

'Material support'

US anti-terrorism law threatens human rights and academic freedom¹

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The terror attacks of September 11 2001 transformed anthropology in ways large and small. Much attention has been paid to anthropologists who are called upon to work in support of the military, intelligence and security sectors, universities with increasing ties to intelligence agencies, and the ways that academic political discourse has changed since 9/11.² Absent from this discourse have been discussions of the ways that a controversial American anti-terrorism law threatens a variety of anthropological undertakings.

United States federal law prohibits the provision of 'material support or resources' to a terrorist group.³ Over the past 10 years, prosecutors have invoked this statute more than any other in pursuit of America's 'war on terror' (Zabel & Benjamin 2009: 11-12). One reason the charge has become so common is that the law does not require proof that a defendant actually intended to support terrorism. Equally troubling is a persistent confusion over what counts as 'support'.

While the 'material support' law has been an important counterterrorism tool in the United States, civil libertarians have expressed great concern about its scope and potential to criminalize otherwise legal and laudable activities such as charitable giving, humanitarian aid, and peacebuilding programmes. Its potential to criminalize academic research should be of equal concern to anthropologists and other scholars working with groups who may be designated as 'terrorists' and the populations that support them or live under their influence.

The law works by prohibiting support to any group designated by the US State Department as a 'foreign terrorist organization' or to any other group one knows to have engaged in terrorist activity.⁴ The law does not differentiate between individuals who intend to support a group's illegal activity and those who do not. It does not matter whether it was just a little support. It does not matter that the support was incidental to providing humanitarian aid or to conducting field research. And the law applies not just to American citizens and individuals inside the United States, but also to non-citizens who live and work entirely outside the country.⁵

Following an amendment in 2004, the US Congress explicitly extended the law's reach to conduct that occurs entirely overseas. Whereas the previous version of the law had been limited to individuals acting 'within the United States or subject to the jurisdiction of the United States', current law 'permits federal prosecution of an act proscribed in section 2339B and committed entirely abroad by a foreign national with no greater connection to the United States required than that we have been able to bring the offender to this country for trial' (Doyle 2005). Thus, individuals and institutions with no connection to the US are meant to fear prosecution by that country for material support of terrorism.⁶ While practical considerations may inhibit the US government's ability to prosecute such cases, the goal is clearly to deter contact with designated groups, to make them 'radioactive – an entity that merits only our contempt, not our contributions' (McCarthy 2005).

Congress has repeatedly amended the material support law and expanded its definition of prohibited 'support' to include property, 'tangible or intangible', and 'service', including 'training', 'expert advice', 'personnel' (including oneself) and 'communications'.⁷ A conviction could yield 15 years in prison.⁸ The absence of an intent requirement, combined with the vagueness and potential breadth of these terms, has led to much confusion and

anxiety among professionals who work in troubled parts of the world.

How, for example, would the law view former US President Jimmy Carter, who monitored the 2009 elections in Lebanon and met with all of the parties, including Hezbollah, to advise them on fair election practices (Cole 2010)? What about a reporter who publishes an interview with a terrorist fighter? A social-media platform with accounts purportedly belonging to the Somali militant group al-Shabab (Greenwald 2011)? Or the *New York Times* and *Washington Post*, both of which have published op-eds from representatives of Hamas in recent years (al-Zahar 2008; Yousef 2007a; Yousef 2007b)?⁹ Does it apply to a humanitarian organization that teaches non-violence?

In 2010, the US Supreme Court weighed in on the last question in a case known as *Holder v. Humanitarian Law Project*.¹⁰ An organization with consultative status at the United Nations sought the court's assurance that it could not be prosecuted for engaging in humanitarian work with the Kurdistan Workers' Party (PKK), for example through training PKK members to use international law to peacefully resolve disputes. The court found that it was constitutional to criminalize a broad range of interactions with designated terrorist groups, including attempts at peacebuilding and support for non-violence.

The court agreed with the US government that there is no meaningful separation between a terrorist organization's legal and illegal activities, and that support for one is equivalent to support for the other.¹¹ It found that even speech designed to discourage violence could serve to 'free up' other resources and provide a terrorist organization with a veil of legitimacy.¹² Following this logic, it is easy to imagine the concern among journalists, aid workers, lawyers and researchers that their work could expose them to criminal prosecution. As Justice Breyer cautioned in dissent, 'Once one accepts this argument, there is no natural stopping place.'¹³ Such broad interpretations raise the likelihood that a wide range of normal ethnographic activities could be illegal under this law.

As the Brennan Center for Justice observed in an amicus brief on behalf of academic researchers, anthropologists must be able to communicate with the subjects of their study in order to perform responsible research.¹⁴ Yet such direct personal interaction with members of the culture being studied, including in-depth interviews and participation in social or cultural events, could run afoul of the 'personnel' or 'service' provisions of the material support law.¹⁵ For example, an anthropologist who conducts extensive interviews with individuals engaged in an organized insurgency and publishes a scholarly article on their views could be construed as providing a 'service' to that group or providing himself as 'personnel'.¹⁶ Similarly, a scholar who seeks to understand how Palestinians respond to the pervasive violence that surrounds them and walks alongside marchers in so-called 'martyr funerals' could be providing 'personnel' in violation of the material support law if the funerals were organized by a designated terrorist group.¹⁷ The Supreme Court acknowledged that activities conducted 'independently' of a terrorist organization would not run afoul of the material support prohibition, but it left great uncertainty about what kind of interaction was still permissible.¹⁸ Exactly how much direction or coordination is necessary to constitute the provision of a 'service'? Is any communication with a member sufficient? What about contact through an intermediary? The court called these questions 'hypothetical' and declined to

1. This article came out of a roundtable organized by Robert A. Rubinstein on 'Anthropological research with "terrorist" groups: Responding to the criminalization of research', held at the Annual Meeting of the American Anthropological Association, 18 November 2011.

2. For example, see Network of Concerned Anthropologists 2009; McNamara & Rubinstein 2011.

3. 18 USC § 2339B(a) (1). Note that there are two 'material support' statutes: 18 USC § 2339A and 18 USC 2339B. Section 2339A prohibits material support for the commission of certain illegal activities, whereas § 2339B prohibits material support for designated terrorist organizations, regardless of whether there is an intention to support illegal activities. Although both statutes use the term 'material support', this article concerns only § 2339B.

4. 8 USC §§1189(a)(1), (d)(4).

5. 18 USC 2339B(d).

6. See for example *United States v. Ahmed*, no. 10 CR 131, 2011 WL 5041456, at 2-3 (SDNY 21 October 2011).

7. 18 USC § 2339A (defining terms).

8. 18 USC § 2339B(a)(1).

9. Mahmoud al-Zahar is a founder of Hamas; Ahmed Yousef is a political advisor to Ismail Haniya.

10. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2712 (2010).

11. *Id.* at 2725-26.

12. *Id.* at 2735 (Breyer, J., dissenting).

13. *Id.* at 2736 (Breyer, J., dissenting).

14. 'Brief for academic researchers and the Citizen Media Law Project as amici curiae in support of respondents/cross-petitioners', *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (nos. 08-1498 & 09-89).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Holder v. Humanitarian Law Project*, 130 S.Ct. at 2709.

19. *Id.* at 2722.

20. The *New York Times* article also notes that the FBI had questioned individuals it believed to be the source for a *Times* article about terrorism, and had threatened to arrest them for providing 'material support'.

21. 'Brief for academic researchers and the Citizen Media Law Project as amici curiae in support of respondents/cross-petitioners', *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (nos. 08-1498 & 09-89).

22. Readers affected by this issue and interested in assisting with reform efforts should contact any of the authors.

Al-Zahar, M. 2008. No peace without Hamas. *Washington Post*, 17 April.

Atran, S. & R. Axelrod 2010. Why we talk to terrorists. *New York Times*, 29 June.

Beals, R. 1967. Background information on problems of anthropological research and ethics. *American Anthropological Association Newsletter* 8(1): 2-13.

Cole, D. 2010. The Roberts Court's free speech problem. *New York Review of Books* blog, 28 June.

Doyle, C. 2005. Material support of terrorists and foreign terrorist organizations: Expiring amendments in brief 4. Congressional Research Service. Available at: <http://fpc.state.gov/documents/organization/56101.pdf>.

Duncan, B. [pseudonym] 1995. Anthropological perils: Dilemmas in the Cold War's wake. *Political and Legal Anthropological Review* 18(2): 7-15.

Greenwald, G. 2011. Can

provide further guidance, finding that 'a person of ordinary intelligence' would understand what the law prohibits.¹⁹

Needless to say, the court's decision did little to assuage concerns that the material support law could reach constitutionally protected activities such as distributing literature, engaging in political advocacy, and providing humanitarian aid. Instead, it raised new questions about whether other activities, such as journalism and academic research, might also be swept up in the dragnet. Following the *Humanitarian Law Project* decision, major newspapers began to question whether journalists could write about the activities and motivations of terrorist groups, or whether scholars conducting research in conflict zones could be arrested for meeting with terror groups and discussing their research (*NYT* 2010).²⁰ Might a zealous prosecutor pursue academics for lending 'legitimacy' to a terrorist group by publishing a paper on its history and reasons for fighting (*USA Today* 2010)?

Such research is crucial to our understanding of terrorism and the communities it affects, but such lingering questions sow the seeds of doubt and may discourage scholars or institutions from pursuing or funding it (Atran & Axelrod 2010). The inevitable chill on much-needed scholarship is a blow to academic freedom that ought to concern all anthropologists.

Contextualizing anthropological concerns

The material support law threatens the academic freedom of anthropologists and other academics in ways that might not be readily apparent. While there are no direct historical parallels to these developments, the history of anthropology has numerous examples of governmental interference in the free conduct of anthropological research. These dark episodes remind us of the predictable consequences of such interference – none of which could reasonably be characterized as positive.

In 1967, as the American Anthropological Association responded to fallout from revelations of Project Camelot's efforts to use anthropologists for counterinsurgency operations, anthropologists Ralph Beals investigated the extent of US intelligence agencies' contact with American anthropologists. His investigations found that it was commonplace for anthropologists working in the Soviet Union, China and nation-states with client relations to communist nations to report being contacted by members of US military and intelligence agencies upon their return to the United States (Beals 1967). Such interactions put these scholars on clear notice that their work was subject to the scrutiny of military and intelligence agencies.

There have also been instances of security forces spying on anthropologists; rifling through field notes and questionnaires to access information on studied populations. For example, the FBI used informants to spy on Oscar Lewis while he was conducting fieldwork in Puerto Rico in 1963-1964. The FBI even went so far as to try and reconstruct the questions Lewis asked in his interviews (Price 2004: 250). Similarly, Marvin Harris' Mozambique field notes were ransacked while being shipped home (Price 2002: 16). And an American anthropologist, writing under the pseudonym of Brooks Duncan, has described how his refusal to compromise his research and cooperate with the Army, FBI and CIA led to FBI surveillance, suspected wiretaps, and the mysterious disappearance of his research materials (Duncan 1995: 7-8).

In the past, vast geographical or political areas of study were so politically sensitive that anthropologists working in these areas became suspect or had entire projects shut down. During the early Cold War, plans for East-West nuclear-weapon delivery routes across northern extremes transformed the entire Arctic region into a hot political theatre, and anyone who worked on a related issue

became, simultaneously, a national asset and a suspect. For example, Vilhjalmur Stefansson spent years coordinating the production of a planned 20-volume comprehensive *Encyclopedia Arctica*, sponsored by the US Navy. But once the first two volumes were finalized and sent to Johns Hopkins University Press, the Navy pulled the plug and prevented their publication without explanation, as the entire Arctic region's flora, fauna and indigenous cultures became cloaked in the secrecy of a potential Cold War thermal nuclear battlefield (Price 2004: 284-289).

Also during the Cold War, anthropologists working on topics ranging from poverty, racial discrimination and post-colonialism, to China and the USSR, at times weakened their analyses or engaged in doublethink to avoid suspicion. These scholars had become increasingly aware of the ways that direct forms of analysis might be interpreted by governments as political betrayal. The public humiliation rituals of the McCarthy period taught anthropologists to avoid studying certain topics or to limit analysis. Even studies critical of domestic racial or economic stratification could lead to FBI investigations or loyalty hearings. These and other episodes from the McCarthy period teach us how easily the national security state's interference with academic inquiry can cast a pall of orthodoxy, retarding and redirecting anthropologists' work (Nader 1997).

Present threats to anthropology

Despite the increasing interest among anthropologists during the last quarter century in studying elite individuals and groups who wield power in their societies, many, perhaps most, contemporary anthropologists still conduct research with people who are marginalized, or who are at the receiving end of actions of state power. Some of those groups include organizations and individuals resisting state action, or who advocate for radical change in their communities. And for a variety of reasons, including politics, some of them have been designated as 'foreign terrorist organizations' by the United States government.

Anthropologists studying or working with such groups must therefore tread carefully to avoid violating the material support prohibition. Yet the opacity of the law, paired with its potentially sweeping scope, makes it almost impossible for anthropologists to determine what conduct is permissible. Ethnographers, for example, might wonder if some of their research activities, which include simple acts of reciprocity that develop in any fieldwork situation – buying food or supplies, or helping informants in some non-tangible way – could be construed as providing material support, and put them at risk of prosecution. As a result, they might well self-censor their fieldwork methods, avoiding opportunities to collect information of which they might otherwise have taken advantage, and producing a less complete ethnographic picture.

Some of the kinds of anthropological research that could well be affected by the material support law were detailed by the Brennan Center for Justice in a 2010 amicus brief submitted to the US Supreme Court in the *Holder v. Humanitarian Law Project* case.²¹ The brief cites, for example, the research done by Carolyn Nordstrom (2004) in which she traced the web of financial and material transactions in war zones, exposing the ways in which both licit and illicit transactions support warfare. In the course of her research Nordstrom necessarily interviewed, ate with, learned from and relied upon the relationships with individuals who could easily have been linked to 'terrorist organizations'.

Similarly, in his ethnographic research on how young men were mobilized for violence and profit during the Sierra Leone and Liberia civil wars, Danny Hoffman (2011) lived among militia members. The militias might easily be classified as terrorist organizations, yet there is no way that Hoffman could have done his research without such contact.

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- Similarly, researchers seeking to understand the political dynamics of conflict in Palestine might easily find their work bringing them into 'material' contact with individuals or organizations that could be listed as terrorists. Lori Allen's research on politics and human rights in Palestine must involve contacts with people related to Hamas. And Richard Norton's 2007 study of Hezbollah would have been impossible without contact with that organization.
- Each of these ethnographic projects relied on contacts and exchanges with groups that might easily be classified as connected in some way to terrorist organizations. Without these contacts and exchanges, there is no way that these researchers could have constructed adequate ethnographic pictures of the social worlds of the people in whom they were interested, or understood the cultural logics that render those worlds understandable. Would researchers such as these, now sensitized to the reach of the material support law, find themselves avoiding settings and situations out of concern that their work might lead to criminal prosecution? If so, the effect on ethnographic work would amount to a kind of self-censorship, with researchers feeling compelled to err on the side of caution and restrict their communications.
- A material support prosecution could also have far-reaching institutional consequences. Researchers alleged to have violated the material support law place not only themselves, but also their institutions, at risk. Universities could have their assets impounded and their research activities halted. Will organizations found to be in violation of the law, or even facing charges of such violation, find that they are no longer able to receive federal or state funding for research, even in disciplines other than anthropology? Acting on fear of such consequences, universities may well take the pragmatic decision to limit the kinds of research conducted by their faculties, even as such decisions would be considered potential violations of academic freedom. The stigma of being labelled an institution that supports terrorism would surely cause applications for admission to a university to fall, and private donations to dry up, both consequences any university would obviously seek to avoid.
- Furthermore, institutional review boards, which already inject their concerns into study design, may be administratively encouraged to deny 'human subjects clearance' to researchers if there is a fear that the proposed research would violate the material support law. Denial of review-board approval would have far-reaching consequences. Even if researchers conducted their projects anyway, they might not be able to publish their work, as increasingly journals are requiring proof of review-board review and approval prior to publication.
- In the years since September 2001, all the private grantmaking organizations in the US, with little notice or public debate, began cooperating with federal agencies and conducting 'due diligence' investigations of grantees. Compliance with Presidential Executive Order 13224, the USA Patriot Act and the material support statute has compelled these foundations to take on new anti-terrorism monitoring responsibilities. In 2005, Wenner-Gren Foundation President Leslie Aiello described how (like all other American funding agencies):
- The Foundation has implemented procedures to comply with these counter-terrorism measures, including checking names of grantees against published lists of terrorists. In the event that a grantee cannot be excluded from these lists, the Foundation also has procedures in place to allow the grantee to clear his or her name and receive funding (personal comm. with D. Price, 13 Dec. 2005; see also Ramos *et al.* 2004).
- While compliance with these federal guidelines does not automatically inhibit anthropological inquiry, such intrusions do contain embedded threats to academic independence.
- Limited access to research support and publication venues carries two more potential consequences. First, in order to preserve itself and to succeed institutionally, there is the danger that a department that self-censors to conform to the material support prohibition could find itself reshaped into an academic unit that simply aped the normative ideological perspective of the national security state that brought about the self-censorship. There would be no need for this to be an intentional process. Subtle influences on judgements about hiring and promotion, which are in part linked to the recognition of publication and grant-getting, could cause such a shift in departmental culture – such subtle and unintended shifts are how institutions were transformed during the McCarthy period. Second, a department that steadfastly refused to restrict the research and publication of its members could easily find itself being denied institutional resources, and eventually being reorganized or even eliminated by a university administration that feared the consequences of being accused of providing material support to a foreign terrorist organization.
- Ethnographic writing is in part an act of translation, in which an ethnographer renders understandable to one group of people the cultural logics that underlie the seemingly irrational or incomprehensible activities of another. In public speaking, anthropologists may present their research in such a way as to help their audience see why members of a designated terrorist organization are conducting the kinds of activities that they are. If anthropologists fear this act of publicly accounting for a group's actions might be considered 'material support', they may well either cease making such explanations, or find themselves prosecuted for doing so. Such fear could create a climate in which forthright conversation was discouraged, and public discussions of important contemporary issues truncated and forced into a single interpretive structure.
- Once such self-censorship begins, it can take on a force of its own. If, for example, explaining to a group resisting state actions how to move from a peripheral political position to central participation in the state's political processes is construed as providing material support, then anthropologists and others will avoid such activities. Fear of such prosecution – which can result in the seizing of assets or imprisonment – is already of great concern to the peace-building and humanitarian communities, which are now hesitant to respond in situations where the status of their efforts is unclear.
- The wide-ranging and vague nature of the US law prohibiting material support may thus foster a deep chilling effect on individual research, on institutional development, and on the organization of academic activities in general. It also carries the potential to create an atmosphere in which conversations about national and international issues take place in an arena that is truncated and narrowly focused.

What is to be done?

It is vital that professional associations, both anthropological associations and general academic associations, take strong public stances in opposition to the criminalization of research. Associations need to raise awareness among their members of the threat to academic freedom posed by the US material support law, and make common cause with other organizations, such as the Brennan Center for Justice, who are working to reform it.²² Anthropologists should contribute to these efforts and seek an amendment to the law that would narrow the definition of material support and restrict its application to people who actually intend to further the illegal activities of a terrorist organization. Individually, we need to document the deforming effects the material support law has on our work. A collection of ethnographically grounded, concrete examples of these effects would help advocates make a more compelling case for changing the law. Collectively, we urge our professional organizations to take up this issue. ●