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Doing Our Part: Acknowledging and Addressing Women's Contributions to ISIS

Elizabeth Buner

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DOING OUR PART: ACKNOWLEDGING AND ADDRESSING WOMEN'S CONTRIBUTIONS TO ISIS

INTRODUCTION

- I. THE EVOLUTION OF ISIS
 - II. RESPONDING TO THE RISE OF ISIS THROUGH LEGAL MEASURES
 - A. *The Global Response to the Rise of ISIS and the Influx of Foreign Fighters*
 - B. *Building on a Legacy of Terrorism Prosecutions: How the United States Can Help Counter the ISIS Threat Through Prosecution of ISIS Women*
 - III. THE WESTERN WOMEN OF ISIS
 - A. *Who They Are and Where They Come From*
 - B. *Their Roles Within ISIS*
 1. *Their Intentions When Going Over*
 2. *The Roles They Fill Once There*
 - IV. HOW THE UNITED STATES CAN RESPOND TO THE CONTRIBUTIONS OF WESTERN FEMALE ISIS MEMBERS THROUGH LEGAL ACTION
 - A. *18 U.S.C. § 2339A: Providing Material Support to Terrorists*
 - B. *18 U.S.C. § 2339B: Providing Material Support or Resources to Designated Foreign Terrorist Organizations*
 - V. DO THE ACTIONS OF THE WESTERN WOMEN OF ISIS CONSTITUTE MATERIAL SUPPORT UNDER 18 U.S.C. § 2339B?
 - A. *ISIS Is a Designated Terrorist Organization and the Women Possess the Requisite Knowledge of Such*
 - B. *The Women's Actions Qualify as Material Support Under 18 U.S.C. § 2339B(g)(4)*
 1. *Providing Material Support by Using Social Media to Recruit Western Women and to Incite Terrorism Abroad*
 2. *Providing Material Support by Serving in the al-Khansa'a Brigade*
 3. *Providing Material Support by Acting as "Comfort Women" for ISIS Fighters*
 4. *Providing Material Support by Bearing/Intending to Bear the Children of ISIS Fighters with the Intent that Those Children Will Grow Up to Be Future Jihadis*
 - VI. ASSUMING THE WESTERN WOMEN OF ISIS CAN BE PROSECUTED FOR PROVIDING MATERIAL SUPPORT TO A FOREIGN TERRORIST ORGANIZATION, SHOULD THEY BE?
- ### CONCLUSION

INTRODUCTION

In the wake of the events of September 11, 2001, the United Nations Security Council passed a resolution prohibiting aid to organizations on its list of banned groups, and individual countries passed a series of counterterrorism laws in furtherance of that objective.¹ Fourteen years later, with the rise of the Islamic State of Iraq and Syria (ISIS) and its increasingly international composition, there is a renewed call for countries around the world to do their part to curb this current wave of extremism, not just through military power, but through legislative and judicial action as well.²

The United States already has a strong judicial framework in place, and its impressive record of terrorism prosecutions is a testament to the robustness of that system. “Ten years after Al Qaeda’s attack on the United States on September 11, 2001, the federal government’s record on terrorism prosecutions is relatively easy to summarize: a heavy reliance on preventive law enforcement, an increasingly aggressive use of material support statutes, and a high conviction rate.”³ However, with the renewed call to action, it is time to reexamine this judicial record for deficiencies and to contemplate ways that it can be augmented.

Overrepresentation or underrepresentation of a particular group of individuals in the judicial record may indicate such a deficiency, and the existence of such a marked disparity begs scrutiny. Examining the record of U.S. terrorism prosecutions since 9/11, it quickly becomes apparent that almost all terrorism defendants have been male. Female defendants have been largely absent from the terrorism prosecutions of the last decade, and this deficiency cannot be attributed to the non-existence of female terrorists.⁴ As such, it is time to question why a marked disparity exists between the number of men and women who are prosecuted on terrorism charges; it is time to

1. Somini Sengupta, *Nations Trying to Stop Their Citizens from Going to Middle East to Fight for ISIS*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/middleeast/isis-recruits-prompt-laws-against-foreign-fighters.html> [http://perma.cc/J5T5-V6H6].

2. *See id.*

3. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPT. 11, 2001–SEPT. 11, 2011 2 (Karen J. Greenberg ed., 2011), <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf> [http://perma.cc/R28F-77UQ].

4. Historically, women have constituted approximately 25 percent of membership in terrorist organizations, though with ISIS that figure is closer to 10 percent, consistent with the gender composition of more far-right movements. Steven Erlanger, *In West, ISIS Finds Women Eager to Enlist*, N.Y. TIMES (Oct. 23, 2014), <http://www.nytimes.com/2014/10/24/world/europe/as-islamists-look-to-fill-ranks-more-western-women-answer-their-call.html> [http://perma.cc/2H2D-A6W2].

acknowledge the different roles that men and women play within terrorist organizations; and it is time for this country to broaden its thinking when it comes to what constitutes material support to a terrorist organization.

In an effort to further these aims, this Note will focus on ISIS and the contributions that women, specifically Western women, are making to that organization. ISIS came to the attention of the international community at large in 2014,⁵ and since that time has been an ever present fixture in international headlines. Daily news reports catalogue its exponential growth in personnel,⁶ its expanding reach,⁷ the increasingly vicious nature of its atrocities within controlled territories,⁸ and the heightened frequency of terrorist attacks carried out by ISIS supporters in locations outside of Syria and Iraq.⁹ Rather than being a blip on the international terror scene, ISIS is gaining momentum at an alarming rate, and other terrorist groups are seeking to align themselves with the organization.¹⁰

5. See Sengupta, *supra* note 1.

6. See, e.g., Jamie Crawford & Laura Koran, *U.S. Officials: Foreigners Flock to Fight for ISIS*, CNN (Feb. 11, 2015, 2:54 PM), <http://www.cnn.com/2015/02/10/politics/isis-for-eign-fighters-combat/index.html> [<http://perma.cc/474U-6KLLK>].

7. Taking advantage of instability in a number of countries, including Libya, Egypt, Afghanistan, Pakistan and Yemen, ISIS has expanded its geographic reach beyond its strongholds in Syria and Iraq. There is concern that ISIS will continue its expansion across North Africa and find a stronghold in Tunisia, an unstable country that already has a significant number of citizens among the ISIS ranks. Tim Lister, *ISIS Atrocity in Libya Demonstrates Its Growing Reach in North Africa*, CNN (Feb. 17, 2015, 8:57 AM), <http://www.cnn.com/2015/02/16/africa/isis-libya-north-africa/index.html> [<http://perma.cc/5D96-CHLTJ>].

8. Several Americans, Brits, Japanese, and Egyptian Coptic Christians have been publicly beheaded, and a downed Jordanian pilot captured in ISIS-controlled territory was burned alive in a cage. See, e.g., *New ISIS Video Shows Beheading of American Hostage Peter Kassig*, FOX NEWS (Nov. 16, 2014), <http://www.foxnews.com/world/2014/11/16/new-isis-video-purportedly-shows-beheading-american-hostage-peter-kassig> [<http://perma.cc/5XNL-GSJ4>]; Steve Almasy, *ISIS: Japanese Hostage Beheaded*, CNN (Feb. 3, 2015, 4:58 PM), <http://www.cnn.com/2015/01/31/middleeast/isis-japan-jordan-hostages> [<http://perma.cc/QY7M-BVPU>]; Hasani Gittens & M. Alex Johnson, *U.S. Condemns 'Heinous' Beheading of 21 Egyptian Christians by ISIS*, NBC NEWS (Feb. 15, 2015, 9:39 PM), <http://www.nbcnews.com/storyline/isis-terror/u-s-condemns-heinous-beheading-21-egyptian-christians-isis-n306721> [<http://perma.cc/L2YG-WM2F>]; Rod Nordland & Ranya Kadri, *Jordanian Pilot's Death, Shown in ISIS Video, Spurs Jordan to Execute Prisoners*, N.Y. TIMES (Feb. 3, 2015), <http://www.nytimes.com/2015/02/04/world/middleeast/isis-said-to-burn-captive-jordanian-pilot-to-death-in-new-video.html> [<http://perma.cc/M78D-C2KC>].

9. ISIS militants or supporters carried out at least 56 attacks outside of ISIS-controlled territory during 2015, including the downing of a Russian jet over Egypt in October, a series of coordinated attacks in Paris in November, and a mass shooting in San Bernardino, California in December. Karen Yourish, Derek Watkins, & Tom Giratikanon, *Recent Attacks Demonstrate Islamic State's Ability to Both Inspire and Coordinate Terror*, N.Y. TIMES (Jan. 14, 2016), <http://www.nytimes.com/interactive/2015/06/17/world/middleeast/map-isis-attacks-around-the-world.html> [<http://perma.cc/4G8N-RHNJ>].

10. Boko Haram, a terrorist organization known for its mass atrocities in Nigeria, has incorporated the ISIS symbol into its flag, has modeled its propaganda campaign

ISIS is drawing in people from around the world to aid in its fight and to help in the establishment of an Islamic State.¹¹ Among the recruits are a number of Western women.¹² Some of these women express a desire to fight on behalf of ISIS,¹³ while others desire to provide services such as medical aid, but many more desire simply to marry ISIS fighters and bear children to help populate the self-declared Islamic State.¹⁴ Once there, all these women undertake domestic responsibilities, and a select few are members of a special women's brigade which patrols the streets ensuring that their fellow women are adhering to ISIS' interpretation of the requirements of Islamic law.¹⁵ But perhaps the most significant contribution these Western women are making to ISIS is through their presence on the internet. Many of these women are taking to social media not only to connect with one another, but in an attempt to recruit other Western women to the cause,¹⁶ encouraging them to make the journey to Syria¹⁷ or, if they cannot, to launch terrorist attacks at home.¹⁸

Though some reports indicate an increasingly active role of women in ISIS,¹⁹ this Note explores four of the more traditional

on that of ISIS, has adopted some of ISIS's more vicious techniques, and has talked of establishing its own Caliphate in northern Nigeria. Lister, *supra* note 7. On March 7, 2015, Boko Haram posted an audio message online pledging allegiance to ISIS. Nima Elbagir et al., *Boko Haram Purportedly Pledges Allegiance to ISIS*, CNN (Mar. 9, 2015, 10:39 AM), <http://www.cnn.com/2015/03/07/africa/nigeria-boko-haram-isis> [<http://perma.cc/8HB6-GVXF>].

11. See Ishaan Tharoor, *At Least 81 Nationalities are Fighting in Syria*, WASH. POST (Aug. 29, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/08/29/at-least-81-nationalities-are-fighting-in-syria> [<http://perma.cc/8RYL-57UJ>].

12. Mia Bloom, *How the Islamic State is Recruiting Western Teen Girls*, WASH. POST (Oct. 9, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/10/09/how-the-islamic-state-is-recruiting-western-teen-girls> [<http://perma.cc/56PY-JVNX>].

13. Though ISIS has typically maintained that it does not allow female fighters, there are some reports of women who have made their way to the battlefield. See, e.g., *Female Jihadist Geo Tracked from Canada to ISIS Frontline*, RT NEWS (Feb. 2, 2015, 6:16 AM), [hereinafter *Female Jihadist Geo Tracked*], <http://rt.com/news/228415-isis-canadian-female-tweets> [<http://perma.cc/Y6GS-4XUE>].

14. See Erlanger, *supra* note 4; see also Aryn Baker, *How ISIS Is Recruiting Women from Around the World*, TIME (Sept. 6, 2014), <http://time.com/3276567/how-isis-is-recruiting-women-from-around-the-world> [<http://perma.cc/K2C2-2DWT>].

15. Bloom, *supra* note 12.

16. See Cassandra Vinograd, *Jihadi Brides Swap Lives in West for Front Line With Syria Militants*, NBC NEWS (July 8, 2014, 3:27 PM), <http://www.nbcnews.com/storyline/iraq-turmoil/jihadi-brides-swap-lives-west-front-line-syria-militants-n150491> [<http://perma.cc/4XGP-VFTT>].

17. *Id.*

18. Mark Townsend & Toby Helm, *ISIS Using UK Female Jihadis to Incite Terror Acts Back Home, Say Researchers*, THE GUARDIAN (Jan. 17, 2015, 4:35 PM), <http://www.theguardian.com/world/2015/jan/17/isis-uk-female-jihadists-database-icsr> [<http://perma.cc/MH4K-UYE8>].

19. See, e.g., *Female Jihadist Geo Tracked*, *supra* note 13.

ways that Western women have been supporting the organization. To contextualize their role within ISIS, this Note will begin by briefly examining ISIS's evolution into the headline-grabbing organization that it has become and its allure for foreign fighters. This Note will then address four ways that Western women have been supporting ISIS: (1) by traveling to Syria to marry ISIS fighters and bear children with the intent that the children will grow up to be future jihadis, (2) by traveling to Syria to act as "comfort women"—to provide sexual support for the fighters, (3) by serving in the al-Khansa'a Brigade as "Islamic morality police," and (4) by taking to social media in an attempt to recruit new followers to ISIS or to incite terrorism abroad. After addressing the scope of these contributions, this Note then examines whether these actions may be subject to prosecution under U.S. terrorism laws, specifically the material support statute, 18 U.S.C. § 2339B. After looking at the statutory requirements of 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, this Note analyzes each form of support within the statutory framework and highlights some of the challenges to bringing prosecutions based on the above actions. Finally, assuming the Western women of ISIS can be prosecuted under the material support statutes for these contributions, this Note addresses the legal justifications and policy ramifications underpinning why they should or should not be prosecuted.

Although this Note focuses on the actions of Western women in support of ISIS, its significance should not be limited to this one terrorist organization. Rather, this Note is intended to highlight an area of prosecution that has been largely deficient, and to encourage discussion regarding other ways to tackle the terror problem, including ways that fall outside the neatly defined case law of the past. This Note is also meant to draw attention to a group of individuals—women—whose contributions to terrorist organizations have been largely overlooked. Although the impact of these women's actions may not be as immediately felt as a bomb around a man's waist, their contributions may have greater consequences in the long run than that for which they are given credit.

Terrorism prevention needs to focus not only on the "here and now" threats but also on the threats that may be years in the making. Because babies intended to be future jihadis will very possibly grow up to be such, and because current social media recruits may well turn into future recruiters themselves, it is necessary to start thinking ahead to the consequences of these current actions five, ten, twenty years down the road. Granted, should the United States choose to prosecute women for these less traditional contributions, it is not going to be a cure-all for the ISIS problem or for the broader

terrorist problem, but at a time of a renewed call for action, it is one more step this country can take in answering the call.

I. THE EVOLUTION OF ISIS

The Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant (ISIL), or Daish, traces its roots back to the late 1990s.²⁰ Founded in 1999 by Abu Musab al-Zarqawi as Jamaat al-Tawhid wal-Jihad (JTWJ), the group underwent a number of name changes, leadership changes, and direction changes in subsequent years, arriving at its current name, ISIS, in 2013.²¹

ISIS, the predecessor organization of which was designated as a Foreign Terrorist Organization by the Department of State on December 17, 2004,²² has risen in prominence over the last two years, finding “fertile ground to grow in the civil war in Syria and the aftermath of the U.S. occupation of Iraq.”²³ And with the declaration of a caliphate and the rebranding of itself as the Islamic State of Iraq and the Levant in June 2014,²⁴ it has garnered even more of a following. That following is not limited to individuals from the region; ISIS is increasingly attracting fighters from around the globe.²⁵ A June 2014

20. Aaron Y. Zelin, *The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, WASH. INST. FOR NEAR E. POL’Y 1 (June 2014), http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf [<http://perma.cc/JJ6B-NAKT>].

21. *Id.* at 1–4. In a strategic move to increase credibility and resources, JTWJ formed an alliance with al-Qaeda and changed its name to Tanzim Qa’idat al-Jihad fi Bilad al-Rafidayn (more popularly known as al-Qaeda in Iraq (AQI)). *Id.* at 2. Following al-Zarqawi’s death in 2006, Abu Omar al-Baghdadi took over the organization, and after a brief name change to Majlis Shura al-Mujahedin (or the Mujahedin Shura Council), the organization was renamed the Islamic State of Iraq (ISI). *Id.* at 1, 3. Abu Bakr al-Baghdadi took over leadership of the organization in 2010, and in 2011, he sent operatives to Syria to develop an offshoot, the al-Nusrah Front, which announced its creation in January 2012. *Id.* at 4–5, 10. Over the years, the relationship between ISIS and al-Qaeda deteriorated, with al-Qaeda officially severing ties with ISIS in February 2014. *Id.* at 3. ISIS now operates independently from both al-Qaeda and the al-Nusrah Front. *Id.* at 4–6.

22. *Foreign Terrorist Organizations*, U.S. DEPT OF STATE, <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<http://perma.cc/K58C-QZUW>] (last visited Dec. 11, 2015) (formerly under the name “al-Qa’ida in Iraq”).

23. Erin McClam, *More Extreme Than Al Qaeda? How ISIS Compares to Other Terror Groups*, NBC NEWS (June 20, 2014, 11:33 AM), <http://www.nbcnews.com/storyline/iraq-turmoil/more-extreme-al-qaeda-how-isis-compares-other-terror-groups-n135516> [<http://perma.cc/5YXS-BGBN>]. ISIS has found additional fertile ground in the instability of Libya, Egypt, Afghanistan, Pakistan, and Yemen. Lister, *supra* note 7.

24. Adam Withnall, *Iraq Crisis: Isis Declares Its Territories a New Islamic State with Restoration of Caliphate in Middle East*, THE INDEPENDENT (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east-isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-albaghdadi-as-emir-removing-iraq-and-syria-from-its-name-9571374.html> [<http://perma.cc/B7SK-BAQS>].

25. Tharoor, *supra* note 11.

estimate placed the number of foreign fighters at around 12,000, representing eighty-one different countries.²⁶ By December 2015, that figure increased to between 27,000 and 31,000 fighters representing potentially upwards of 100 countries.²⁷ Although most of those numbers are made up of individuals from countries in close proximity to ISIS controlled territory, approximately 5,000 are Western European nationals.²⁸ The exact number of Americans fighting abroad is unknown,²⁹ but reports have indicated that as of fall 2015 more than 250 American citizens or permanent residents have either traveled or attempted travel to Syria or Iraq to join ISIS.³⁰

The focus on foreign fighters has been largely male-centric; however, men are not the only ones answering the call.³¹ Although

26. *Id.* Other sources indicate those numbers may be higher.

27. SOUFAN GROUP, FOREIGN FIGHTERS: AN UPDATED ASSESSMENT OF THE FLOW OF FOREIGN FIGHTERS INTO SYRIA AND IRAQ 4 (2015), http://soufangroup.com/wp-content/uploads/2015/12/TSG_ForeignFightersUpdate3.pdf [<http://perma.cc/RYP5-2ADP>]. While the Soufan Group placed the number of foreign fighters in the 27,000–31,000 range in December 2015, it stated 86 countries were represented. *Id.* By contrast, a May 2015 figure presented by the United Nations Security Council estimated the number of foreign fighters at over 25,000, but claimed these fighters represented more than 100 countries. Press Release, Security Council, Action Against Threat of Foreign Terrorist Fighters Must Be Ramped Up, Security Council Urges in High-Level Meeting, U.N. Press Release SC/11912 (May 29, 2015), <http://www.un.org/press/en/2015/sc11912.doc.htm> [<http://perma.cc/L4GF-FPT9>]. It is impossible to know the precise number of foreign fighters or the total number of countries represented, as both figures are in a state of constant flux. Estimates vary, but the above data provides a best estimate based on chronology and available sources.

28. SOUFAN GROUP, *supra* note 27, at 12. Just as the overall number of foreign fighters increased between mid-2014 and the end of 2015, the number of Europeans increased from a June 2014 estimate of approximately 3,000 individuals. Tharoor, *supra* note 11.

29. *FBI Director: Americans Fighting in Syria Hard to Track*, CBS NEWS (Aug. 11, 2014, 3:46 PM), <http://www.cbsnews.com/news/fbi-director-americans-fighting-in-syria-hard-to-track> [<http://perma.cc/RZV4-CP2L>].

30. LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA 4 (2015), http://cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report_0.pdf [<http://perma.cc/2W45-GXWA>]. These numbers are likely on the low side, as there is a distinct possibility of additional, though unknown, individuals who have successfully made the journey from Western countries, including the United States. Crawford & Koran, *supra* note 6. While the exact number of ISIS sympathizers is unclear, FBI Director Comey noted in May 2015 that ISIS “is attempting to recruit ‘hundreds, maybe thousands’ of potential terrorists across the country.” Tom Vanden Brook, *ISIL Activity Drives Up Pentagon Threat Level*, USA TODAY (May 8, 2015, 5:55 PM), <http://www.usatoday.com/story/news/nation/2015/05/08/pentagon-security-isis/26976725> [<http://perma.cc/9NLP-E9JP>]. As of October 2015, the FBI had over 900 active investigations into homegrown extremists underway, covering all 50 states. Kevin Johnson, *Comey: Feds Have Roughly 900 Domestic Probes About Islamic State Operatives, Other Extremists*, USA TODAY (Oct. 23, 2015, 4:33 PM), <http://www.usatoday.com/story/news/nation/2015/10/23/fbi-comey-isil-domestic-probes/74455460> [<http://perma.cc/V4Z2-FRKZ>]. “Since March 2014, 71 individuals in one way or another linked to ISIS have been charged in the U.S. for terrorism-related activities. The number of arrests has spiked in recent months, with 56 arrested since January 2015.” VIDINO & HUGHES, *supra*.

31. See, e.g., Erlanger, *supra* note 4.

men are arriving in much higher numbers—several sources estimate the ratio to be approximately 10:1³²—women are heeding the call as well.³³ Some women want to fight on behalf of ISIS,³⁴ others to lend skills such as medical training to the cause, but by and large the majority of women have gone to become jihadi brides.³⁵ “The exact number of women who have gone to marry jihadis is impossible to ascertain—which is exactly why experts are worried.”³⁶ But one thing is clear—their numbers are on the rise. Estimates from the end of 2014 indicated there were approximately 200 Western women in Syria, including women from the United States, Canada, Australia, the United Kingdom, and other parts of Europe.³⁷ A year later, that number more than doubled, with estimates from 2015 placing the number of Western women who have joined ISIS at over 550.³⁸ Although jihadi brides are not a new phenomenon, there has potentially been an increase in their numbers coinciding with the announcement of the Islamic State.³⁹ Families are needed to sustain the State, and women are needed to create those families.⁴⁰

II. RESPONDING TO THE RISE OF ISIS THROUGH LEGAL MEASURES

A. The Global Response to the Rise of ISIS and the Influx of Foreign Fighters

“[T]he prospect of radicalized youths’ [sic] becoming hardened on the battlefields of Syria and Iraq has sent a new ripple of anxiety through nations of all stripes, reviving a longstanding tension, especially in democratic countries, over how to balance civil liberties and security in an age of transnational terrorism.”⁴¹ In the wake of the ISIS surge, countries around the world are exploring ways to stem the flow of their citizens heading over to join such extremist groups.⁴²

France wants more power to block its citizens from leaving the country, while Britain is weighing whether to stop more of

32. *Id.*; see also Bloom, *supra* note 12.

33. See, e.g., Bloom, *supra* note 12.

34. Erlanger, *supra* note 4.

35. See, e.g., *id.*; see also Baker, *supra* note 14.

36. Vinograd, *supra* note 16.

37. Erlanger, *supra* note 4; see also Baker, *supra* note 14.

38. ERIN MARIE SALTMAN & MELANIE SMITH, “TILL MARTYRDOM DO US PART: GENDER AND THE ISIS PHENOMENON 4 (2015), http://www.strategicdialogue.org/Till_Martyrdom_Do_Us_Part_Gender_and_the_ISIS_Phenomenon.pdf [<http://perma.cc/X5TU-PT62>].

39. Vinograd, *supra* note 16.

40. *Id.*

41. Sengupta, *supra* note 1.

42. *Id.*

its citizens from coming home. Tunisia is debating measures to make it a criminal offense to help jihadist fighters travel to Syria and Iraq, while Russia has outlawed enlisting in armed groups that are “contradictory to Russian policy.” . . .

. . . .
 . . . The Saudi king this year issued a rare decree making it a criminal offense to join a foreign war.⁴³

The United States took the issue to the international community as a whole when it pushed for the United Nations Security Council (U.N.S.C.) to issue a legally binding resolution “that would compel all countries in the world to take steps to ‘prevent and suppress’ the flow of their citizens into the arms of groups considered to be terrorist organizations.”⁴⁴

Although the United States’ proposal was a worthy one and the resulting U.N.S.C. Resolution⁴⁵ affirmed the continued need for global action to fight terrorism, these actions are largely symbolic.⁴⁶ Though the U.N.S.C. resolution binds U.N. Member States,⁴⁷ it will have little impact upon the individuals who choose to pursue an extremist path.⁴⁸

Instead, it will come down to domestic legislation and enforcement to curb these trends of foreign fighters. Furthermore, “[t]he debate over stemming the flow of foreign fighters has opened up new legal territory and raised the question of when and how countries should prosecute their citizens for fighting in another country’s war.”⁴⁹ In taking on this challenge, these countries will face similar hurdles—such as how to balance civil liberties and national security, standards of proof for prosecutions, and concern about the backlash from such prosecutions—but at the end of the day, each country must decide how to best balance their domestic security needs against the liberties of their citizens.⁵⁰

43. *Id.*

44. *Id.*

45. S.C. Res. 2178, ¶ 15, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

46. Sengupta, *supra* note 1. Though a Chapter VII U.N.S.C. resolution can be enforced by military or nonmilitary actions, such as sanctions, the implementation and enforcement of international law is often very difficult. *See The Security Council*, U.N. SEC. COUNCIL, <http://www.un.org/en/sc/> [<http://perma.cc/J9BB-TEMP>] (last visited Dec. 11, 2015).

47. *The Security Council*, *supra* note 46.

48. *See The Security Council*, *supra* note 46. U.N.S.C. resolutions bind member states, not individuals or organizations. *Id.* Therefore, U.N. Member States are required to take steps to enforce the U.N.S.C. resolution, and failure to do so may result in intervention by the Security Council. *Id.* However, the U.N. does not have the power to stop individuals from joining ISIS; that action must come from the State. *See S.C. Res. 2178*, *supra* note 45, ¶ 15.

49. Sengupta, *supra* note 1.

50. *See id.*

B. Building on a Legacy of Terrorism Prosecutions: How the United States Can Help Counter the ISIS Threat Through Prosecution of ISIS Women

United States terrorism prosecutions in the decade after 9/11 were marked by an increase in prosecutions of defendants with a terrorist organization affiliation.⁵¹ However, the majority of jihadist defendants prosecuted did not have a specific terror target.⁵² The dramatic increase in material support charges during this decade reflected, in part, this more generalized affiliation.⁵³ Of the 431 resolved cases, approximately 87% resulted in a conviction.⁵⁴

However, one thing that is striking about this impressive record is the underrepresentation of female defendants. There have been a few female defendants, including Colleen LaRose (also known as Jihad Jane) who was convicted for her role in the 2009 plot to murder a Swedish cartoonist and for her use of the internet to recruit men and women to wage jihad.⁵⁵ Another defendant, Lynne Stewart, was convicted for her role in passing messages between her incarcerated client and an al-Qaeda-affiliated terrorist organization.⁵⁶

51. CTR. ON LAW & SEC., *supra* note 3, at 16–17.

52. *Id.* at 18.

53. *Id.* at 16–17.

54. *Id.* at 7.

55. Carrie Johnson, *Jihad-Jane, an American Woman, Faces Terrorism Charges*, WASH. POST (Mar. 10, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030902670_pf.html [<http://perma.cc/D9BC-6Z8N>]; see also “Jihad Jane” Gets Reduced Sentence for Cooperation, CBS NEWS (Jan. 6, 2014, 12:11 PM), <http://www.cbsnews.com/news/jihad-jane-gets-reduced-sentence-for-cooperation> [<http://perma.cc/ZK7T-CSQJ>]. Colleen LaRose (also known as Jihad Jane and Fatima La Rose) “bec[ame] one of the few women ever charged in the U.S. with terrorist activities” when she was indicted for her role in a 2009 plot to kill a Swedish artist whose depiction of the prophet Muhammad angered many around the world. *Id.* LaRose, a Pennsylvania woman, was recruited via jihadist websites, and, according to the indictment, used the internet to “recruit[] men and women in the United States, Europe and South Asia to ‘wage violent jihad’” Johnson, *supra*. She sought out recruits like herself, whose appearance and passport would allow them to blend in and go undetected in the United States and in Europe. *Id.* She pled guilty to conspiracy to support terrorists and conspiracy to kill in a foreign country, as well as non-terrorism charges of lying to investigators and attempted identity theft, and was sentenced to 10 years in jail. See “Jihad Jane” Gets Reduced Sentence for Cooperation, *supra*. Another woman, Jamie Paulin-Ramirez (aka Jihad Jamie) was also charged in connection with the same plot to murder the Swedish artist. *Family: No Word from Freed “Jihad Jamie”*, CBS NEWS (Mar. 15, 2010, 3:19 AM), <http://www.cbsnews.com/news/family-no-word-from-freed-jihad-jamie> [<http://perma.cc/GSK4-38GR>].

56. *United States v. Stewart*, 590 F.3d 93, 98–99 (2d Cir. 2009). Lynne Stewart, a New York attorney, was convicted in 2005 on material support charges stemming from a violation of Special Administrative Measures (SAMs) imposed on her client, Sheikh Omar Ahmad Ali Abdel Rahman. *Id.* at 108. Under the SAMs, Stewart was prohibited from passing messages between her client and the outside world, including the media, restrictions which she disregarded. *Id.* at 102–03. As a result she was charged with

Though female defendants are not completely absent from the courtroom in terrorism prosecutions, they are few and far between. The reasons for this deficit are unclear. It is likely that, at least in part, the dearth of female terrorist defendants stems from restrictions placed on women in certain terrorist organizations and from an undervaluation by the United States of the support that these women do provide, as their contributions do not fit within traditional notions of terrorist activity.⁵⁷ However, it is time to reevaluate the role of women in terrorist organizations, and question whether certain actions rise to the level of terrorist activity.

Over the last two years there have been numerous reports of Western women who have successfully joined ISIS or been stopped en route.⁵⁸ A number of Europeans have made the journey successfully,⁵⁹ as have at least two Canadians⁶⁰ and two Americans.⁶¹ During the same time period, at least four attempts by women from the United States have been thwarted.⁶² In April 2014, a nineteen-year-old

violating 18 U.S.C. § 2339A and 18 U.S.C. § 2, providing and concealing material support to the conspiracy to murder persons in a foreign country, and of conspiring to provide and conceal such support in violation of 18 U.S.C. § 371. *Id.* at 99. She was also charged with violating 18 U.S.C. § 1001, knowingly and wilfully making false statements, in connection to her affirmation to abide by the conditions of the SAMs. *Id.*

57. Another possible explanation has to do with the finality of the role that many women play within terrorist organizations—women are frequently used as suicide bombers because they are less likely to arouse suspicion than men. Mia Bloom, *Analysis: Women and Children Constitute the New Faces of Terror*, CNN: SECURITY CLEARANCE (Aug. 6, 2012, 1:00 AM), <http://security.blogs.cnn.com/2012/08/06/analysis-women-and-children-constitute-the-new-faces-of-terror> [<http://perma.cc/LNC5-C65B>].

58. See, e.g., Bloom, *supra* note 12; *FBI: Colorado Woman Aimed to Go to Syria for Jihad*, CBS NEWS (July 2, 2014, 9:44 PM), <http://www.cbsnews.com/news/fbi-colorado-woman-aimed-to-go-to-syria-for-jihad> [<http://perma.cc/2D9J-P5YY>].

59. Harriet Sherwood et al., *Schoolgirl Jihadis: The Female Islamists Leaving Home to Join Isis Fighters*, THE GUARDIAN (Sept. 29, 2014, 3:52 PM), <http://www.theguardian.com/world/2014/sep/29/schoolgirl-jihadis-female-islamists-leaving-home-join-isis-iraq-syria> [<http://perma.cc/Y76C-7NNW>].

60. Nadim Roberts, *The Life of a Jihadi Wife: Why One Canadian Woman Joined ISIS's Islamic State*, CBC NEWS (July 7, 2014, 5:00 AM), <http://www.cbc.ca/news/world/the-life-of-a-jihadi-wife-why-one-canadian-woman-joined-isis-s-islamic-state-1.2696385> [<http://perma.cc/9CJ3-72RW>].

61. Ariel Bradley, a 29-year-old from Chattanooga, Tennessee made the trip to Syria in April 2014 with her husband and young daughter, as did Hoda, a 20-year-old university student from Alabama, who traveled to Syria in November of 2014. Ellie Hall, *How One Young Woman Went from Fundamentalist Christian to ISIS Bride*, BUZZFEED NEWS (July 20, 2015, 11:26 PM), <http://www.buzzfeed.com/elliervhall/womanjourneyfromchattanooga> [<http://perma.cc/V69G-85VP>]; Ellie Hall, *Gone Girl: An Interview with an American in ISIS*, BUZZFEED NEWS (Apr. 17, 2015, 10:57 PM), http://www.buzzfeed.com/elliervhall/gonegirlaninterviewwithanamericaninisis?utm_term=.4ldqpgp&bffb#opNW7LX2V4 [<http://perma.cc/J38V-TQME>].

62. Jack Healy & Michael S. Schmidt, *U.S. Says It Stopped 3 Young Women Seeking to Join Islamic State*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/us/us-says-it-stopped-3-young-women-seeking-to-join-islamic-state.html> [<http://perma.cc>

Denver woman, Shannon Maureen Conley, was arrested at the Denver airport as she was about to leave for Turkey, en route to Syria.⁶³ Once in Syria, she planned to marry a jihadist she met online⁶⁴ and to pursue her dream of waging jihad.⁶⁵ Conley, a certified nurse's aide, intended to draw on the military training she received from the U.S. Army Explorers⁶⁶ or, alternatively, to employ her nursing skills to help the wounded fighters.⁶⁷ Conley was charged with conspiracy to provide material support to a terrorist organization and pled guilty on September 10, 2014.⁶⁸ Just a month later, in mid-October 2014, three teenage girls from the Denver suburbs, "two sisters of Somali descent and a friend of Sudanese descent," were intercepted by law enforcement as they attempted to make their way to Syria to join the ISIS militants.⁶⁹ After being detained in Frankfurt, Germany, they were returned to their families in Denver;⁷⁰ no criminal charges have been filed against them.⁷¹

In April 2015, another U.S. woman, thirty-year-old Keonna Thomas, was arrested in Philadelphia and charged with "knowingly attempting to provide material support and resources to a designated foreign terrorist organization" in connection with her plan to "travel overseas in order to join, fight with, and martyr herself on behalf of [ISIS]." ⁷² Over her defense attorney's objections that the charges

/BX33-L4R6]; Adam K. Raymond, *Colorado Teen Arrested After Falling in Love with Jihadist over the Internet, Trying to Join ISIS*, N.Y. MAG. (July 3, 2014, 12:32 PM), <http://nymag.com/daily/intelligencer/2014/07/teen-arrested-for-trying-to-join-isis-for-love.html> [<http://perma.cc/5X48-SR5Z>].

63. *Colorado Teen Shannon Conley's Support of ISIS Raises Alarm About American Jihadists*, CBS NEWS (Sept. 10, 2014, 1:20 PM), <http://www.cbsnews.com/news/colorado-teen-shannon-conleys-support-of-isis-raises-alarm-about-american-jihadists> [<http://perma.cc/7J8D-UQXB>]; Raymond, *supra* note 62.

64. Raymond, *supra* note 62.

65. *Colorado Teen Shannon Conley's Support of ISIS Raises Alarm About American Jihadists*, *supra* note 63.

66. *FBI: Colorado Woman Aimed to Go to Syria for Jihad*, *supra* note 58.

67. *Colorado Teen Shannon Conley's Support of ISIS Raises Alarm About American Jihadists*, *supra* note 63. Conley was sentenced to four years of prison in January 2015. Michael Martinez, Ana Cabrera, & Sara Weisfeldt, *Colorado Woman Gets 4 Years for Wanting to Join ISIS*, CNN (Jan. 24, 2015, 9:29 AM), <http://www.cnn.com/2015/01/23/us/colorado-woman-isis-sentencing> [<http://perma.cc/QN4G-K5P5>].

68. Martinez, Cabrera, & Weisfeldt, *supra* note 67.

69. Healy & Schmidt, *supra* note 62.

70. *Id.*

71. The decision not to charge the Denver teens likely stems from a combination of factors, including their age and their professed lack of interest in fighting on behalf of ISIS. Katie Zavadski, *Feds Catch and Release Teens Busted for Trying to Join ISIS*, DAILY BEAST (Dec. 1, 2015, 1:06 PM), <http://www.thedailybeast.com/articles/2015/12/01/feds-catch-and-release-teens-busted-for-trying-to-join-isis> [<http://perma.cc/B7TY-8DSN>].

72. Polly Mosendz, *Philadelphia Woman Charged With Providing Materials and Attempting to Join ISIS*, NEWSWEEK (Apr. 3, 2015, 11:10 PM), <http://www.newsweek.com>

were a violation of her rights to freedom of speech and association, the judge upheld the charges, saying that provision of “‘material support’ isn’t covered by free speech protections.”⁷³

Four months later, on August 8, 2015, nineteen-year-old Jaelyn Delshaun Young and her twenty-two-year-old fiancé, Muhammad Oda Dakhalla, were arrested at an airport in Mississippi as they prepared to board a plane to Turkey with plans to travel on to Syria.⁷⁴ Young, a former high school honors student and member of the homecoming court, was a student at Mississippi State with plans to become a doctor.⁷⁵ Like so many of the other Western women who already joined ISIS, Young has been described as smart and from a good family.⁷⁶ Through social media communications with an undercover FBI agent, Young indicated her skills would be useful, noting “I am skilled in math and chemistry and worked at an analytical lab here on my college campus. My partner is very good with things like computer science/media. We learn very fast and would love to help with giving medical aid.”⁷⁷ Both “repeatedly expressed their wish to contribute to the growth of ISIS’s self-proclaimed caliphate”⁷⁸ and Young professed her desire to “raise little Dawlah [ISIS] cubs.”⁷⁹ They have been charged with conspiracy and attempting to provide material support and resources to ISIS.⁸⁰

Unlike Conley, who desired to fight on behalf of ISIS, Thomas, who desired to martyr herself, or Young, or desired to provide medical assistance, many of the women joining ISIS have less traditionally defined material support activities in mind. Many are going only with the intent to marry fighters and, in some cases, to have their children,⁸¹ but once there, many women are taking on increasingly

/philadelphia-woman-charged-providing-materials-and-attempting-join-isis-319372 (last visited Dec. 11, 2015) (quoting from Criminal Complaint, *United States v. Thomas*, No. 15-417-M (E.D.Pa. filed Apr. 3, 2015)).

73. *Judge Lets Stand Case Against Philly Woman Accused of Trying to Join ISIS*, PENN LIVE (Dec. 25, 2015, 6:45 PM), http://www.pennlive.com/news/2015/12/judge_lets_stand_case_against.html [<http://perma.cc/9U83-WG8Y>].

74. Catherine E. Shoichet & Sam Stringer, *Feds: Mississippi Couple Planned Honey-moon to Join ISIS in Syria*, CNN (Aug. 12, 2015, 6:49 AM), <http://www.cnn.com/2015/08/11/us/mississippi-couple-isis> [<http://perma.cc/CVD2-UM26>].

75. *Id.*

76. Enjoli Francis & Emily Shapiro, *Teen Girl Accused of Trying to Join ISIS is Kind, Bubbly Person, Friend Says*, ABC News (Aug. 12, 2015, 5:33 PM), <http://abcnews.go.com/US/teen-girl-accused-join-isis-kind-bubbly-person/story?id=33036086> [<http://perma.cc/HEP9-VYKD>].

77. Shoichet & Stringer, *supra* note 74.

78. VIDINO & HUGHES, *supra* note 30, at 1.

79. *Id.* (citing Criminal Complaint at 4, *United States v. Young*, No. 3:15MJ32-SAA (N.D. Miss. filed Aug. 8, 2015)).

80. Shoichet & Stringer, *supra* note 74.

81. *See, e.g.*, Erlanger, *supra* note 4; *see also* Baker, *supra* note 14.

supportive roles, such as recruiting other Western women⁸² or serving on the all-female police force, the al-Khansa'a Brigade.⁸³ These women are important to the ISIS cause, not because of their fighting ability, but because they can do two important things—bear children and bring in other women.⁸⁴ Although these contributions to the organization may not be as radical or immediate as taking up arms, they have long-term implications for the organization. By bearing children who could then grow up to be jihadis, or by recruiting other women for the same purpose, these women are helping to build a foundation for the organization. So far, they have received relatively little attention for their efforts, especially in the legal context.

The United States is looking for ways to combat the latest threat of international extremism, most specifically the proliferation of ISIS.⁸⁵ One way to combat ISIS is by paying greater attention to the Western women joining the organization. Focusing on these women and potentially prosecuting them for their contributions to ISIS will not be the panacea to stopping terrorism, but it may provide a useful roadblock to ISIS's expansion in the long term. To better understand how this could be another weapon in the United States' legal armory, it is necessary to look at who these women are, where they come from, what they believe, and how they are contributing to the Islamic State.

III. THE WESTERN WOMEN OF ISIS

A. *Who They Are and Where They Come From*

It is difficult to pin down the exact number of women and girls that have left their Western homes to join the Islamic State fighters in the Middle East. Recent estimates indicate that potentially more than 550 Western women may have joined ISIS;⁸⁶ the Australian Foreign Minister, Julie Bishop, has projected that the number may be even higher, saying that "women now account for one fifth of all foreign fighters joining ISIS."⁸⁷ Regardless of the exact number, members of this "troubling and growing sisterhood"⁸⁸ are leaving behind

82. See Katie Zavadski, *Meet the Female Recruiters of ISIS*, N.Y. MAG. (Sept. 4, 2014, 10:10 AM), <http://nymag.com/daily/intelligencer/2014/09/meet-the-female-recruiters-of-isis.html> [<http://perma.cc/W3AN-7M4Z>].

83. Bloom, *supra* note 12.

84. Zavadski, *supra* note 82; see also Bloom, *supra* note 12.

85. Sengupta, *supra* note 1.

86. SALTMAN & SMITH, *supra* note 38, at 4.

87. Mary Lloyd & Georgia McCafferty, *Australian PM: ISIS Is 'Terrorism with Global Ambitions'*, CNN (June 11, 2015, 1:32 AM), <http://www.cnn.com/2015/06/11/asia/australia-extremism-meeting> [<http://perma.cc/55JG-VYWF>].

88. Vinograd, *supra* note 16.

their Western lives for what many see as a “hijrah” (emigration).⁸⁹ Most of the women leaving North America, Europe, and Australia are young, typically between the ages of sixteen and twenty-four,⁹⁰ educated,⁹¹ pious, and active on social media.⁹² The majority are going without their parents’ permission.⁹³

These women are coming, or attempting to come from all around the world. Again, the numbers are not exact, but estimates indicate that there are at least sixty-three French recruits, fifty British recruits, forty Germans, and fourteen Austrians, in addition to women from a number of other European countries.⁹⁴ The exact number of American women who have successfully made the journey is unknown,⁹⁵ but the list includes twenty-nine-year-old Ariel Bradley from Tennessee and twenty-year-old Hoda Muthana from Alabama.⁹⁶ They are joined by twenty-year-old Aqsa Mahmood from Scotland, twin sixteen-year-old sisters Zahra and Salma Halane from England, fifteen-year-old Yusra Hussein from England, fifteen-year-old Nora el-Bathly from France, fifteen-year-old Sarah O. from Germany, teen friends Sabina Selimovic and Samra Kesinovic from Austria, sisters from Norway, and Umm Haritha, a twenty-year-old woman from Canada.⁹⁷ These are just a sampling; the list goes on. Additionally, there were several Americans who attempted to join, including nineteen-year-old Shannon Maureen Conley, three Denver teenagers, thirty-year-old Keonna Thomas, and nineteen-year-old Jaelyn Delshaun Young, who were intercepted en route to Syria during 2014 and 2015.⁹⁸

Although each woman’s motivation is different, it seems that many of the women are drawn in by romanticized images of life in the Islamic State or by appeals to their faith and ideology,⁹⁹ others are looking for an adventure or a sense of identity and belonging.¹⁰⁰

89. See Bloom, *supra* note 12.

90. There have been reports, however, of girls as young as 13 making the journey. Sherwood et al., *supra* note 59.

91. At the time of their departure several girls were still in school or university, and a number of others were recent university graduates. See, e.g., Sherwood et al., *supra* note 59.

92. *Id.*

93. *Id.*

94. *Id.*; see also Erlanger, *supra* note 4.

95. Sherwood et al., *supra* note 59.

96. Hall, *One Young Woman*, *supra* note 61; Hall, *Gone Girl*, *supra* note 61.

97. Roberts, *supra* note 60; Sherwood et al., *supra* note 59.

98. *Supra* Part II.B.

99. Vinograd, *supra* note 16.

100. See *id.* A recent report by researchers at the Institute for Strategic Dialogue highlighted the diversity among female recruits while at the same time identifying what the researchers consider to be major “push factors” and “pull factors” driving women to leave their Western homes and “migrate to the so-called Caliphate.” SALTMAN & SMITH, *supra* note 38, at 9–17. Among the “push factors” are feelings of social and/or cultural

“In most cases, women and girls appear to have left home to marry jihadis, drawn to the idea of supporting their ‘brother fighters’ and having ‘jihadist children to continue the spread of Islam’”¹⁰¹

Some of these women accompany male family members who are going over to fight, such as Manchester twins Zahra and Salma Halane who followed their brother to Syria in July of 2014,¹⁰² but many more of the women are recruited through the internet, specifically through social media.¹⁰³ “[T]he role of social media cannot be overstated. There are people who are enticing women to come over social media, romanticizing the whole aspect of coming over and imploring them that it’s their religious duty”¹⁰⁴

B. Their Roles Within ISIS

1. Their Intentions When Going Over

The majority of the women who have journeyed to Syria to join ISIS have done so with the intent of marrying jihadis, and some with the intent of bearing their children.¹⁰⁵ When they arrive, most of their work within ISIS is relegated to the domestic sphere, with “most . . . undertaking ‘typical’ female roles: making house and establishing community and support structures—not fighting.”¹⁰⁶

However, other women have made the journey intending to take a more active role in the organization.¹⁰⁷ “[I]ncreasing numbers of very young western women are heeding the calls of their jihadi ‘sisters’ and heading to Iraq and Syria, not just as wives to the militants but

isolation including questions of identity, feelings that the Muslim community at large is being persecuted, and “anger, sadness, and/or frustration over a perceived lack of international action in response to this persecution.” SALTMAN & SMITH, *supra* note 38, at 9. The “pull factors” (which “embrace positive incentives and motivational reasonings”) include “[i]dealistic goals of religious duty and building a utopian ‘Caliphate state,’ [b]elonging and sisterhood, [and] [r]omanticisation of the experience.” SALTMAN & SMITH, *supra* note 38, at 13.

101. Sherwood et al., *supra* note 59. Not all scholars agree with this assertion, however. While acknowledging “[t]he responsibility of Western women under ISIS-controlled territory is first and foremost to be a good wife to the jihadist husband they are betrothed to and to become a mother to the next generation of jihadism,” researchers at the Institute for Strategic Dialogue assert that “[t]he assumption that females join ISIS primarily to become ‘jihadi brides’ is reductionist and above all, incorrect.” SALTMAN & SMITH, *supra* note 38, at 5. These researchers argue a number of causal factors influence each woman’s decision to join. *Id.*

102. *Id.*

103. *Id.*

104. Vinograd, *supra* note 16 (internal quotation marks omitted).

105. Sherwood et al., *supra* note 59.

106. Vinograd, *supra* note 16.

107. See, e.g., Sherwood et al., *supra* note 59; Vinograd, *supra* note 16.

also as fighters.”¹⁰⁸ Whether they are actually allowed to take up arms, however, is unclear.

There are also reports of women who have gone to Syria not to be wives or fighters, but to serve as “comfort women” through *jihād al-nikah* or “sexual jihad,” whereby women join the jihad by providing sex to the male fighters.¹⁰⁹ Though many accounts of *jihād al-nikah* are that it is not voluntary,¹¹⁰ there have been other reports of women responding to an ISIS edict, and an earlier Wahhabi edict,¹¹¹ asking for women to “offer themselves as comfort women ‘to boost the morale of fighters’ in Syria”¹¹² In addition to a number of Tunisian women, women from Australia, the United Kingdom, and Malaysia have reportedly traveled to Syria and Iraq to become “comfort women” for jihadists establishing the Islamic State.¹¹³

2. *The Roles They Fill Once There*

Besides serving in a domestic capacity and bearing children, women as a group are fulfilling two other important roles. A small, select group, including some Western women, is serving in a special, all-female militant group.¹¹⁴

From 25 to 30 women are handpicked to join the Al Khansa’a brigade. This crew, limited to females in their peak childbearing years, patrols the streets of Raqqa as Islamic morality police, ensuring that woman [sic] are comporting themselves according to the strictures of the Islamic faith [T]hey may also be working at checkpoints to prevent enemies from leaving.¹¹⁵

Involvement with the brigade gives these women a power and authority that most women in ISIS do not experience.

108. Carol Hunt, *Young, Vulnerable Women Being Groomed for Jihad*, INDEPENDENT.IE (Aug. 24, 2014, 2:30 AM), <http://www.independent.ie/opinion/columnists/carol-hunt/young-vulnerable-women-being-groomed-for-jihad-30531667.html> [<http://perma.cc/N6R2-4NVZ>]; see also Vinograd, *supra* note 16.

109. *ISIS Issues Orders in Mosul: Give Over Girls for ‘Sex Jihad’*, THE CLARION PROJECT, <http://www.clarionproject.org/print/news/isis-issues-orders-mosul-give-over-girls-sex-jihad> [<http://perma.cc/7UWJ-NQSU>].

110. See, e.g., *id.*

111. Mary Chastain, *Women Volunteer for Sexual Jihad with Islamic State*, BREITBART (Aug. 27, 2014), <http://www.breitbart.com/Big-Peace/2014/08/27/Women-Volunteer-for-Sexual-Jihad-with-Islamic-State> [<http://perma.cc/SE8R-97GA>].

112. *Id.*

113. *Id.* It is worth noting that while there are reports of women going voluntarily, most of the women involved in *jihād al-nikah* have been forced into it against their will, after being involuntarily conscripted by fighters as the fighters took over towns. *Id.*

114. Bloom, *supra* note 12.

115. *Id.*

But perhaps where Western women are having their greatest impact is on the internet. ISIS has a large social media presence,¹¹⁶ and these Western women, who themselves are social media savvy and were often recruited online,¹¹⁷ are the perfect tool to reach out to aspiring jihadis.

While their husbands are out fighting, these women communicate ISIS's message to the outside world, and particularly to other women curious about the same cause. Because of their youth and Western upbringings, they do so in slang and emoji, intermixed with a handful of Islamic phrases that they have picked up.¹¹⁸

Using a variety of social media platforms, including Facebook, Twitter, Tumblr, instant messenger KiK, and Ask.fm, these women are connecting with one another and recruiting other Western women to join the cause.¹¹⁹ "Women already living amid ISIS fighters use[] social media adeptly to portray Syria as a utopia and to attract foreign women to join their 'sisterhood in the caliphate'"¹²⁰ The content of their posts ranges from idealized descriptions of daily life, to Koranic verses, to glorifications of martyrdom, to practical advice regarding what women should and should not bring with them when making the journey to Syria.¹²¹ Photos of food and sunsets, as well as selfies, stand in stark contrast to photos of themselves with weapons and images of decapitated bodies.¹²²

In addition to recruiting Western women to join them in Syria, a number of British women are attempting to incite terrorism back home in the United Kingdom.¹²³ The International Centre for the Study of Radicalisation (ICSR), which has been monitoring the social media accounts of a number of British women in northern Syria, reports that in addition to recruiting on behalf of ISIS and praising recent attacks, these British women have been promoting further violence.¹²⁴ Directing their messages at Western women, these British ISIS recruits are encouraging those who are unable to come to Syria to carry out terrorist attacks at home.¹²⁵

116. *Id.*

117. See Sherwood et al., *supra* note 59; Vinograd, *supra* note 16.

118. Zavadski, *supra* note 82.

119. See Bloom, *supra* note 12; Vinograd, *supra* note 16; Zavadski, *supra* note 82.

120. Sherwood et al., *supra* note 59.

121. Baker, *supra* note 14.

122. Sherwood et al., *supra* note 59.

123. Townsend & Helm, *supra* note 18.

124. *Id.*

125. *Id.* It appears that these calls have not gone unheard. In April 2015, two U.S. women, 28-year-old Noelle Velentzas and 31-year-old Asia Siddiqui, were arrested in New York City on charges stemming from their plan to bomb unspecified targets in the city.

One of the most active Westerners on social media is Aqsa Mahmood. Aqsa Mahmood was a typical twenty-year-old radiology student from Glasgow, Scotland, and the child of a secular, middle-class family.¹²⁶ She left all of that behind and traveled to Syria to join ISIS and marry a fighter.¹²⁷ “[L]ured to ISIS through online propaganda,”¹²⁸ Aqsa Mahmood has emerged as an online spokesperson for ISIS, taking to social media in an effort to inspire more women to join the cause.¹²⁹ Posting under the names Umm Layth and AlBrittaniyah,¹³⁰ Mahmood has reached out to women through a number of social media outlets, including Tumblr and Twitter, glorifying all the worldly and spiritual benefits awaiting the women in the so-called idealist state.¹³¹ For young, impressionable women, these enticements are working, though the reality awaiting them is far different from this idealized version.¹³²

IV. HOW THE UNITED STATES CAN RESPOND TO THE CONTRIBUTIONS OF WESTERN FEMALE ISIS MEMBERS THROUGH LEGAL ACTION

Curbing the influx of foreigners into the ranks of ISIS, and combating the threat of ISIS more generally, will likely require a multifaceted approach, including the use of force, diplomacy, legal measures, education, and a media countercampaign. Fortunately, when it comes to legal measures, the United States already has a strong legal framework in place, one that requires neither amendments nor new statutes to handle the current situation. Rather, the current legal framework is set up to handle such cases through the material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B. These statutes, enacted in the mid-1990s,¹³³ have been an effective tool for

Polly Mosendz & Victoria Bekiempis, *2 Women with ISIS Link Arrested in Planned NYC Bomb Attack: Officials*, NEWSWEEK (Apr. 2, 2015, 11:49 AM), <http://www.newsweek.com/report-two-women-arrested-planning-bomb-attack-nyc-result-isis-radicalization-319069> (last visited Dec. 11, 2015). An FBI investigation revealed research into ISIS propaganda as well as research on how to create a homemade bomb. Mosendz & Bekiempis, *supra*.

126. Bloom, *supra* note 12.

127. Caitlin Moscatello, *British ISIS Bride Reportedly Recruiting Women to Marry Islamic State Militants*, GLAMOUR (Sept. 8, 2014), <http://www.glamour.com/inspired/blogs/the-conversation/2014/09/british-bride-of-isis-reported> [<http://perma.cc/8SUK-WXJ5>].

128. *Id.*

129. Bloom, *supra* note 12.

130. Chris Clements, *From Matilda to Martyrdom: Scottish Jihadi Bride Took Just Months to Descend from Student to Fanaticism*, DAILY RECORD (Sept. 3, 2014, 9:42 AM), <http://www.dailyrecord.co.uk/news/scottish-news/matilda-martyrdom-scottish-war-bride-4155672> [<http://perma.cc/R8LF-JNV5>].

131. Bloom, *supra* note 12.

132. *Id.*

133. 18 U.S.C. § 2339A was enacted in 1994 and 18 U.S.C. § 2339B was enacted in 1996. Each have been amended several times as Congress expanded and clarified their scope.

prosecutors over the last decade and beyond.¹³⁴ Between 2001 and 2011, the number of cases involving material support charges rose significantly.¹³⁵ After a low in 2007—material support was charged in only 11.6 percent of terrorism cases—the number of material support charges skyrocketed to be present in 87.5 percent of terrorism cases in 2011.¹³⁶

Material support charges could be an effective legal means for dealing with the targetless threats posed by the Western women of ISIS. Both material support statutes (§ 2339A and § 2339B) may be effective in prosecuting these women, though § 2339B is likely to be the most useful.

A. 18 U.S.C. § 2339A: Providing Material Support to Terrorists

Under 18 U.S.C. § 2339A, a person may be prosecuted for providing, attempting to provide, or conspiring to provide material support, knowing or intending that the support be used in a terrorist offense.¹³⁷ Included in the statute is a list of terrorist offenses, and the subsections of § 2339A define what constitutes material support.¹³⁸ This statute is specific, designed to prosecute individuals for their contributions to a particular terrorism offense.¹³⁹ Although there may be instances where the women of ISIS could be prosecuted under this statute, for example, if they use social media to recruit individuals for a specific offense, this statute is less likely to be applicable to them due to the more general nature of their contributions. As such, this Note will focus on whether Western women can be prosecuted under 18 U.S.C. § 2339B for providing support to a designated terrorist organization, rather than providing support for a specific offense, though it is worth bearing in mind that these women may also be prosecuted under 18 U.S.C. § 2339A depending on the nature of their involvement and if evidence supports such a charge.

B. 18 U.S.C. § 2339B: Providing Material Support or Resources to Designated Foreign Terrorist Organizations

In contrast to the specific nature of 18 U.S.C. § 2339A, 18 U.S.C. § 2339B is a general statute, designed to prosecute individuals, not

Charles Doyle, *Terrorist Material Support: A Sketch of 18 U.S.C. 2339A and 2339B*, CONG. RES. SERV. 1 (July 19, 2010), <http://fas.org/sgp/crs/natsec/R41334.pdf> [<http://perma.cc/93QX-YZWJ>].

134. See CTR. ON LAW & SEC., *supra* note 3, at 2.

135. *Id.* at 19.

136. *Id.*

137. 18 U.S.C. § 2339A (2009).

138. *Id.*

139. *Id.*

for contributions to specific terrorist acts, but rather for the support they provide to a terrorist organization.¹⁴⁰ Like § 2339A, § 2339B covers providing, attempting to provide, or conspiring to provide material support. However, in contrast to § 2339A, instead of knowing that it will be used for a terrorist offense, the knowledge requirement is that an offender is contributing to a designated terrorist organization knowing that it has been designated as such or knowing that the organization engages in or has engaged in terrorist activities.¹⁴¹ “The knowledge requirement does not require a showing that the defendant intended to further the illegal activities of the organization.”¹⁴² Section 2339B defines “material support or resources” as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials¹⁴³

Of particular relevance for the discussion that follows, § 2339B(h) provides additional guidance with regards to the provision of personnel:

No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.¹⁴⁴

In addition to detailing the prohibited activities, § 2339B also contains a subsection regarding the extraterritorial application of the statute.¹⁴⁵ For the purposes of the individuals discussed in this Paper, of greatest relevance are § 2339B(d)(1)(A), (C), and (F), which

140. See 18 U.S.C. § 2339B (2015).

141. See 18 U.S.C. § 2339B(a)(1) (2015).

142. CTR. ON LAW & SEC., *supra* note 3, at 21.

143. 18 U.S.C. § 2339B(g)(4) (2015). This is the same definition of material support or resources as provided in 18 U.S.C. § 2339A(b)(1), and in fact 18 U.S.C. § 2339B(g)(4) refers to that statute for the definition.

144. 18 U.S.C. § 2339B(h) (2015).

145. 18 U.S.C. § 2339B(d)(2) (2015).

grant the United States jurisdiction if the individual is a citizen or permanent resident of the United States,¹⁴⁶ if after the offense occurs the person is brought into or found to be in the United States,¹⁴⁷ or if “an offender aids or abets [or conspires with] any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a)”¹⁴⁸

Though the extraterritorial application of the statute is clearly relevant when targeting members of a terrorist organization who are largely operating outside of the United States, the real significance of § 2339B lies in the goal of the statute and the way in which Congress has shaped it to further its objectives.

The statute’s merging of the broad scope of activities that constitute material support with the lack of specific intent in Section 2339B means that any knowing material support for a foreign terrorist organization, whether intended to support illegal activity or not, can result in prosecution for very serious terrorism charges and in lengthy prison sentences. The Supreme Court found that Congress purposefully weakened the intent language in 2339B relative to 2339A.¹⁴⁹

Having withstood recent constitutional challenges that the statute was unconstitutionally vague and that its prohibitions infringed on the First Amendment rights of free speech and freedom of association,¹⁵⁰ 18 U.S.C. § 2339B remains a viable tool in the prosecutor’s tool belt.¹⁵¹

V. DO THE ACTIONS OF THE WESTERN WOMEN OF ISIS CONSTITUTE MATERIAL SUPPORT UNDER 18 U.S.C. § 2339B?

As this Note examines the actions of ISIS’s Western female recruits, it is important to understand that “[s]ection 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing ‘material support’ to such a group.”¹⁵² Keeping that in mind, in analyzing whether these women’s actions constitute “knowingly provid[ing] material support or resources to a foreign terrorist organization,”¹⁵³ it is helpful to break

146. 18 U.S.C. § 2339B(d)(1)(A) (2015).

147. 18 U.S.C. § 2339B(d)(1)(C) (2015).

148. 18 U.S.C. § 2339B(d)(1)(F) (2015).

149. CTR. ON LAW & SEC., *supra* note 3, at 21.

150. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 2 (2010).

151. The Court did, however, limit its holding to the case in front of it and left open the possibility of future constitutional challenges. *See id.* at 6.

152. *Id.* at 18.

153. 18 U.S.C. § 2339B(a) (2015).

down the analysis into three parts: (1) whether ISIS qualifies as a foreign terrorist organization, (2) whether the women knew that they were supporting an organization that has been designated a terrorist organization or that engages in or has engaged in terrorist activities, and (3) whether their actions fall within 18 U.S.C. § 2339B's definition of material support or resources.

A. ISIS Is a Designated Terrorist Organization and the Women Possess the Requisite Knowledge of Such

The first part of the analysis, whether ISIS qualifies as a foreign terrorist organization, can be quickly dispensed with. As ISIS (under its former name) was designated a Foreign Terrorist Organization by the Department of State on December 17, 2004, and remains as such,¹⁵⁴ there is no question as to the status of the organization.

The second part of the analysis, though requiring more attention, likewise poses no challenge to prosecution. Whether the Western women know that ISIS has been designated as a foreign terrorist organization will be case dependent; however, it is almost certain they are aware of the terrorist activities that ISIS engages in and has engaged in.

It is important to keep in mind that the women, which form the focus of this Note, are Western women, and, as discussed previously, are largely educated and social media savvy. As such, it is highly probable that they would have been exposed to international media coverage of ISIS activities while in their home countries. It is also highly probable that they were exposed to ISIS's own media campaign glorifying their violent actions in furtherance of the creation of the Islamic State. In fact, social media coverage of ISIS's activities likely factored into the decision of the majority of these women to join the organization.¹⁵⁵ Besides being exposed to information about the terrorist activities ISIS engages in, many of them have further disseminated information about ISIS's activities by, for example, glorifying the beheadings of James Foley and two other Americans on their social media pages.¹⁵⁶ To claim that they were unaware of

154. *Foreign Terrorist Organizations*, *supra* note 22.

155. See Sherwood et al., *supra* note 59.

156. In addition to the three Americans, two other Westerners, both British aid workers, were beheaded by ISIS in 2014, and their deaths were also acknowledged and glorified in many of the ISIS online posts. See Greg Botelho, *ISIS Executes British Aid Worker David Haines; Cameron Vows Justice*, CNN (Sept. 14, 2014, 2:24 PM), <http://www.cnn.com/2014/09/13/world/meast/isis-haines-family-message> [<http://perma.cc/V2SG-CM87>]; Louisa Loveluck & Magdy Samaan, *Alan Henning 'Was Certain He Would Be Freed By Isil Captors'*, THE TELEGRAPH (Oct. 5, 2014, 9:30 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/1142282/Alan-Henning-was-certain-he-would-be-freed-by-Isil-captors.html> [<http://perma.cc/3ZA4-HGYA>].

the terrorist activities of ISIS would be inconsistent with their actions and their intent in joining the organization in the first place.

In evaluating whether the following activities can be prosecuted under 18 U.S.C. § 2339B, neither the status of ISIS as a terrorist organization nor the women's knowledge of such poses a realistic problem. Any real challenges to prosecution will center around whether the activities described below rise to the level of material support as provided for in the statute.

B. The Women's Actions Qualify as Material Support Under 18 U.S.C. § 2339B(g)(4)

As with any criminal prosecution, proof will be a challenge in these material support prosecutions. However, assuming that there is sufficient proof, the women of ISIS may be prosecuted based on the following contributions. All of the following forms of support involve either the provision of personnel or the provision of services to the organization.

1. Providing Material Support by Using Social Media to Recruit Western Women and to Incite Terrorism Abroad

The use of social media to recruit Western women to ISIS and to incite violence abroad qualifies as material support as defined under 18 U.S.C. § 2339B(g)(4). While freedom of speech is a fundamental right guaranteed by the Constitution¹⁵⁷—a right which extends to speech on the internet¹⁵⁸—this freedom is not unlimited. There are a handful of well-recognized exceptions to protected speech,¹⁵⁹ among which are threats and incitement to unlawful action.¹⁶⁰ And in the terrorism context, freedom of speech has been further narrowed by the decision in *Holder v. Humanitarian Law Project*.¹⁶¹

157. U.S. CONST. amend. I.

158. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). The court afforded speech on the internet the same protections as speech in any other medium, finding “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Id.*

159. *See id.* at 874.

160. *See, e.g., Frequently Asked Questions—Speech*, FIRST AMENDMENT CTR., <http://www.firstamendmentcenter.org/faq/frequently-asked-questions-speech> [http://perma.cc/2C FE-AK8F] (last visited Dec. 11, 2015). Speech is considered “incitement to violence” when it is intended to incite violence, when it is likely to incite violence, and when that likelihood is imminent. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RES. SERV. 4–5 (Sept. 8, 2014), <http://fas.org/sgp/crs/misc/95-815.pdf> [http://perma.cc/92JM-V29K].

161. 561 U.S. 1, 17–18 (2010). The Court in *Holder v. Humanitarian Law Project* “held that peaceful speech in the U.S. can be criminalized if it is ‘coordinated’ to support a foreign terrorist organization named by Congress.” Noah Feldman, *Speech Isn’t Free When*

Looking at social media communications of many of the Western ISIS women, it is clear that at least some of their communications fall outside the bounds of free speech and squarely within the support proscribed by the material support statutes. Not all of their communications would subject them to prosecution—their utopian portrayals of life in the caliphate, their Koranic recitations, and even their messages glorifying the past atrocities of ISIS would likely fall outside the bounds of the material support statute.¹⁶² However, their social media postings that are designed to recruit new followers or to incite violence in Syria or abroad would qualify as material support and could potentially subject them to prosecution under § 2339B.

The type of material support they provide may be characterized in two ways—provision of a service and provision of personnel. The first characterization is the stronger of the two arguments. These women are providing a service to ISIS by acting as recruiters for its cause. They are reaching out to women around the world, encouraging them to travel to Syria to join ISIS or, alternatively, to carry out terrorist attacks wherever they happen to be.¹⁶³ These actions take the

Terrorism Is Involved, BLOOMBERG VIEW (Nov. 14, 2013, 12:58 PM), <http://www.bloombergview.com/articles/2013-11-14/speech-isn-t-free-when-terrorists-are-involved> [http://perma.cc/MXN6-6PDZ]. If peaceful speech can be criminalized as such, certainly coordinated speech that is designed to recruit members and/or terrorists for a designated foreign terrorist organization or to encourage terrorist attacks can be criminalized. A 2013 1st Circuit case, *United States v. Mehanna*, attempted to clarify whether independent action could amount to coordinated activity. *Id.* However, the 1st Circuit declined to tackle this issue directly. 735 F.3d 32, 42 (1st Cir. 2013). Mehanna had been convicted on material support charges stemming from a (failed) trip to Yemen to join the jihad, as well as his translations and online posts of Arabic language materials sympathetic to the jihadi cause. *Id.* at 41, 45–46. On appeal, rather than ruling on whether these independent translations and uploads amounted to coordinated action (and were thus a crime under the *Holder* precedent), the 1st Circuit chose to avoid addressing the First Amendment implications, instead finding that there was enough evidence to sustain the conviction based on his failed attempt to join a terrorist training camp. Feldman, *supra*.

162. If these communications are personal reflections, as opposed to coordinated communications on behalf of ISIS, they would likely be considered free speech. However, this may change. A Department of Justice official, John Carlin, recently indicated a willingness to use the material support statutes to “try to blunt ISIS’s violent PR operation by essentially trying propagandists as terrorists.” Shane Harris, *Justice Department: We’ll Go After ISIS’s Twitter Army*, DAILY BEAST (Feb. 23, 2015, 9:07 PM), <http://www.thedailybeast.com/articles/2015/02/23/justice-department-we-ll-go-after-isis-twitter-army.html> [http://perma.cc/C9PV-E2FR]. In contrast to the proposal in this Note, Carlin proposed prosecuting “technical expertise,” as opposed to provision of a “service” or provision of “personnel.” *See id.* His proposal also appears broader in scope, such that it would encompass promotion of ISIS and glorifications of ISIS’s past atrocities, rather than being limited to messages targeted at recruitment or at inciting future violence. *See id.* Unsurprisingly, legal experts have already questioned the constitutionality of using the material support statutes to prosecute speech traditionally protected by the First Amendment. *See, e.g., id.* However, it is unclear whether they object to prosecuting individuals for any social media support of ISIS or whether they object to the expansive scope of Carlin’s proposition.

163. Townsend & Helm, *supra* note 18.

women beyond mere membership in the organization—something which is not illegal—into the realm of providing material support—something which is illegal under § 2339B.

Alternatively, their actions may be considered provision of personnel. They are providing themselves as personnel, by serving as recruiters and mouthpieces on behalf of the organization. They are also attempting to provide other personnel, Western female recruits who will join and work on behalf of ISIS either in the area it controls in the Levant region, or abroad. Relying on this as the basis for a material support charge may be the more challenging of the two options, as § 2339B(h) requires that the personnel “work under th[e] terrorist organization’s direction or control Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”¹⁶⁴ It is not always clear whether these women are working under the control of ISIS or whether they are independently seeking to support its cause. The ability to argue that they are providing personnel will largely depend on whether it can be shown that they were working at ISIS’s direction, and will therefore require a more case-specific analysis.

Whether one chooses to categorize the women’s material support through social media as a service, or in some cases as a provision of personnel, both forms of aid are explicitly proscribed by the material support statutes.¹⁶⁵ As such, these women may be prosecuted based on their online recruitment efforts for providing material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. These dual and often overlapping support roles, providing a service as well as providing personnel, are common among the Western women of ISIS, as evidenced by their involvement in the al-Khansa’a Brigade.

2. Providing Material Support by Serving in the al-Khansa’a Brigade

A select number of women have been enlisted in the al-Khansa’a Brigade, an all-female group who serve as morality police for ISIS.¹⁶⁶ Like the online recruiters, the women who are members of this brigade may be charged with providing material support to ISIS in the form of either a service or personnel. The service they provide may be categorized as counterinsurgency operations within ISIS-controlled territory, as they ensure that women comport themselves with the

164. 18 U.S.C. § 2339B(h) (2015).

165. See 18 U.S.C. § 2339A(b)(1) (2009).

166. *Supra* Part II.B.2. See also Bloom, *supra* note 12.

dictates of the Islamic State and prevent anti-ISIS fighters from slipping through ISIS checkpoints dressed as women.¹⁶⁷ Though the Brigade is not currently known to have engaged in terrorist activities,¹⁶⁸ the service they are providing is still in furtherance of a terrorist organization. Though some may argue that their activities fall outside the bounds of material support, the Court, in *Holder v. Humanitarian Law Project*, “deferred to Congress’ finding that there is no meaningful separation between a terrorist organization’s legal and illegal activities, therefore support for one is functionally equivalent to support for the other.”¹⁶⁹

The women of the al-Khansa’a Brigade could also be charged with providing material support in the form of personnel—their selves. In contrast to the difficulties that may face a provision of personnel argument in the social media context due to uncertainty about oversight, when it comes to the al-Khansa’a Brigade there is no question that these women are operating at the direction of ISIS. ISIS established the al-Khansa’a Brigade in early 2014 to work on its behalf in enforcing morality requirements on women and to weed out men who were disguising themselves as women.¹⁷⁰ ISIS set the conditions for joining the Brigade—the women must be single and between the ages of eighteen and twenty-five—and pays the women a salary for their services.¹⁷¹ Thus, the women who volunteer or are selected to be on the Brigade act at the direction of ISIS, not independently of it.

Just as the women who provided support to ISIS through online recruitment efforts could be charged with providing material support to ISIS, so too can the women who serve on the al-Khansa’a Brigade. Providing such a service or personnel to ISIS is a clear violation of 18 U.S.C. § 2339B.

3. Providing Material Support by Acting as “Comfort Women” for ISIS Fighters

Though the veracity of reports of women traveling to Syria to become “comfort women” has been the subject of much debate, should the accounts be substantiated, the women who perform *jihad al-nikah* could face charges for providing material support to ISIS.¹⁷² Should

167. *Al-Khansaa Brigade*, TERRORISM RES. & ANALYSIS CONSORTIUM, <http://www.trackinterrorism.org/group/al-khansaa-brigade> [<http://perma.cc/HQP9-M9FM>] (last visited Dec. 11, 2015).

168. *Id.*

169. CTR. ON LAW & SEC., *supra* note 3, at 21.

170. *Al-Khansaa Brigade*, *supra* note 167; *see also* Bloom, *supra* note 12.

171. *Al-Khansaa Brigade*, *supra* note 167.

172. This is, of course, limited to those women whose actions are voluntary. Those women who were involuntarily conscripted by fighters as they took over towns are victims of ISIS atrocities and could not and should not be prosecuted.

they be charged, it would be for providing material support in the form of personnel—themselves.¹⁷³ They are providing themselves for sex,¹⁷⁴ there to help boost the morale of the male fighters and make them more powerful warriors, and are doing so in response to an ISIS edict.¹⁷⁵

Of all the arguments advanced in this Note, this is arguably the weakest.¹⁷⁶ However tenuous it might be, if it can be shown that these women traveled to Syria at the direction of ISIS for the purpose of providing support to the ISIS fighters, they may be charged under 18 U.S.C. § 2339B for providing material support to a terrorist organization.¹⁷⁷

4. Providing Material Support by Bearing/Intending to Bear the Children of ISIS Fighters with the Intent that Those Children Will Grow Up to Be Future Jihadis

Women who join ISIS with the specific intent of bearing children that will grow up to be future jihadis may be charged with providing material support to a designated terrorist organization. Although rights to privacy and personal autonomy—which includes the right to bear children—have traditionally been constitutionally protected rights,¹⁷⁸ that right is called into question when the act of having children is used to further an illicit purpose.

173. Alternatively, it may be possible to categorize their provision as a “service.” However, this may be more challenging as it is questionable what effect this actually has on the organization. Provision of personnel would be the better argument.

174. See Sherwood et al., *supra* note 59.

175. Chastain, *supra* note 111.

176. There is not a lot of information about the prevalence of this practice, and evidentiary support will likely be hard to come by.

177. Although this argument may seem tenuous, looking at the definition of material support in § 2339B, the definition is open ended, and the only things that explicitly do not count as material support are the provision of medicine and religious materials. 18 U.S.C. § 2339B (2015) (adopting the definition of “material support” found in 18 U.S.C. § 2339A).

178. The Constitution does not explicitly safeguard the rights to privacy and personal autonomy, however, the Supreme Court has interpreted the Constitution to protect those rights. See, e.g., *Constitutional Law*, JUSTIA, <https://www.justia.com/constitutional-law/docs/privacy-rights.html> [<http://perma.cc/P8UH-CVAE>]. The right to procreate, or not to procreate, falls under these rights to privacy and personal autonomy. Over the years, the Court has addressed a number of issues related to marriage and procreation, and has essentially held procreation to be a fundamental right. See, e.g., *Roe v. Wade*, 410 U.S. 113, 129 (1973) (holding that state laws restricting a woman’s right to terminate her pregnancy in the first trimester interferes with her fundamental right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down a Massachusetts law denying unmarried persons access to contraceptives, thus extending constitutional protection to intercourse outside of marital relations); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding a Connecticut law prohibiting the use of contraceptives unconstitutional for violating the right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding an Oklahoma law providing for the forced sterilization of certain habitual criminals to be unconstitutional).

Despite the common assumption that there exists a vague, personal and broad (if not unlimited) procreative right, encompassing in its scope various distinct behaviors, that which can legally and morally be regarded as the valuable and protected procreative behavior is much more narrow. . . . This satiable and narrow right is not arbitrary, but reflects specific competing rights and duties—especially the rights of prospective children—that both qualify and justify the right. While commentators, courts and even the U.S. Congress have in the abstract inflated the right as limitless in scope and even inviolable, in those instances where the right has been tested in conflicts with other rights, it is invariably limited. This is consistent with the normative relation between law and procreation, and with intuitive limits on the right based on the limited intrinsic value of procreating, its interpersonal nature, and the specific competing rights and duties at issue—those of the prospective children and those of society.¹⁷⁹

A number of ISIS women, through interviews or postings on social media, have stated goals of marrying a jihadi brother and bearing children that will grow up to be jihadis themselves.¹⁸⁰ One source even alleges that some women were offered compensation for bearing children.¹⁸¹ When framed in that light, having children to further the objectives of a terrorist organization may cease to be a protected fundamental right, and might rise to the level of material support.

The material support they are providing is in the form of personnel—both themselves and their children-to-be. First, they are providing, attempting to provide or conspiring to provide themselves as personnel, specifically providing their bodies for the purpose of bearing a future generation of terrorists. Second, they are providing, attempting to provide or conspiring to provide their offspring as future jihadis. And they are doing so, at least some of them, at the direction of ISIS, an organization which has encouraged women to come over and have children,¹⁸² and even possibly incentivized them to do so.¹⁸³

This is not to say that all women who are ISIS members can be prosecuted for having children. As stated previously, being a member of ISIS alone does not violate 18 U.S.C. § 2339B, and the decision to

179. Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 63 (2007).

180. Sherwood et al., *supra* note 59; Umm Ubaydah, a Northern European woman likely in her late teens or early 20s, writes online “about being a wife and aspiring to become a mother, and bringing up the next generation of *mujahids*, or jihadis.” Zavadski, *supra* note 82 (emphasis in original).

181. See, e.g., Sherwood et al., *supra* note 59.

182. *Id.*

183. *Id.*

have children for the sake of having children does not run afoul of the statute. It is where these women specifically intend to provide these children so that they may grow up “to work under that terrorist organization’s direction or control”¹⁸⁴ that they run afoul of the material support statute. Providing themselves as incubators and intending to provide their future children as the next generation of jihadis could subject these women to prosecution under 18 U.S.C. § 2339B.

VI. ASSUMING THE WESTERN WOMEN OF ISIS CAN BE PROSECUTED
FOR PROVIDING MATERIAL SUPPORT TO A FOREIGN TERRORIST
ORGANIZATION, SHOULD THEY BE?

Just because the United States may be able to prosecute the Western women of ISIS for the above contributions to the organization does not mean that it should. Besides the strengths and weaknesses of the arguments advanced, it is important to keep in mind the feasibility of prosecution, availability of resources, likelihood of success, and potential consequences, both positive and negative, of prosecution. As such, certain arguments are better than others.

Of all the arguments advanced, the one most worth pursuing is that these Western women should be prosecuted for providing material support by using social media to recruit Western women and to incite terrorism abroad. The reasons for this are multifold. First, these prosecutions would have the strongest legal support, with precedents clearly proscribing the use of speech to incite violence or support a terrorist organization. Second, there would be the strongest evidentiary support for social media related prosecutions, as there is proof of the communication efforts to recruit other women and to incite others to attack at home. And third, prosecution for social media recruitment and advocacy of violence would be the least controversial in the court of public opinion. Though some may argue against this intrusion into free speech, most would agree that terrorist recruitment and incitement to violence is something that needs to be strongly curtailed.

Besides the feasibility of prosecution, of the four scenarios advanced, prosecuting women for their social media activities has the potential to have the most significant impact on the ISIS problem. A terrorist organization cannot sustain itself without numbers, and membership is due in significant part to recruitment efforts. ISIS women are not only appealing to Western women ideologically, but they are often providing detailed instructions on how to get to Syria

184. 18 U.S.C. § 2339B(h) (2015).

and helpful information regarding what to bring.¹⁸⁵ And for those women unable to travel, the ISIS women are encouraging them to carry out attacks at home.¹⁸⁶ By prosecuting the ISIS women and taking them out of communication with impressionable foreigners, it will hopefully staunch some of the flow of foreigners into Syria and possibly prevent a future attack.

The other three arguments—prosecuting women who want to give birth to future jihadis, prosecuting al-Khansa'a Brigade members, and prosecuting "comfort women"—though technically possible to make, share a number of deficiencies. First, they are unprecedented, so there is no case law for support. Second, evidentiary issues for all of these will be significant.¹⁸⁷ Third, they are significantly more controversial arguments to make.

Although prosecuting women intending to give birth to future jihadis may be a controversial idea, choosing to do so could have a significant future impact on the organization. Prosecuting a woman for having a child or wanting to have a child is certainly unprecedented and will likely be unpopular, but that does not mean it is not something to be considered. Evidentiary proof will likely also be a challenge, though some ISIS women have communicated their intent to bear future jihadis in their social media communications,¹⁸⁸ so there may well be some documentary support. Despite these challenges, prosecuting these mothers-to-be may be worth it, as doing so may help to prevent a future generation of jihadi fighters. The impact will not be immediately felt, but it could have an impact years down the road.

Though a strong case could possibly be made for prosecuting the women involved in the al-Khansa'a Brigade, doing so would not be wise. Although people may disagree with the strict requirements that they enforce on their fellow women, for now, their actions are contained within ISIS's self-declared caliphate. They are not carrying out terroristic activities, their actions do not directly impact the United States, and bringing them to the United States for prosecution would be an unfavorable decision both from an international relations and fiscal standpoint.¹⁸⁹ Choosing to prosecute them would

185. Zavadski, *supra* note 82.

186. Townsend & Helm, *supra* note 18.

187. With the exception of some women who have posted on their social media accounts about their desire to marry fighters and raise the next generation of jihadis, there is likely to be little tangible evidence of these activities. See, e.g., Zavadski, *supra* note 82. Most evidence regarding involvement in the al-Khansa'a Brigade or women who have gone over as "comfort women" will be circumstantial.

188. See, e.g., Zavadski, *supra* note 82.

189. The war on terror is financially draining and the limited resources can arguably be better spent on combating activities that have an impact outside of ISIS-controlled

have little impact on the current or future ISIS situation. For this reason, it would be wise to forego prosecution of women in the al-Khansa'a Brigade at this time.

Finally, prosecuting the individuals who are acting as "comfort women" would be an unwise decision. For one, women traveling to Syria to act as "comfort women" does not appear to be a significant problem, and it would likely be hard to discover those individuals who are involved. For another, the actions of these "comfort women" are not significantly benefitting the organization and are having no discernible impact on the rest of the world. And finally, choosing to prosecute "comfort women" would not only likely be a futile exercise, but would also detract resources from other counterterrorism efforts that are more significant and likely have a greater chance of success. Though the ISIS women could be prosecuted for each of the actions discussed above, to do so would be unwise. After considering these four options based on the likely success of prosecution and the deterrent impact on ISIS, the two most viable options would be prosecuting the ISIS women for their social media contributions to the organization and their intent to provide ISIS with future jihadi babies. Of those two options, the first is the better of the two options.

CONCLUSION

Women play important, though undervalued, roles in ISIS, providing domestic support to the male fighters, populating the self-declared caliphate, policing the morality of their fellow women, and perhaps most importantly, recruiting other women to the cause. As the world contemplates how best to counter the latest extremist threat that is ISIS, it is important not to discount these contributions. Though different in nature, women's contributions to ISIS are no less

territory. This is not to discount the contributions of these women to the organization, or to foreclose the possibility of prosecution in the future should the nature or the scope of their contributions change. However, as of now, the work of the al-Khansa'a Brigade is limited both geographically and temporally, and allocating resources to prosecuting women for their participation in such an organization is likely to be met with considerable resistance, as it is questionable what impact doing so would have on the terror problem. As such, financial resources would be better allocated to curtailing ISIS's recruitment efforts or at countering their acts of violence. As the head of the FBI's counterterrorist section acknowledged in early 2015 when asked about combating threats to America, "there are lots of threats out there, criminal threats, counter-intelligence-based threats, cyber threats and terrorism threats. And we have to identify those highest priority threats and focus the resources. There is a finite number of resources and we have to focus those resources on those threats." Pamela Brown & Wesley Bruer, *FBI Official: ISIS Is Recruiting U.S. Teens*, CNN (Feb. 3, 2015, 7:40 PM), <http://www.cnn.com/2015/02/03/politics/fbi-isis-counterterrorism-michael-steinbach> [<http://perma.cc/4LTK-2EW9>].

important than men's contributions, and arguably may have greater significance in the long term.

Stopping ISIS will require a multifaceted approach that incorporates education, media countercampaigns, legal action, diplomacy, and force. However, any success will be limited if a significant portion of the population is overlooked in these measures. It is time for the world to start acknowledging and addressing the different ways men and women contribute to terrorist organizations.

Just because women's terrorist contributions fall outside the traditional conceptions of terrorist activity does not mean that they cannot be addressed using familiar tools. The material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, have been an effective legal tool in the past and can be so in these circumstances, as they are uniquely tailored to the more generalized support that women provide to terrorist organizations. That being said, just because material support charges may be brought, does not always mean that they should be brought. It is important to consider the effectiveness of doing so in light of the totality of the circumstances, including feasibility of prosecution, availability of resources, and impact on the current situation.

Material support charges may be one way to address the contributions of women to ISIS, but it is certainly not the only way. Nor should the activities discussed herein be considered all-encompassing of the contributions women are making to ISIS specifically or terrorist organizations generally. Rather the activities discussed and the means for combating them should serve as a jumping-off point for discussing novel ways to tackle the terror problem. Every country must do its part to curb the latest wave of extremism, but in order to be successful in that endeavor, it is necessary to start recognizing and valuing the contributions women make to terrorist organizations, and it is likewise necessary to start holding those women accountable for their contributions.

ELIZABETH BUNER*

* J.D. Candidate, William & Mary Law School, May 2016; B.A., Smith College, 2005, Psychology, cum laude. The author would like to thank her family and friends for their unwavering support, patience, and love throughout law school, especially during the process of writing this Note. She would also like to thank the editors and staff of the *William & Mary Journal of Women and the Law* for their work in preparing this Note for publication.

