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The War on Terror and U.S. Criminal Law
Markus Dubber*

This paper addresses the question of what impact the so-called “new security agenda against terrorism” has had on substantive criminal law in the United States. This question has a simple answer: none.

I.

To inquire into the “impact” of one thing upon another suggests that the two are distinct, conceptually and temporally, in a meaningful way. This is not the case. U.S. penal law in general, and U.S. substantive criminal law in particular, is not helpfully conceptualized as a separate entity that exists independent of, or prior to, some security agenda that might, upon its arrival, impact on it in one way or another. American criminal law instead never established itself as an autonomous body of doctrine, based on general legal principles that in turn are more or less clearly derived from norms of the legitimacy of state power, or, for that matter, some notion of the rule of law or Rechtsstaat. There was never a creational moment when American criminal law, as law, emerged; instead American criminal law survived the American Revolution essentially unchallenged, and unchanged, and therefore remained rooted in the same conception of state power that undergirded the common law of crime as an offense against the peace, and therefore also against the authority, of the sovereign.¹

The so-called security agenda against terrorism, therefore, appears as simply another, contemporary, manifestation of a particular mode of penal governance, which regards itself as emanating from the sovereign’s power to police, understood here in the traditional sense of the power to maintain the peace, or, in Blackstone’s phrase, the sovereign’s power as “pater-familias of the nation” to see after “the public police and oeconomy,” i.e., “the due regulation and domestic order of the kingdom.”² The security agenda, in this sense, is neither “new,” nor can it have an “impact” on American criminal law, simply because it is American criminal law, and always has been.

Another way of making this point is to say that there is nothing new about the so-called War on Terror, except for a redesignation of its object, from Crime to Terror. The mode of governance, its essence as a “security agenda,” remains unchanged; it is a war either way, be it against crime or terror. The war on terror is no more or less incompatible with the idea of law, here understood roughly as a system of norms grounded in the recognition of the legal subject as a person, a being capable of self-

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¹ University of Toronto Faculty of Law. This paper was written for a workshop on “The Impact of Contemporary Security Agendas Against Terrorism on Criminal Law and Law Enforcement” at the Max-Planck-Institute for Foreign and International Criminal Law in December 2009.

government, than is the war on crime, or for that matter the war on drugs, on guns, or on poverty.

In fact, both wars, on terror and on crime, are also similar in that they are misnomers, insofar as they elide a commonly drawn distinction between war and police action, which has proved useful at various points in American political history. Whereas “war” requires congressional action and therefore legitimation in the familiar terms of (representative) autonomy, “police action” operates in an alegal realm of sovereign discretion, or executive (i.e., presidential) fiat or order. Insofar as wars, unlike exercises of the power to police, are not by definition alegal (or unjust), talk of the war on terror—or the war on crime—obscures and dulls the distinction between exercises of sovereign state power and the idea of law. The war on terror—and, again, the war on crime—are no more instances of the idea of war than American criminal law is an instance of the idea of law.

The irrelevance of substantive criminal law in the American war on terror reflects the irrelevance of substantive criminal law in American penal police actions in general. American penalty is dominated by procedure, not substance. Rigid rules of substantive criminal law stand in the way of the sovereign discretion that drives the American penal regime. An essentially discretionary system of penalty that manifests the sovereign’s power to police whenever and however necessary has no use for a doctrinal system of substantive criminal law; autonomous rules of criminal liability in a fully-worked general part are as much a hindrance to the expeditious exercise of sovereign power as are narrowly drawn and strictly applied crime definitions in the special part of criminal law. Substantive criminal law functions as the facilitator of the exercise of sovereign discretion in the actuality of the penal process, rather than as a constraint on that exercise.

It is therefore no surprise that the War on Terror, as any penal police action, focused on procedural techniques, not on the details of substantive criminal law. The War on Terror did not produce new norms of substantive criminal law, in either its general or in its special part. It instead further expanded and entrenched, and made explicit, the enforcement techniques that facilitate the use of these instrumental, and always imperfect and ultimately irrelevant, norms to identify and neutralize threats against the sovereign’s peace (or mund or household, at its origin). Again, to say that the War on Terror is fought with procedural, rather than with substantive, weapons is not to say that these procedural weapons, though more numerous, are any more “new” than the substantive ones.

Substantive criminal law, then, is irrelevant to the not-so-new “security agenda against terrorism” not only because, in general, any mode of law is anathema to the very project of a police action, which regards its target not as a person endowed with rights, and most fundamentally with the capacity for autonomy, but as an object of control, but also because police actions concern themselves not with substantive norms, but with procedural means of implementation and enforcement.

The Obama administration recently has shown a greater interest in the criminal law as a form of the affirmative exercise of state power, announcing its intent to seek criminal indictments of at least some of the persons held alegally at Guantanamo Bay.3 The

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possible use of the criminal law in the war on terror, however, does not imply any
connection between the war on terror and criminal law in general or even the specific
criminal law tools in question, never mind some impact the former might have on the
latter. The substantive prosecutorial tools have been in place since at least the
“Antiterrorism and Effective Death Penalty Act of 1996” (AEDPA), passed as part of the
implementation of Newt Gingrich’s 1994 “Contract with America,” if not earlier, much
earlier (insofar as they have been in the Anglo-American prosecutor’s toolbox for
decades, if not centuries, or millennia). The AEDPA not only predates the current War
on Terror, launched in the fall of 2001, but also had very little to do with terrorism even
when it was passed. Though passed in the wake of the Timothy McVeigh’s 1995
bombing of the Oklahoma City federal building, the Antiterrorism and Effective Death
Penalty Act was, despite its title, not primarily about “antiterrorism,” but about an
“effective death penalty.” More specifically the AEDPA fulfilled the Republicans’
promise, in clause two of the Contract with America, to pass a “TAKING BACK OUR
STREETS ACT,” an “anti-crime package including stronger truth-in-sentencing, ‘good
faith’ exclusionary rule exemptions, effective death penalty provisions, and cuts in social
spending … to fund prison construction and additional law enforcement to keep people
secure in their neighborhoods and kids safe in their schools.”

In other words, the AEDPA was very much still a weapon in the war on crime, rather
than the war on terror. To the extent the substantive criminal law plays a role in the war
on terror it is in the form of enforcement tools long familiar from the war on crime. The
crimes are traditional offenses—not, incidentally, the crime of terrorism—including
standard offenses against the person, ranging from assault to murder and property
destruction, along with the likewise familiar staples of inchoate and vicarious criminal
liability such as conspiracy, possession, and complicity. These ingredients are nicely
combined, and remixed, in the “new” offense of “provid[ing] material support or
resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so,”
which is currently before the U.S. Supreme Court on a specificity (void-for-vagueness)
challenge. This most recent kitchen-sink offense, however, also cannot be claimed as an
offspring from the war on terror, having been inserted into the U.S. Code as part of the
AEDPA in 1996. The case before the Supreme Court, Humanitarian Law Project v.
Holder, involves not the support of Al Qaeda, but of the Kurdistan Workers Party
(“PKK”), and the Liberation Tigers of Tamil Eelam (“LTTE”), which are active in
Turkey and Sri Lanka, respectively, and were designated in 1997 as foreign terrorist

prosecution in federal criminal court of Ahmed Khalfan Ghailani under a 1998 indictment, superseded in
Be Prosecuted in U.S. Federal Court,” http://www.justice.gov/opa/pr/2009/May/09-ag-496.html (May 21,
2009).
5 See also United States v. Stewart, 2009 U.S. App. LEXIS 25184 (2d Cir. 2009) (rejecting vagueness
challenge to material support provision).
6 552 F.3d 916 (9th Cir.), cert. granted, 2009 U.S. LEXIS 5137 (2009).
organizations by the U.S. Secretary of State under 8 U.S.C. § 1189(a)(1). It is a civil case brought after the terrorist designation of PKK and LTTE by “six organizations, a retired federal administrative law judge, and a surgeon,” primarily on free speech grounds.

Before we take a closer look at some of the substantive features of the war on terror, consider briefly the irrelevance of substantive criminal law not as a tool in the war on terror, but as a source of criminal liability for those who prosecute it. While Eric Holder, the Attorney General in the Obama administration, has been pondering the possibility of inquiring into the criminal liability of certain officials who engaged in behavior that might meet the definition of torture, which—unlike terrorism—is a crime defined in the federal criminal code, substantive criminal law in fact has not stood in the way of the actual prosecution of the war on terror.

Take, for instance, the internal and once secret, now declassified, Justice Department memorandum of August 2002, signed by the then Assistant Attorney General for the Office of Legal Counsel (now federal appellate judge) Jay Bybee and drafted primarily by then Deputy Assistant Attorney General in the OLC (and Berkeley law professor) John Yoo, the federal torture provision is interpreted very narrowly to cover only the intentional infliction of “physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.” The memo goes on to conclude that even acts that fall within this narrow definition would not generate criminal liability because the perpetrators would be entitled to the defenses of necessity (balance of evils) or self-defense (defense of another, national self-defense).

Whether Holder decides to pursue criminal charges remains to be seen; so far, the public debate about the issue has focused not on questions of legal principle, and certainly not on anything resembling a principle of compulsory prosecution (Legalitätsprinzip), which is unknown to American criminal law, but on pragmatic or outright political considerations such as the chilling effect prosecutions might have on the conduct of state officials engaged in the war on terror. The question of whether substantive criminal liability exists is of no importance simply because even if it does exist, the Attorney General may well decide not prosecute. In this light, the Bybee memo is noteworthy for denying substantive criminal liability in the first place, thereby obviating even the need to invoke prosecutors’ unfettered discretion to ignore evidence of

7 18 U.S.C. §§ 2340-2340A.
8 Reproduced in The Torture Papers: The Road to Abu Ghraib 172 (Karen J. Greenberg and Joshua L. Dratel, eds., 2005).
9 Not surprisingly, the memo has no greater difficulty demonstrating the irrelevance of international criminal law (particularly the Convention Against Torture) than it has establishing that of domestic criminal law. The war on terror operates beneath, or beyond, the reach of substantive criminal law of any stripe, domestic (federal or state) or international.
10 A civil suit against Yoo, filed by a person designated as an enemy combatant and detained for over three years, recently survived a motion to dismiss in federal court. Padilla v. Yoo, Order Denying Defendant’s Motion to Dimiss, No. C 08-00035 JSW (June 12, 2009, N.D. Cal.).
substantive criminal liability (where, of course, both the person exercising his or her discretion and the person whose conduct is at issue are perceived as comrades-in-arms in the war on terror, with the former seen as second-guessing the latter’s original discretionary judgment, made on the ground, in the heat of the moment, under exigent circumstances, in good faith, and so on). Incidentally, the *de facto* criminal legal immunity of state penal officials is also a deep feature of American penality that is not unique to the war on terror. Apart from very rare cases, almost always involving the use of deadly force by police officers, the substantive criminal law is simply not considered as a constraint on the behavior of state penal officials, including judges and prosecutors, who in their judicial or quasi-judicial capacity also enjoy absolute immunity from civil liability even for “malicious or dishonest” actions. Prosecutors have virtually unfettered discretion to determine whether, and if so how, to pursue a case. And, as Jackie Ross has shown, the issue of entrapment is not conceptualized as a question of the criminal liability of the entrapper, but as a possible defense for the entrappee, with an eye toward encouraging proper, rather than punishing improper, police conduct.

For our purposes more relevant, the legal memoranda exploring the non-existent limits, or at least guidelines, that American substantive criminal law might impose on the conduct of the war on terror reveal the malleability and groundlessness of American substantive criminal law that, with little effort, can be construed as a carte blanche for the exercise of discretion not only by the chief executive but by state officials at every level, down to the interrogator who considers various more or less torturous interrogation methods. So easily manipulable, ill-defined, and rootless is American substantive criminal law that the provisions of general and special parts cannot place meaningful constraints on a committed police action, either by specifying the available legal tools (through the definition of principles of criminal liability and specific offenses) or by subjecting the state officials who use them to legal oversight. In the end, procedure dominates substance, and procedure is discretion, discretion in the choice and interpretation of police tools of substantive criminal law, discretion in the framing of the parameters of substantive criminal legal liability for those who choose, interpret, and apply the police tools, and, finally, discretion in the decision whether or not to invoke the substantive criminal law to hold those who exercised their discretion legally accountable after the fact.

II.

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12 This scenario, and this language, are not unique to the war on terror; they instead are familiar from scores of American court decisions scrutinizing police conduct in the war on crime, not for purposes of determining the officer’s criminal liability, but to assess the constitutionality of the conduct and, if necessary, its remedy. See, e.g., Charles H. Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* (5th ed. 2007).

13 And much more, as the recent Supreme Court decision in Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009) (extending absolute civil immunity to supervisory prosecutors’ failure to train subordinates), makes clear.

For the remainder of the paper, I will highlight some characteristics of substantive criminal law as they manifest themselves, however instrumentally and non-obtrusively, in various aspects, and stages, of American penality, most notably the war on crime (and on drugs) and, most recently, the war on terror.\textsuperscript{15}

Beginning with the general part of substantive criminal law, American penality is characterized by the ubiquity of, and heavy reliance on, so-called inchoate (or incomplete) and vicarious criminality. Inchoate criminality comes in various forms, including attempt, conspiracy, solicitation, facilitation, and—perhaps most important—liability for possession in all shapes and sizes, including simple and compound possession (i.e., possession simpliciter or with the intent to use the item possessed), actual (or physical) and constructive possession (i.e., possession through the (potential) “dominion or control” over an area containing the item in question or over a person in actual possession of the item) of scores of items, ranging from firearms and all manner of other weapons, dangerous weapons, instruments, appliances, or substances, including toy guns, air pistols and rifles, tear gas, ammunition, body vests, and anti-security items, to burglary tools or stolen property, and of course drugs, and everything associated with them, including drug paraphernalia, drug precursors, not to mention instruments of crime, graffiti instruments, computer related material, counterfeit trademarks, unauthorized recordings of a performance, public benefit cards, forged instruments, forgery devices, embossing machines (to forge credit cards), slugs, vehicle identification numbers, vehicle titles without complete assignment, gambling devices, gambling records, usurious loan records, prison contraband, obscene material, obscene performances by a child, “premises which [one] knows are being used for prostitution purposes,” eavesdropping devices, fireworks, noxious materials, and taximeter accelerating devices (in New York), spearfishing equipment (in Florida), or undersized catfish (in Louisiana), etc.

The war on terror if it doesn’t simply draw on it, simply supplements this list of contraband, with such things as “missile systems designed to destroy aircraft,”\textsuperscript{16} “radiological dispersal devices,”\textsuperscript{17} “any funds in which a foreign terrorist organization, or its agent, has an interest,”\textsuperscript{18} or, in the U.K., “money or other property” intending “that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism,”\textsuperscript{19} and, more broadly still, “an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.”\textsuperscript{20} (The Australian Criminal Code similarly criminalizes possession of a “thing” that is “connected with preparation for, the engagement of a person in, or assistance in a terrorist act.”\textsuperscript{21})

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\begin{itemize}
\item[\textsuperscript{16}] 18 U.S.C. § 2332g.
\item[\textsuperscript{17}] 18 U.S.C. § 2332h.
\item[\textsuperscript{18}] 18 U.S.C. § 2339B.
\item[\textsuperscript{19}] Terrorism Act 2000, § 16(2).
\end{itemize}
Possession offenses are significant not only because they expand the concept of inchoacy beyond the already wide boundaries of more familiar inchoate offenses such as attempt and conspiracy (which are likewise prominently featured in the war on terror), but also because they nicely expose the futility and groundlessness of even the most basic of basic principles of Anglo-American criminal law, actus reus. Traditionally both attempt and conspiracy require the commission of some act, however remote or minute. Attempt liability in theory attaches only once the elusive line between preparation and attempt has been crossed.\textsuperscript{22} Conspiracy ordinarily (though in contemporary American criminal law, not necessarily\textsuperscript{23}) requires the commission of some overt act in furtherance of the conspiratorial agreement. Possession requires no act, no matter how framed. Possession is a status, rather than an act, a status that describes the relationship between a person and an object, more obviously through physical contact or at least proximity, but—in the case of so-called constructive possession—also indirectly through another person. Possession liability extends the general project of inchoate criminality beyond the artificial, and notoriously malleable, bonds of the law of attempt and conspiracy by permitting the state to identify and eliminate perceived threats at a still earlier stage. There is no need to await action of any kind once the possessor, through the possession, has revealed himself to pose a risk of offense, where the possession itself may represent sufficient evidence of dangerousness by itself or, more commonly, in combination with a characteristic of the possessor, including a prior conviction as in “felon-in-possession” offenses. The significance of the contraband, after all, lies in its relevance to a diagnosis of the dangerousness of its possessor, rather than of its dangerousness. Judgments about the possessor’s dangerousness are inherently discretionary and drive much of contemporary policing, not merely the war on terror, which is facilitated by a dense and wide net of possession offenses so common that the question ordinarily is not whether a suspect has committed a possession offense but which one, and most important, whether this offense is taken to signify sufficient dangerousness to warrant more intrusive state intervention (beyond the initial observation, investigation, search, and seizure).\textsuperscript{24}

Possession offenses combine inchoate with vicarious, or derivative, criminality in at least two senses. In all cases, possession liability is derivative insofar as it is based not on an act, but on the association with a dangerous thing. Liability for possessing contraband flows from the contraband itself, without more. In the case of constructive

\textsuperscript{22} Model Penal Code § 5.01(2) (“substantial step”); see generally Dubber/Kelman, American Criminal Law ch. 6.C. (2d ed. 2009).
\textsuperscript{23} See Model Penal Code § 5.03(5) (no overt act required if object offense is serious felony); see generally Dubber/Kelman, American Criminal Law ch. 8.B. (2d ed. 2009).
possession, liability derives from the actual possession of the contraband by another (so that constructive possession in fact is twice derivative, once from object to physical possessor and once from physical possessor to constructive possessor). As a result, constructive possession can also be shared, with more than one person being in constructive possession of a thing, particularly when the constructive possession results from “dominion or control” over an area (such as an apartment or a car) rather than over a person (who is in actual possession).

Conspiracy liability, another long familiar feature of American penality that also makes frequent appearances in the American war on terror, likewise can be seen as both inchoate and vicarious, most obviously in jurisdictions that—like U.S. federal criminal law—follow the so-called *Pinkerton rule* that holds all conspirators liable for any substantive offense foreseeably committed in furtherance of the conspiracy, even absent the ordinary prerequisites for accomplice liability (notably the requirement of intentional facilitation or solicitation).

The previously mentioned “material support” provision introduced by the AEDPA in 1996 highlights the role of vicarious criminality in American penality in two ways. First, like possession, it criminalizes conduct that otherwise would not fall under long-standing doctrines of accomplice liability, which required proof of intentional facilitation or solicitation. Note here that the AEDPA originally did not require any mental state with respect to the provision of material support; only after the Ninth Circuit’s intervention in the early rounds of *Humanitarian Law Project* did Congress insert a requirement that the person *knowingly* provide material support to a terrorist organization. (It is in fact another feature of American penality that *mens rea* requirements often are eliminated or circumvented (through, for instance, presumptions of various kinds) as impediments to the effective exercise of the power to police, as illustrated, for instance, by the spread of strict liability (or presumption-encased) possession offenses and the retention of strict liability felonies, including most notoriously the doctrine of felony murder.)

Second, AEDPA’s material support provision illustrates a policing strategy that found its most significant, if not its first, expression in the Money Laundering Control Act of 1986, which added money laundering to the arsenal of a federal war on organized crime in general, and on drug crime in particular. The federal crime of money laundering expands federal criminal liability beyond the members of a criminal organization to those who permit it to sustain itself financially, through the supply or the expenditure of funds, in both cases with predictable results of casting the penal net wide enough to capture persons such as the retired federal administrative law judge and the surgeon in *Humanitarian Law Project*, the interior decorators and real estate agents found in money laundering cases,26 or the criminal defense lawyers who appear as defendants in both material support and money laundering cases.27

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A penal regime that is driven by enforcement and regards substantive criminal law as
a hindrance at worst and as an imperfect, if technically necessary, facilitator at best, does
not favor narrow and precise offense definitions. Small wonder, then, that the war on
crime and the war on terror show no particular concern for the principle of legality in
general, and the principle of specificity (void-for-vagueness) in particular. Two of the
central substantive tools in the federal war on crime, RICO and honest services fraud, are
not only marked by great flexibility and breadth, but are championed for that very reason,
not only by the legislature but by courts as well. Their very malleability and scope marks
them as powerful tools in the hands of state officials who, in their unfettered discretion,
heed and mold them as necessary in the penal police action of the moment, against
crime, drugs, terror. It remains to be seen whether the Supreme Court, in Humanitarian
Law Project, will subject the AEDPA’s “material support” provision (which
embraces the supply of “training,” “expert advice or assistance,” “service,” and
“personnel”) to serious specificity scrutiny; any concern about its constitutionality is
likely to derive from its effect on free speech rights under the First Amendment rather
than from a commitment to the principle of legality in criminal law.28

Note that the ostensible object of the criminal war on terror, i.e., the crime of
terrorism, does not raise specificity concerns. This is so not because terrorism is defined
clearly and narrowly, but because the crime of terrorism is not defined at all in federal
criminal law. U.S. criminal law abounds with definitions of terrorism; by last count,
there were well over a hundred.29 None of them, however, defines a crime of terrorism.30
They are not substantive provisions, but procedural ones: They define the type of suspect
conduct that triggers the use of certain investigatory tools (such as wiretapping) or the
authority of certain state officials (such as the Attorney General) or establishes federal
jurisdiction. The object of the war on terror, thus, is both undefined and overspecified.31
The absence of a definition of the crime of terror is even more conducive to, or rather less
obstructive to, effective policing than a vague and broad definition. From the standpoint
of enforcement, the best substantive definition is no definition at all.

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28 In the lower courts, the case has been framed primarily as a first amendment (free speech) case.
29 Nicholas J. Perry, “The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many
30 The new mini-criminal code for the new military commission does define “terrorism,” though not as a
criminal law offense, but as a military law offense under the law of war. See 10 U.S.C. § 950t(24). The
very novelty of these definitions raises prospectivity concerns, even under the international law of war,
which is generally thought to be more flexible on this question than criminal law. See, e.g., United States
v. Hamdan, D012 Ruling on Motion to Dismiss (Ex Post Facto) and D050 Defense Request to Address
Supplementary Authority on D012 (Military Commission, July 14 2008) (rejecting ex post facto claim
based on “providing material support for terrorism” and “conspiracy,” 10 U.S.C. §§ 950t(25) & (29)).
31 It is not unusual to find many, even scores, of different definitions of a given offense (murder is an often
cited example) in federal criminal law. It is unusual to not find a single substantive definition, and an
abundance of procedural ones. For the difficulties this state of affairs posed for the U.S. Sentencing
Commission in drafting a sentencing provision for the (non-existence) crime of terrorism, see United States
v. Graham, 275 F.3d 490 (6th Cir. 2001). The sorry state of the so-called Federal Criminal Code, title 18 of
the United States Code, alone powerfully illustrates the irrelevance of substantive criminal law in American
penalty; it overflows with thousands of duplicative, overlapping, inconsistent, incomplete, broad, obscure,
vague, antiquated (not to mentioned ill-considered) offense definitions loosely organized under chapters
that appear in more or less alphabetical order, with “Terrorism” (ch. 113B) sandwiched between
“Telemarketing” (ch. 113) and “Torture” (ch. 113C).
III.

The irrelevance of American substantive criminal law goes far beyond the state’s police action on terror. To the extent there is public, or scholarly, discussion of the definition of terrorism, it is not carried on in terms of substantive criminal law. Not surprisingly, this discourse has not generated a generally accepted definition of terrorism; instead, participants marvel at the difficulty of the task and agree only on the absence of agreement, often proceeding to ponder the reasons for the difficulty, if not the impossibility, of defining terrorism. It is one thing, of course, to note the indeterminacy of concepts, or the multiplicity of public and theoretical viewpoints and approaches. It is quite another, however, to find room for that indeterminacy and multiplicity in a system of substantive criminal law, unless, again, that system is essentially instrumental to the implementation of a discretionary penal regime.

More generally, the irrelevance of substantive criminal law to public and academic discourse on terrorism is another symptom, along with its irrelevance to the war on terror, of the absence of a well-developed and legitimately grounded conceptual framework of substantive criminal law in the United States. American substantive criminal law has nothing to say about terrorism because it lacks even the basic conceptual tools to consider the proper scope of any given offense. There is no doctrine of the Rechtsgut or its equivalent (occasional theoretical explorations of the Millian “harm principle” notwithstanding), no account of the distinction between civil and criminal liability, and there is no doctrine of the essential ingredients of criminal liability, not to be confused with the continued reincantation of meaning- and groundless anachronistic Latinisms such as *actus non facit reum nisi mens sit rea*. Undermotivated, underdeveloped, and underconceptualized, American substantive criminal law did not stand in the way of the war on crime then, and it does not stand in the way of the war on terror now.32

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32 Just what it would mean for a body of legal doctrine and principles to “stand in the way” of state action is another question. For an interesting analysis of German (private) law under National Socialism, see Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (6th ed. 2005).