enforcing this policy, and his words and conduct caused reasonable fear of the imminent commission of such a murder.[119]

Thus, the defendant met the elements of making a terroristic threat.[120]

B. People v. VanPatten

In *People v. VanPatten*,[121] the Third Department reaffirmed its holding in *People v. Jenner*. There, the Madison County District Attorney "received a letter threatening his life and the lives of his wife and children, as well as the lives of several county employees, unless [he] ceased any prosecutions involving violations of Penal Law article [490]."[122] Further, the letter "indicated that the Madison County Courthouse and the County Department of Social Services would 'look like the Olklahoma [sic] City federal' building."[123] The only "relevant prosecution pending at the time involved the defendant's biological father," the defendant in *People v. Jenner*.[124] The letter included the author's full name, "prison identification number and the address of the detention facility where defendant was held on unrelated parole violation charges."[125] The defendant appealed his conviction for violating section 490.20 of the Penal Law arguing that the statute is

---

117. *Id.*

118. *Jenner*, 835 N.Y.S.2d at 504.

119. *Id.*

120. N.Y. PENAL LAW § 490.20 (McKinney 2008).

121. 850 N.Y.S.2d 213 (N.Y. App. Div. 2007), *appeal denied*, 889 N.E.2d 91 (N.Y. 2008).

122. *VanPatten*, 850 N.Y.S.2d at 215.

123. *Id.* at 215-16.

124. *Id.* at 216.

125. *Id.* at 215.

"unconstitutionally vague as applied to him."[126] Once again, the appellate court rejected such a challenge to the statute, holding that the defendant

> cannot reasonably contend that in threatening [the district attorney], his family and numerous county employees with murder unless [the district attorney] ceased prosecuting any cases involving a violation of Penal Law article [490], he did not intend to "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."[127]

It is important to note that although the defendant was unlikely to be able to carry out the threat because he was incarcerated at the time he wrote the letter, the trial court denied the defendant's motion to dismiss the indictment because section 490.02(2) of the statute "specifically provides that it is no defense to the charge that the defendant was not actually capable of making good on the threat."[128]

IV. RAMIFICATIONS OF APPLYING THE STATUTE TOO BROADLY: EXCESSIVE PENALTIES

The statute has the adverse effect imposing "excessive penalties" by elevating the sentence that a defendant could have received without the anti-terrorism statute.[129] When a jury convicts the defendant under section 490.25 (Crime of Terrorism), the sentence is elevated as follows:

> If the predicate specified offense is a class C, D or E felony, the new statute makes the punishment for the crime of terrorism one level higher than the level assigned to the specified offense or an attempt or conspiracy to commit the specified offense.
>
> If the predicate specified offense is a class B felony, the terrorism statute elevates the conduct to the level of a class A-I felony, with the sentence to be imposed in accordance with N.Y. Penal Law [section] 70.00.
>
> Where the predicate specified offense is already a class A-I felony, the terrorism statute punishes the conduct with lifetime imprisonment without the possibility of parole, unless the specified offense

126. *Id.* at 216.

127. *VanPatten*, 850 N.Y.S.2d at 216.

128. People v. Van Patten, 792 N.Y.S.2d 859, 862 (N.Y. County Ct. 2005).

129. Stashenko, *supra* note 84; *see also* Stephen Greer, *Miscarriages of Justice Reconsidered*, 57 MOD. L. REV. 58, 74 (1994) (characterizing "unjustified conviction[s]" based on "anti-terrorist criminal justice processes" a "miscarriage of . . . justice").

> constitutes first degree murder under N.Y. Penal Law [section] 125.27, in which case a terrorism defendant is subject to capital punishment.

Finally, when the predicate specified offense is a class B, C, D or E felony, the crime of terrorism is deemed to be a violent felony offense.[130]

Bronx County District Attorney Robert Johnson appeared to acknowledge that the elevated sentences that Mr. Morales could receive were the motivation behind charging Mr. Morales under the anti-terrorism statute.[131] In announcing the jury's verdict, Mr. Johnson said:

> The jury's finding of terrorism is significant in determining an appropriate punishment. Ordinarily, a first degree manslaughter conviction is punishable by a maximum sentence of up to 25 years imprisonment, however, since the shooting was found to be a crime of terrorism, the maximum penalty is elevated to 25 years to life imprisonment.[132]

Thus, absent the jury's finding that the murder of Malenny Mendez and shooting of Javier Tocchimani were crimes of terrorism, Mr. Morales would have been convicted of manslaughter in the second degree and attempted murder in the second degree, respectively. The maximum sentences for those crimes are a maximum of twenty-five years of imprisonment.[133] But the jury's finding that those were "crimes of terrorism," turned the maximum term of imprisonment into the minimum term of imprisonment.[134] On December 10, 2007, State Supreme Court Justice Michael Gross sentenced Mr. Morales to two consecutive terms of twenty years to life imprisonment on the manslaughter and attempted murder convictions.[135] As such, he will serve a minimum of forty years before he will be eligible for parole.[136] Although the murder of a child and the paralysis of a young man as a

---

130. *Terrorism-Article 490*, *supra* note 100, at 1497; *see* N.Y. PENAL LAW § 490.25(1)(2)(a)-(d) (McKinney 2008); *see also* N.Y. PENAL LAW § 70.02 (McKinney 2004) (sentencing for violent felony offenses).

131. *Gang Member Found Guilty*, *supra* note 1.

132. *Id.*

133. N.Y. PENAL LAW §§ 70.00(3)(a)(i), 125.15 (McKinney 2004); N.Y. PENAL LAW § 110.05 (McKinney 2008).

134. N.Y. PENAL LAW § 70.00(2)(a) (McKinney 2004); N.Y. PENAL LAW § 490.25 (2)(d) (McKinney 2008).

135. Press Release, Office of the District Attorney, Bronx County, New York, *Life Imprisonment for Gang Member Convicted of Manslaughter and Attempted Murder as Crimes of Terrorism* (Dec. 10, 2007), *available at* http://bronxda.nyc.gov/information/2007/case66.htm.

136. *Id.*

result of gang violence are tragic and awful, they are not acts of terrorism. By using article 490's vague definitions, Mr. Morales faces a prison sentence that is excessive because the Legislature did not intend to include ordinary street crime within the scope of the law.[137]

If the jury had convicted Mr. Morales of murder in the second degree, which was the original charge,[138] for the murder of Malenny Mendez, and if the jury found that murder to be a "crime of terrorism," then Mr. Morales's sentence would have been even more severe. Murder in the second degree is a class A-I felony punishable with a minimum term of imprisonment of fifteen years and a maximum term of imprisonment of twenty-five years.[139] But a finding that the murder was a crime of terrorism would elevate the sentence to life imprisonment without the possibility of parole.[140]

Finally, this statute also permits the death penalty where the specified offense constitutes first degree murder under section 125.27 of the Penal Law.[141] Though the anti-terrorism statute permits the death penalty, the New York Court of Appeals, the state's highest court, declared in 2004 that the state's death penalty statute was unconstitutional under article one, section six of New York's Constitution because of the jury deadlock instruction prescribed in New York Criminal Procedure Law 400.27(10).[142] Although the New York Legislature has yet to amend the state's death penalty statute to conform to the Court of Appeals' ruling, there is nothing to stop the Legislature from reinstating the death penalty as it had done once before.[143]

Should the Legislature amend the death penalty to conform to the state constitution, the death penalty could be imposed on those whom the Legislature did not originally intend to include. Such a sentence would be excessive in light of the scope of the original death penalty statute that reserved the death penalty for the most heinous of crimes, and not ordinary street crime.

The penalty for conviction under section 490.20 (Making a Terroristic Threat) of the Penal Law drastically increases the sentence that would have been available without the statute. Prior to 2001, making a death threat, like the ones in *Jenner* and *Van Patten*, would

---

137. *See supra* Part I.A.1.

138. *Gang Members Charged with Terrorism*, *supra* note 20.

139. N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney 2004).

140. N.Y. PENAL LAW § 490.25(2)(d) (McKinney 2008).

141. *Id.*

142. People v. LaValle, 817 N.E.2d 341, 344 (N.Y. 2004).

143. James Dao, *Death Penalty Reinstated in New York After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

have likely amounted only to menacing in the second degree[144] or aggravated harassment in the second degree,[145] unless the perpetrator's conduct came dangerously close to committing the crime, in which case an attempt to commit that crime would be appropriate.[146] Both menacing in the second degree and aggravated harassment in the second degree are class A misdemeanors punishable by a term of imprisonment not to exceed one year.[147] New York's anti-terrorism statute turned what would normally be a misdemeanor crime into a class D felony.[148] A class D felony carries a maximum penalty of seven years imprisonment.[149]

While we should not condone death threats against public officials or institutions, they are not acts of terrorism. The excessive penalties imposed by the anti-terrorism statute could turn a misguided youth who makes a prank call into a terrorist.

CONCLUSION

Under article 490 of the New York Penal Law, terrorism is the commission of a specified offense "intended to (i) intimidate or coerce a civilian population; (ii) influence the policy of a unit of government by intimidate or coercion; or (iii) affect the conduct of a unit of government by murder, assassination, or kidnapping."[150] New York's anti-terrorism law, like those of many other states, makes it easy for juries to find almost any crime to be an "act of terrorism." All that is

144. N.Y. PENAL LAW § 120.14(2) (McKinney 2004) ("A person is guilty of menacing in the second degree when: . . . He or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death . . . .").

145. N.Y. PENAL LAW § 240.30 (McKinney 2008) ("A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: 1. . . . (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail or by . . . any other form of written communication, in a manner likely to cause annoyance or alarm."). Although harassment in the first or second degrees, in violation of New York Penal Law sections 240.25 or 240.26, respectively, might also be appropriate, the facts from *Jenner* and *Van Patten* indicate that aggravated harassment in the second degree would be the most appropriate.

146. *See, e.g.*, People v. Naradzay, 11 N.Y.3d 460, 467 (citing People v. Mahboubian, 543 N.E.2d 34, 43 (N.Y. 1989)) ("As [the New York State Court of Appeals has] 'explicitly recognized' in previous decisions, 'there comes a point where it is 'too late in the *stage of preparation* for the law to conclude that no attempt occurred.'") (emphasis in original).

147. N.Y. PENAL LAW §§ 70.15(1), 120.14 (McKinney 2004); N.Y. PENAL LAW § 240.30 (McKinney 2008).

148. N.Y. PENAL LAW § 490.20(2) (McKinney 2008).

149. N.Y. PENAL LAW § 70.00(2)(d) (McKinney 2004).

150. N.Y. PENAL LAW § 490.05(1) (McKinney 2008).

required to find a defendant guilty of the crime of terrorism is a finding that the perpetrator committed the requisite specified offense with the intent to "intimidate or coerce a civilian population."[151] But almost any of the specified offenses will "intimidate or coerce a civilian population," and Mr. Morales's conviction under the anti-terrorism statute is just the first case where the statute was used in a way that was not intended by the Legislature that enacted the law.

Section 490.20 of the Penal Law, the crime of making a terroristic threat, has received even more use in unanticipated ways.[152] Using the anti-terrorism statute against those who the Legislature did not intend to include as defendants has significant ramifications because the statute elevates their sentences substantially and excessively.[153] Mr. Morales's conviction under the statute set the precedent for using the statute against gang members. The state senator who sponsored the legislation had called the use of the statute against Mr. Morales an "unanticipated application" of the law.[154] Years after the 9/11 terrorist attacks and in light of the statute's use in unanticipated ways, the Legislature should amend the statute to clarify who may be charged under the statute and what acts constitute terrorism. Amending the statute would mitigate the "over-kill" that is occurring as district attorneys across the state use the anti-terrorism statute in unanticipated ways.

151. *Id.*

152. *Terrorism Law Is Used to Convict Bronx Gang Member*, *supra* note 78.

153. *See supra* Part III.

154. *Bronx Murder Case*, *supra* note 3.