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## MISPERCEPTIONS AND MISREPRESENTATIONS ABOUT U.S. COUNTERTERRORISM EFFORTS

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### I. INTRODUCTION

This Article offers a critique of how journalists and academics have covered the United States' efforts to combat terrorist financing. In these fields—industries that are expected to get facts right—there appears to be a trend of official actions mischaracterized, successes and failures misidentified, and relevant factors, motivations, and metrics misperceived. This Article describes examples of these failures, highlights the logical and factual errors journalists and academics consistently make, and speculates about the reasons why and how they should be remedied in the future. Why is getting it right important? Public policy arguments that flow from mischaracterizations and misperceptions can result in externalities that are exactly what critics of the government's soft-power counterterrorism actions would like to avoid: greater reliance on military options and an inability to direct the full range of the government's multitool arsenal at international problems extending beyond terrorism. American counterterrorist financing efforts must be understood, accepted, and institutionalized in order to stand a chance of redressing problems that extend beyond terrorism, like international human rights violations. In this sense, enthusiastic supporters of multilateral instruments of statecraft should embrace the remedies unilaterally available to the world's lone superpower that are a microcosm of United Nations actions, if man-made international problems are to be effectively redressed.

### II. FACTUAL MISCHARACTERIZATIONS OF AMERICAN COUNTERTERRORISM RECORD

Factual errors abound in the public reporting of the American law enforcement post-9/11 record of prosecuting terrorists. Consider the following examples:

- “[D]espite Bush’s claims, the ‘war on terror’ at home has resulted in the conviction of hardly any actual terrorists,” wrote

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Georgetown Law Professor David Cole in the March 9, 2006 edition of the *New York Review of Books*.<sup>1</sup>

• “The legal war on terror has yielded few visible results. There have been . . . almost no convictions on charges reflecting dangerous crimes,” concluded New York University’s Center on Law and Security.<sup>2</sup>

• “Despite the flurry of activity, . . . actual convictions for financing terrorism have been few and far between,” reported the *Christian Science Monitor*.<sup>3</sup>

• According to the *Washington Post*, “[a]n analysis of the Justice Department’s own list of terrorism prosecutions . . . provide[s] little support for the contention that authorities have discovered and prosecuted hundreds of terrorists here.”<sup>4</sup>

• According to an article in the *New York Times*, “the government has a twenty-nine percent conviction rate in terrorism prosecutions overall, compared with ninety-two percent for felonies generally.”<sup>5</sup>

These claims are not only wrong, but they are widely off the mark. Proof comes from an article by Professor Robert M. Chesney that lists all of the cases in which the United States has prosecuted someone for terrorist financing from 9/11 to July of 2007.<sup>6</sup> His numbers are conservative in that they do not even include those prosecuted for conspiring to commit violent acts of terrorism, as opposed to nonviolent support for terrorists.<sup>7</sup> They show seventy-four people convicted and only fifteen acquitted in terrorist financing cases, with cases against sixty-two people pending.<sup>8</sup> This is a far cry from the figures reported by these other sources.

One can legitimately question why the government cannot count as well as Professor Chesney. Part of the problem is the government’s public affairs officers and how they responded to

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1. David D. Cole, *Are We Safer?*, N.Y. REV. BOOKS, Mar. 9, 2006, at 15, 18 (reviewing DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* (2005)).

2. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, *TERRORIST TRIALS: A REPORT CARD 1* (2005), available at <http://www.lawandsecurity.org/publications/terroristtrialreportcard.pdf>.

3. Mark Rice-Oxley, *Why Terror Financing Is So Tough to Track Down*, CHRISTIAN SCI. MONITOR, Mar. 8, 2006, at 4, available at <http://www.csmonitor.com/2006/0308/p04s01-woeu.html>.

4. Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

5. Adam Liptak & Leslie Eaton, *Financing Mistrial Adds to U.S. Missteps in Terror Prosecutions*, N.Y. TIMES, Oct. 24, 2007, at A16.

6. Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 878, apps. A & B.

7. *Id.* at 878.

8. *See id.* at 879, 884.

questions from commentators.<sup>9</sup> The same accusations can be made against major news outlets. They have the same information that Chesney does, but they consistently get the numbers wrong.<sup>10</sup>

The numbers, of course, are less important than the public commentary and analysis about terrorist financing efforts, which will be discussed below. Unfortunately, the reasoned commentary from credible journalists and academic researchers about the United States' efforts to suppress terrorist financing fares little better than their colleagues' performance when it comes to statistics.

Why are these types of demonstrably false factual claims repeated by such reputable institutions as New York University, the New York Times, and the Washington Post?<sup>11</sup> The reasons are varied. For better or worse, we live in a spectator culture. There is a tendency to believe that a certain amount of lawlessness is part of the American essence, and it is good for the journalism business to fight efforts to eliminate it.<sup>12</sup> Alleged errors by the government make good copy. On top of all this, we live in a political season, and losses by Executive Branch agencies have partisan political implications, despite the fact that—in reality—all of these cases are being handled by apolitical careerists.<sup>13</sup> These explanations are not

9. See Cole, *supra* note 1, at 15 (describing the Bush administration's persistent claims of prosecuting over 400 individuals and obtaining over 200 convictions in "terrorism-related" cases). When confronted with more modest statistics, however, the administration consistently retreats from these claims by explaining that most of the prosecutions and convictions "are for minor, nonviolent crimes such as immigration fraud or making false statements, not terrorism." *Id.* at 17.

10. See, e.g., David Cole, *Taking Liberties; Ashcroft: 0 for 5,000*, THE NATION, Oct. 4, 2004, at 20 (claiming there had been not one person convicted of terrorism since 9/11, despite John Walker Lindh's conviction by plea on charges of supporting the Taliban and carrying explosives in the commission of a felony); Eggen & Tate, *supra* note 4, at A1 (claiming just thirty-nine convictions on charges related to terrorism as opposed to Chesney's more ambitious numbers).

11. See *supra* notes 2, 4–5 and accompanying text. Compare CTR. ON LAW & SEC., *supra* note 2, at 1 (claiming prosecution of terrorism "has yielded few visible results"), and Eggen & Tate, *supra* note 4, at A1, A18 (reporting that "[t]he statistics provide little support for the contention that authorities have discovered and prosecuted hundreds of terrorists"), with Chesney, *supra* note 6, at 879 tbl.1, 885 tbl.6 (presenting data to indicate that—when including pending prosecutions—there have been hundreds of such cases).

12. See, e.g., David Carr, *A Tough Call, and Then Consequences*, N.Y. TIMES, July 11, 2005, at C1 (concerning the controversy elicited by the protection of anonymous sources even though doing so breaks the law).

13. See, e.g., JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 14 (1978) ("Because both U.S. attorneys and assistants live in the district and plan to remain, they enjoy substantial career flexibility. They plan to leave the position sooner or later and can usually find other attractive local employment without difficulty."). *But see id.* at 204 ("No one is totally immune to pressures, and U.S. attorney's are no exception. Politically appointed men who harbor ambitions that require the support of others for realization cannot ignore how others will react . . .").

helpful because they are just speculation, and they are simply diagnoses rather than remedies. It is a remedy—ideally one that does not depend on an accurate diagnosis—that is really important.

### III. THE REMEDY: ASSESSING COSTS TO CORRECT THE INCENTIVE IMBALANCE

In terms of how these errors might be remedied, it is important to understand that the reason journalists and academics get it wrong is simply because they are willing to be sloppy.<sup>14</sup> This willingness is based on the absence of incentives not to be. The problem emerges where there is a systematic underestimation of the costs of the errors, especially the costs to other interests and initiatives that are important but are made more difficult when erroneous claims find traction.<sup>15</sup> The remedy for this incentive imbalance is to create new incentives to be accurate (or disincentives to be sloppy). One way of doing this is by publicizing the damaging consequences of mistaken factual claims and analyses. If this occurs, perhaps those involved in terrorist financing commentary will have greater incentives to get their information right and to dig deeper in their analyses of official terrorist financing efforts.

A key part of my argument is the theory that counterterrorism and human rights promotion go hand in hand. This is important because some of the most aggressive critics of American efforts in counterterrorism are human rights enthusiasts, critical of the projection of American military power.<sup>16</sup> To the extent they care both about human rights and the viability of soft-power tools, the logical consequences of their unfounded criticism of soft-power tools applied to counterterrorism will be the reduction in the viability of these tools directed at human rights violations and greater reliance on military options to fight terrorism.<sup>17</sup>

### IV. THE SOFT-HARD POWER CONTINUUM: DIPLOMACY, ECONOMIC SANCTIONS, LAW ENFORCEMENT, AND THE MILITARY

A key concept in assessing costs for faulty analyses of American counterterrorism efforts is the multitool arsenal that the United States enjoys in formulating a package of remedies that can be

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14. See ELLIOT D. COHEN, *PHILOSOPHICAL ISSUES IN JOURNALISM* 232 (1992) (describing how the journalists' role in "making casual inferences" in news reporting leads to unavoidable errors and biases); CYNTHIA CROSSEN, *TAINTED TRUTH: THE MANIPULATION OF FAITH IN AMERICA* 31 (1994) (describing the common practice among journalists of including statistical support in their writing without considering "the inner workings of a study").

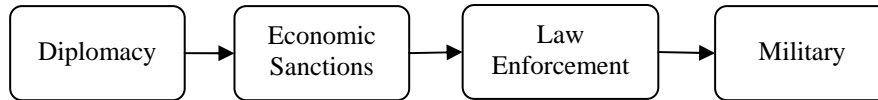
15. See COHEN, *supra* note 14, at 238–39.

16. See Mark Follman, *Why the Antiwar Left Must Confront Terrorism*, SALON, Nov. 15, 2003, <http://dir.salon.com/story/news/feature/2003/11/15/amnesty/index.html>.

17. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 136–37 (2004).

applied to terrorism or any international problem. These tools can be viewed as falling on different points along the “Soft-Hard Power Continuum.”<sup>18</sup>

THE SOFT-HARD POWER CONTINUUM



The Continuum is essentially a how-to manual for fighting international mischief. Soft-power remedies (on the left side of the Continuum) are the most viable (and less controversial) options of first resort. They should be considered first when discussing possible responses to particular international challenges and exhausted before moving rightward along the Continuum to the harder options.

The fact that options are considered “soft,” of course, does not mean that they do not seek to compel the object of these efforts to do or refrain from doing something. After all, the fact that unilateral or multilateral “power” is being contemplated means that we are seeking to compel an international villain to do something that it would not be willing to do absent the threatened use of power.<sup>19</sup> Occasionally, the objects of these efforts can be brought to heel solely through soft-power remedies. It happened with Colonel Muammar Gaddafi and Libya.<sup>20</sup> Even soft-power options are coercive, if not violent.<sup>21</sup>

The Continuum is supported by historical precedent. After all, soft-power remedies such as economic sanctions were promoted as the best option by those who opposed the American invasion of Iraq in 2003.<sup>22</sup> According to this argument, sanctions should have been kept in place to deter Saddam Hussein from developing weapons of mass destruction.<sup>23</sup> Faced with the American drumbeat toward

18. The “Soft-Hard Power Continuum” is a term of the author’s, illustrative of the gradual shift in the harshness of power from “soft” (exclusively non-force) to “hard” (traditional military force). For a discussion of soft and hard power by the originator of the term “soft power,” see NYE, JR., *supra* note 17, at 136–37.

19. Robert A. Dahl, *The Concept of Power*, in *POLITICAL POWER: A READER IN THEORY AND RESEARCH* 79, 80 (Roderick Bell et al. eds., 1969).

20. See Scott MacLeod, *Notebook: Gaddafi’s Confession?*, *TIME* (Europe), Aug. 18–25, 2003, available at <http://www.time.com/time/magazine/article/0,9171,474532,00.html>.

21. NYE, JR., *supra* note 17, at 7.

22. See, e.g., DAVID CORTRIGHT ET AL., *SANCTIONS AND SEC. PROJECT OF THE JOAN B. KROC INST. FOR INT’L PEACE STUDIES AT THE UNIV. OF NOTRE DAME & THE FOURTH FREEDOM FORUM, WINNING WITHOUT WAR: SENSIBLE SECURITY OPTIONS FOR DEALING WITH IRAQ* 11 (2002), available at <http://kroc.nd.edu/research/withoutwar.pdf>.

23. *Id.* at 5, 12–13.

military force in Iraq, few people argued that the civilized world should do nothing.<sup>24</sup> Economic sanctions, a form of soft power, were characterized as the best policy option to be exhausted before sending in the military.<sup>25</sup>

One of the big misperceptions about official actions is that the government or international organization acts with one brain. In reality, official actions are the product of open competition among a number of nerve centers and often take the form of a zero-sum game among them.<sup>26</sup> “Zero-sum” means that a victory for one actor’s or component’s interests means a loss for one or more competing interests.<sup>27</sup> It also means that successful efforts to thwart the exercise of soft-power tools can actually promote harder power, a concept that critics do not properly understand.<sup>28</sup> Inaccurate criticism of the efficacy or fairness of soft-power tools makes their masters less powerful in the intragovernment competitive cauldron. The inadvertent result is to promote the power of masters of hard-power tools.

With American unilateral efforts against terrorist financing, the discussion centers around two types of tools located in the middle of the Soft-Hard Power Continuum—law enforcement and economic sanctions. In the terrorist financing arena, the government masters of these particular tools prevailed and were able to persuade the Commander in Chief to rely on these types of actions, in lieu of military actions against terrorist financiers, which were believed to be too hard to undertake without first attempting softer power.<sup>29</sup>

In terrorist financing, law enforcement and economic sanctions actions are intertwined. The Treasury and State Departments engage in “name and shame” actions, announcing those persons and groups that they have designated under the President’s economic embargo authority.<sup>30</sup> From there, law enforcement enforces the legal consequences of this embargo by prosecuting people who violate it.<sup>31</sup>

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24. See, e.g., *Archbishops Doubt Morality of Iraq War*, BBC NEWS ONLINE (U.K.), Feb. 20, 2003, [http://news.bbc.co.uk/2/hi/uk\\_news/2781783.stm](http://news.bbc.co.uk/2/hi/uk_news/2781783.stm).

25. See David Rieff, *Were Sanctions Right?*, N.Y. TIMES, July 27, 2003, § 6 (Magazine), at 42.

26. Wesley Clark, *An Army of One?*, WASH. MONTHLY, Sept. 2002, at 19, 22–23.

27. Jennifer Sterling-Folker, *Game Theory*, in MAKING SENSE OF INTERNATIONAL RELATIONS THEORY 93, 94 (Jennifer Sterling-Folker ed., 2006).

28. *Id.* at 94–95.

29. See, e.g., KENNETH KATZMAN, CRS REPORT FOR CONGRESS, THE IRAN SANCTIONS ACT (ISA), 1–2 (2007); Michael Abramowitz, *U.S. Increases Sanctions on Syria Over Terrorists*, WASH. POST, Feb. 14, 2008, at A21.

30. Celina B. Realuyo, Policy Advisor, Counterterrorism Office, Remarks to Western Union International Compliance Conference (Sept. 18, 2002), available at <http://www.state.gov/s/ct/rls/rm/14647.htm>.

31. See generally JEFF BREINHOLT, REACHING THE WHITE COLLAR TERRORIST: OPERATIONAL CHALLENGES (2004), available at <http://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/breinh.pdf>.

In terrorist financing, the first embargo was announced by President Clinton in 1995.<sup>32</sup> Since then, there have been several lists that expanded this embargo through the current administration of President Bush.<sup>33</sup> Today, there are approximately 500 individuals and entities that the United States treats as embargoed terrorists or terrorist financiers.<sup>34</sup> Engaging in financial transactions with these individuals and entities is a crime.<sup>35</sup>

Note that this strategy can apply to the full range of international mischief. The combination economic embargo/law enforcement model can be extended beyond terrorism to any man-made international problem.<sup>36</sup> It is a form of soft power, which makes it more palatable and preferable to those who criticize reliance on the U.S. military to redress this particular example of international mischief. These soft tools are particularly humanistic; those who feel they have been wrongly included on the embargo list can challenge their inclusion in judicial proceedings. The fact that the government does not always win economic embargo prosecutions<sup>37</sup> shows that the system is fair.

#### V. ERRONEOUS ANALYSIS: IBRAHIM WARDE'S *THE PRICE OF FEAR*

Like the problem of terrorism prosecution statistics, commentary about American efforts to combat terrorist financing has suffered from errors. The most recent offering is a book by Tufts University academic Ibrahim Warde, *The Price of Fear*.<sup>38</sup> Warde does rely on the most definitive account of how al-Qaeda obtained its

32. Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

33. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

34. U.S. DEPT OF THE TREASURY, FACT SHEET: TARGETED FINANCIAL MEASURES TO PROTECT OUR NATIONAL SECURITY (2007), available at <http://ustreas.gov/press/releases/hp458.htm>.

35. 18 U.S.C. § 2339B (2000); 50 U.S.C. § 1701 (2000).

36. MEGHAN L. O'SULLIVAN, SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM 3 (2003).

37. Stanley J. Marcuss, *Grist for the Litigation Mill in U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501, 505 (1999).

38. IBRAHIM WARDE, *THE PRICE OF FEAR: THE TRUTH BEHIND THE FINANCIAL WAR ON TERROR* (2007). Another recent book that is similar to Warde's is *Satanic Purses* by R.T. Naylor. This Article focuses on Warde's views because, of the two books, Warde's can be considered more mainstream. Naylor, for example, claims that 9/11 was a lucky hit, and he is not convinced that al Qaeda was behind it despite the fact that Osama bin Laden took credit for it and promised more. R.T. NAYLOR, *SATANIC PURSES: MONEY, MYTH, AND MISINFORMATION IN THE WAR ON TERROR* 13 (2006). Naylor believes that radical al-Qaeda is a myth created by American law enforcement, much like they created the Italian Mafia, for the purpose of selling the public on draconian police measures and advancing their own careers, and that bin Laden's claiming credit for something he might not have done brought some welcome perspective to the disparity between the attention paid to anti-American violence and what the United States perpetrates on innocent populations. *Id.* at 13.

funding, the *9/11 Monograph on Terrorist Financing*, which means that there is large agreement on the facts and that the mischaracterizations are limited to his analysis.<sup>39</sup>

A. *Money Laundering and Terrorist Financing*

The errors begin early in Warde's book:

The mistake of financial warriors is to look at terrorist financing as a subfield of criminology—a self-contained, free-standing field insulated from politics. They like to consider the financial war as a technical matter, best left to experts, where official proclamations are taken at face value: frozen amounts are to be subtracted from the terrorists' stash of money, and the terrorist threat is assumed to be reduced accordingly. In their parallel universe, the principal building block is the money laundering template, which grew out of the law enforcement agencies' battles against organized crime and drug trafficking. Although money laundering is fundamentally different from terrorist financing, the two have become virtually indistinguishable following the September 11 attacks. Money laundering is about "hiding and legitimizing proceeds derived from illegal activities." Terrorist financing, in contrast, is not driven by a crime-for-profit logic and has seldom anything to do with cleaning dirty money.<sup>40</sup>

Warde obviously believes he is onto something significant. He characterizes terrorist financing as being "about clean money being soiled."<sup>41</sup> He then bemoans: "[y]et for bureaucratic and political reasons money laundering and terrorist financing have, since September 11, 2001, become interchangeable."<sup>42</sup> Why is this difference important? Warde claims it is because "[t]he amounts needed to fund terrorist operations are small, and such amounts can easily bypass the formal banking system. Furthermore, terrorist financing is in many ways the opposite of money laundering: it is not about cleaning dirty money, but about soiling clean money."<sup>43</sup>

The response to this critique—that money laundering and terrorist financing are fundamentally different phenomena—is relatively easy. Recent events show that Warde is describing a distinction without a difference.<sup>44</sup> The real value of terrorist

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39. Posting of Jeffrey Breinholt to PA Pundits, <http://papundits.wordpress.com/2008/04/24/be-careful-what-you-wish-for-a-review-of-ibrahim-wardes-%e2%80%98the-price-of-fear> (Apr. 24, 2008).

40. WARDE, *supra* note 38, at xxii.

41. *Id.* at 36 (internal quotation marks omitted).

42. *Id.*

43. *Id.* at 47.

44. Take, for example, the recent closing of a private Gaza company involved in laundering on behalf of Hamas and Islamic Jihad. Hanan Greenberg, *Hamas Money Laundering Network Busted*, YNETNEWS, Jan. 11, 2006, <http://www.ynetnews.com/articles/0,7340,L-3198378,00.html>.



financing being placed into the money laundering template is the incentive it gives bankers to report certain customer activity, as in the U.S. Bank Secrecy Act (“BSA”).<sup>45</sup> If the U.S. terrorist financing regime outlaws all financial transactions involving designated entities, it makes the banks responsible for ferreting out indications of prohibited transactions and reporting them in BSA-required “suspicious activity reports.”<sup>46</sup>

Warde might say that money laundering and narcotics trafficking involves funds in large amounts. The same is not true of terrorist financing.<sup>47</sup> This is an important distinction, he would claim, and it shows why money laundering and the BSA template are inappropriate.

However, the recent well-publicized downfall of New York Governor Elliot Spitzer (which occurred after Warde’s book went to press) anecdotally shows the value of the BSA to uncovering relatively minor crimes involving small amounts that are not motivated by greed.<sup>48</sup> News reports suggest that the authorities uncovered the prostitution ring involving Spitzer as a customer as a result of an alert bank employee, who noted that Spitzer was attempting to engage in suspicious wire transfers.<sup>49</sup> If this occurred, it is hard to credit Warde’s claim that the BSA is not useful in terrorist financing.

Warde makes several other complaints about American efforts to combat terrorist financing. These also break down when considered carefully.

#### *B. Religious Expression and Financial Regulation*

Warde makes much of the fact that American efforts to combat terrorist financing are focused on financial transactions involving Muslims and the fact that there is an Islamic doctrinal mandate to give money to the poor.<sup>50</sup> “By hitting the most visible Islamic charities in the United States,” Warde argues, “the Bush administration opened itself to accusations that it was waging a war on Islam, which would later greatly complicate the task of ‘winning hearts and minds’ in the Islamic world.”<sup>51</sup> Efforts to scrutinize the recipients of charitable giving, Warde argues, are counterproductive and unconstitutional.<sup>52</sup>

This argument overlooks the court opinions that upheld efforts

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45. 31 U.S.C. §§ 5311–5332 (2000).

46. 12 C.F.R. § 21.11 (2008).

47. *See, e.g.*, WARDE, *supra* note 38, at xxi–xxii.

48. Erika Hayasaki & Stephanie Simon, *Calls for Spitzer’s Resignation Grow*, L.A. TIMES, Mar. 12, 2008, <http://articles.latimes.com/2008/mar/12/nation/na-spitzer12>.

49. *Id.*

50. WARDE, *supra* note 38, at 135–41, 145–46.

51. *Id.* at 119.

52. *Id.* at 140.

to criminalize religiously-inspired conduct, as well as opinions dealing specifically with U.S. terrorist financing laws being challenged on First Amendment grounds.<sup>53</sup> It is a myth that the U.S. government cannot constitutionally limit what people do with their money, just as it is a myth that crimes motivated by religion cannot be constitutionally prosecuted.<sup>54</sup>

C. *Pretextual Prosecution*

Warde suggests that it is somehow unfair to intentionally charge someone with crimes that are more minor than what prosecutors know about the full scope of their activities, something that has come to be described as the “Al Capone” prosecution strategy.<sup>55</sup> He states:

Finance is subject to detailed and arcane regulations, and different rules of evidence make financial crimes easier to prosecute. From a law enforcement standpoint, “fishing expeditions” hold the tantalizing prospects of nailing the bad guys for minor regulatory infractions—even better, of using such infractions as a way of hooking bigger fish . . . The main problem with the use of the money weapon to “frame the guilty” is that it hinges on the designation of public enemies.<sup>56</sup>

This is an argument that has been suggested recently by several other news outlets and is particularly noxious because it is essentially nihilistic.<sup>57</sup> It seeks to render legal results irrelevant. Guilty pleas and convictions are not really victories for the government, goes this argument, because the proceedings cost so much and the defendant was not really dangerous.<sup>58</sup> This is very much Warde’s view:

Victims of abusive designation and false positives are often forced to plead guilty to lesser charges, something that is very common in the financial realm, where complex and contradictory rules give discretion to prosecutors and law

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53. See, e.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

54. See, e.g., *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Hudson*, 431 F.2d 468 (5th Cir. 1970); *People v. Jones*, 697 N.E.2d 457 (Ill. App. 3d 1998); *State v. Lee*, 419 P.2d 927 (Kan. 1966).

55. WARDE, *supra* note 38, at 26; see also Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135 (2004).

56. WARDE, *supra* note 38, at 26.

57. See Drake Bennett, *Small Change*, BOSTON GLOBE, Jan. 20, 2008, at K1, available at [http://www.boston.com/bostonglobe/ideas/articles/2008/01/20/small\\_change](http://www.boston.com/bostonglobe/ideas/articles/2008/01/20/small_change); Guy Lawson, *The Fear Factor*, ROLLING STONE, Feb. 7, 2008, at 61; Eric Umansky, *Department of Pre-Crime*, MOTHER JONES, Feb. 29, 2008, <http://www.motherjones.com/news/feature/2008/03/departments-of-pre-crime.html>.

58. Lawson, *supra* note 57, at 61.

enforcement officials: the wrongly accused will always be found guilty of something, no matter how trivial.<sup>59</sup>

This view has never resonated in academic literature because it is an attack on prosecutorial discretion itself.<sup>60</sup> To the extent that criminal charging decisions are based on information in the hands of the government, there is no requirement that prosecutors charge defendants with the full extent of what is known about their conduct. The better the information (such as when the charging decision is based on classified information that cannot be disclosed), the better the decision, since it is more reasoned than, say, a coin toss to determine which of two people to charge. Arguments that prosecutors should not charge people with less than the full extent of their conduct, where the decision is strategic to avoid an unpalatable amount of disclosure, fail to point to an individual right that is implicated.<sup>61</sup> They also tend to mistake the true purpose of the criminal justice system; it is to incapacitate people, not to show off all the information in the government's possession.

#### D. *Quantifying Results*

Finally, Warde tries to engage empirically, arguing that there is no statistical proof that the U.S. terrorist financing efforts have been effective.<sup>62</sup> He claims that it is virtually impossible to confirm alleged government victories<sup>63</sup> and complains that “financial warriors are constantly touting their achievements, yet acts of terrorism keep increasing.”<sup>64</sup> He then gives himself away by his faulty empirical methodology:

The measurement of success should be the end of terrorism, or at the very least a steep decline in acts of terror. But in the parallel universe of the financial war, rules and processes have taken on a life of their own, and the measure of success is no longer a reduction in the number of acts of terror, but rather the multiplication of rules and the hyperactivity of process. The much touted “aggressiveness” of the financial war was seen as synonymous with effectiveness. The empirical evidence is troubling. Not only is there a disconnect between actions and results, but the propensity of the financial war to

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59. WARDE, *supra* note 38, at 105.

60. See Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, 21 AM. U. INT'L L. REV. 157, 167 (2005) (considering and rejecting attacks on “pretextual prosecutions”).

61. See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 621–23 (2005).

62. WARDE, *supra* note 38, at 154, 168–72.

63. *Id.* at xii.

64. *Id.* at xxv.

overkill has become counter-productive.<sup>65</sup>

The question is not whether counterterrorist financing efforts have eliminated terrorism. They clearly have not. Rather, it is whether there would have been more terrorist incidents but for the terrorist financing efforts. There is no way of knowing for certain whether this has occurred. However, at least one FBI agent has publicly stated that the U.S. terrorist financing efforts have scored significant victories, and that “numerous attacks” have been defeated by the financial tracking mechanisms in place; however, “[t]he good story out there is entirely classified.”<sup>66</sup>

#### VI. ASSESSING COSTS: THE “YES, BUT . . .” ARGUMENT

It is ironic that those who are the most critical of American military actions are often critical of its reliance on soft-power tools against the same problems.<sup>67</sup> Viewed this way, it is difficult to understand the complaints by those like Warde who argue that economic sanctions are too often viewed as the option of first resort.<sup>68</sup> What then can be wrong with a soft-power strategy? After all, economic sanctions and law enforcement are fairly leftward on the Soft-Hard Power Continuum.<sup>69</sup> They do not generate body bags. Should we always be required to exhaust even softer options before relying on economic sanctions? If so, not many exist. Surely, in terms of options of first resort, economic sanctions are more humanitarian than military force.<sup>70</sup>

There is no doubt about how Warde views U.S. military adventurism: “[m]artial finance was perpetrated by the emergence of a powerful military-industrial-security complex, driven by unprecedented defense and homeland security spending, a growing militaristic culture, and last, but not least, the vested interests of

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65. *Id.* at 154 (citation omitted).

66. *Banks, Govt Team Up to Fight Terrorism*, WASH. POST, Apr. 10, 2005, [http://www.washingtonpost.com/wp-dyn/articles/A41562-2005Apr10\\_2.html](http://www.washingtonpost.com/wp-dyn/articles/A41562-2005Apr10_2.html).

67. *See, e.g.*, Follman, *supra* note 16. “A vigorous defense of human and civil liberties, while essential to spreading democracy worldwide, is not enough to stop terrorists from blowing up airplanes or shopping malls,” notes William Schulz, executive director of Amnesty International USA. *Id.* “And that presents the left with a problem, because some of the tools needed to fight terror, such as stricter border controls or beefed up intelligence . . . chafe against traditional leftist values.” *Id.*

68. WARDE, *supra* note 38, at 32–34.

69. *See New York Post* columnist and Heritage Foundation scholar Peter Brookes’s article, *Iran: Our Military Options*, HERITAGE FOUND., Jan. 23, 2006, <http://www.heritage.org/press/commentary/ed012306a.cfm>, in which he categorizes economic sanctions as “soft power” options but stresses their increased efficacy when backed by force.

70. Albert C. Pierce, *Just War Principles and Economic Sanctions*, 10 ETHICS & INT’L AFF. 99, 99 & n.1 (1996) (citing LAWRENCE FREEDMAN & EFRAIM KARSH, *THE GULF CONFLICT 1990–1991*, 292–93 (1993) and BOB WOODWARD, *THE COMMANDERS* 338, 342 (1991)).

many cheerleaders of omni-directional belligerence.”<sup>71</sup>

In the end, if we accept the existence of international rogues, complaints about economic sanctions as being too hard raise the question of what should be considered as an alternative. Warde inexplicably offers no suggestions. He is too busy trying to argue the wrongheadedness of soft-power remedies.<sup>72</sup> He is nihilistic in his approach, essentially throwing his hands up to say that there is no way we can ever prevent the financing of terrorism:

What happens when people and charities are forbidden by law to help legally blacklisted, yet religiously deserving recipients? Given the religious, or indeed the humanitarian imperative, such help, even when forbidden by law, is likely to occur, albeit through underground or informal channels . . . . As sanctions multiply against groups, individuals and especially charities in the Islamic world, one can simply imagine the creative ways in which the law can get circumvented.<sup>73</sup>

Which of the various soft-power tools might Warde not find disagreeable? How about art—the expression of the view through abstract depictions and analogies that some people should alter their ways? Art is nothing if not soft. After all, no one dies when it is created and disseminated. Artistic expression is probably the softest of all of the soft-power remedies—on the Continuum, it would be somewhere to the left of diplomacy. Surely, no one would argue that, as a counterterrorism option, art goes too far and creates too many collateral dangers.

Guess again. Plenty of seemingly enlightened people say just that. On the *Counterterrorism Blog*, Farhana Ali, for example, has taken the Danish publishers to task for their decision to run political cartoons that depicted Muslim fanatics in a bad light.<sup>74</sup> She is in good company. When the cartoons were originally run in 2005, the critics of this decision included Kofi Annan and former President Bill Clinton.<sup>75</sup> A British knight named Iqbal Sacranie opined that killing Salman Rushdie for *The Satanic Verses* was too generous and

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71. WARDE, *supra* note 38, at 78.

72. *See id.* at 89. Warde bemoans the blocking and freezing of assets, the increased listing and classifying of terrorist groups, and expanding the anti-money laundering arsenal under the U.S. Patriot Act, as well as economic sanctions. *Id.* at viii, 32.

73. WARDE, *supra* note 38, at 147.

74. Posting of Farhana Ali to Counterterrorism Blog, [http://counterterrorismblog.org/2008/03/outside\\_view\\_danish\\_cartoons\\_d.php](http://counterterrorismblog.org/2008/03/outside_view_danish_cartoons_d.php) (Mar. 23, 2008, 10:33 EST).

75. Anthony Browne, *Denmark Faces International Boycott Over Muslim Cartoons*, *TIMES ONLINE*, Jan. 31, 2006, <http://www.timesonline.co.uk/tol/news/world/europe/article723266.ece?print=yes&randnu>; Kofi Annan, U.N. Sec’y Gen., Off the Cuff Remarks to the President and the Public (Feb. 9, 2006), <http://www.un.org/apps/sg/offthecuff.asp?nid=832>.

that he should be made to suffer more than merely the loss of life.<sup>76</sup> To these people, it seems even that fighting terrorism through something as soft as art is considered too harsh.<sup>77</sup> If economic sanctions are too rough, and even art is insufficiently soft, exactly what does that leave us as softer alternatives? If we forgo all of the soft-power options, the Continuum is destroyed. We are essentially left with the sole option of military force, which makes its use more likely.

#### VII. CONCLUSION: THE MERGER OF HUMAN RIGHTS AND COUNTERTERRORISM

With the Soft-Hard Power Continuum, there is a latent discovery waiting to come out: it does not matter whether the goal is to combat something like terrorism, or something that is near and dear to the hearts of multilateralists, like human rights violations. The Continuum describes the tools that a country, or group of countries, might use to combat international mischief generally. Of course we do not want to eliminate consideration of soft-power tools like economic sanctions or law enforcement when conjuring appropriate responses to particular mischief because they are excellent complements to military actions.<sup>78</sup>

The American prosecutor, it can now be said, is the human rights activists' secret best friend. American law allows us to prosecute people who violate human rights, even if they have never set foot in the United States.<sup>79</sup> That means that the American prosecutor can actually achieve justice in particular cases, if that is something that you would consider preferable to never-ending academic debates about what could be done.

For those inclined to attack American terrorist financing tools, that is something to think about. People like Warde and Naylor should be careful what they wish for; and worried about succeeding in their attacks. If they ultimately succeed, they might find that the American public has no more appetite for soft-power tools, and that these tools cannot be used when the mischief is something we care about.

To illustrate this phenomenon, here are two quotes from two different people involved in different American lawsuits. One of the quotes is taken from a suit involving terrorism that is being pursued

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76. Peter Murtagh, *Rushdie in Hiding after Ayatollah's Death Threat*, THE GUARDIAN, Feb. 18, 1989, <http://www.guardian.co.uk/books/1989/feb/18/fiction.salmanrushdie>.

77. *No 'Faith Solution' to Extremism*, BBC NEWS, Aug. 29, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/4194102.stm](http://news.bbc.co.uk/2/hi/uk_news/4194102.stm).

78. See Brookes, *supra* note 69 (suggesting that "soft power" options such as economic sanctions are always more effective when backed up by the credible threat of force").

79. 18 U.S.C. § 2339B(d) (2000); see also Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150, 150 (2001).

by family members of victims of Islamic terrorism.<sup>80</sup> The other is from a lawyer representing the family of someone killed by a foreign government in an alleged human rights deprivation.<sup>81</sup> The words in these quotes that would disclose which quote belongs to which lawsuit have been omitted. Try to determine which quote belongs to which lawsuit:

Here's how I would explain to a jury all this legal mumbo jumbo. This is a [ ] factory. Let's call it [ ] Inc. And those smokestacks are spewing out . . . hatred . . . [and mischief]. So who's liable if you've lost a loved one to [ ] Inc.? It's the bank that loaned the money. It's the architect who designed the factory, knowing it was going to be spewing out hatred. It's the suppliers who supplied the factory with ingredients to manufacture [ ] acts. They're all responsible, each and every one. That's the law of the United States.<sup>82</sup>

And the second: "International law clearly provides that corporations can be held accountable for [international mischief]. [ ], a young American killed abroad because [ ] purposefully turns a blind eye as to how their products are used, must have access to justice."<sup>83</sup>

These quotes are virtually identical, yet they differ because they describe lawsuits that are on opposite sides of the ideological spectrum. One deals with human rights, the other with terrorism. The answers? The first quote is from Ron Motley, the lead lawyer in a lawsuit seeking to hold the defendants liable for acts of 9/11.<sup>84</sup> The second is from Jennifer Green of the Center for Constitutional Rights in her lawsuit against Caterpillar, Inc. for its sale of bulldozers to the Israeli military that were allegedly the proximate cause of the death of peace activist Rachel Corrie.<sup>85</sup>

This exercise shows the most powerful argument for American journalists and academics to be fair in their treatment of American counterterrorism efforts. If they do not fight through the urge to settle on sloppy reporting and analysis of American soft-power tools against terrorism, the result could be an absorption and internalization of policy prescriptions that harm the civilized world's efforts to redress things about which they care deeply. Discouraging soft-power options has the tendency to destroy the Soft-Hard Power

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80. WARDE, *supra* note 38, at 89.

81. *Family of American Woman Killed by Bulldozer Files Suit Against Caterpillar, Inc.*, COMMON DREAMS PROGRESSIVE NEWSWIRE, Mar. 15, 2005, available at <http://www.commondreams.org/news2005/0315-21.htm> (hereinafter *Killed by Bulldozer*).

82. WARDE, *supra* note 38, at 89.

83. See *Killed by Bulldozer*, *supra* note 81.

84. WARDE, *supra* note 38, at 89.

85. See *Killed by Bulldozer*, *supra* note 81.

Continuum, making military actions more likely than they would otherwise be in formulating appropriate responses to international mischief. This is a real externality which, if properly assessed, might create an incentive for commentators to fight through the temptation to be satisfied with sloppy commentary.