

Chapter 1

Terrorists in the Criminal Justice System: Political and Conceptual Problems

The criminalization of no other behavior evokes as much debate as terrorism and terrorists. Although the focus of this work is an examination of 'officially designated acts of terrorism' and the criminal investigations of groups resulting from those acts, it would be naive to accept governmental definitions of terrorism without comment. The debate about terrorism and how it should be studied reflects a common problem in criminology. While many criminologists accept the government's legal definitions of crimes (as well as the statistics generated by such definitions), others contend that the study of crime must include, for example, violations of 'human rights,' racism, and other behaviors not explicitly defined as criminal in the legal codes.¹

Students of terrorism grapple with the same issues. While some accept governmental figures and statistics on terrorism at face value,² others contend that governmental definitions of the subject render official statistics meaningless. Consequently, scholars have defined, refined, and redefined terrorism to accommodate personal preferences regarding what should or should not be labeled "terroristic." Each published work on terrorism seems to compound the vagueness of the concept rather than provide conceptual clarity to the subject.³ Unfortunately, the variations in definitions of terrorism have given some legitimacy to the aphorism "One man's terrorist is another man's freedom fighter." In the cur-

rent study, the acceptance of the FBI's official definition of terrorism is somewhat restrictive. It eliminates any examination of state-sponsored terror and, as we shall see, it largely eliminates consideration of acts of terrorism committed by isolated individuals. Nonetheless, the history of the American government's official definition of terrorism and its subsequent response to terrorism provides useful insights into the polity's own difficulty in coming to grips with the conceptual problems associated with defining and criminalizing terrorism. To the casual observer terrorists appear to be treated no differently than other criminals. And, as we shall see, the polity usually makes every effort to perpetuate that view. In reality, the Federal Bureau of Investigation's definition of terrorism and the guidelines used to investigate these offenders set in motion intervention strategies that clearly separate terrorists from traditional criminals throughout the judicial process—from investigation to prosecution and eventual sentencing.

The FBI's Definition of Terrorism

While some claim that the American political system vacillates over who is labeled a "terrorist," depending on current public opinion, the official definition of terrorism used by the FBI has remained unchanged for many years.⁴ Terrorism is officially defined by the bureau as:

the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social goals.⁵

The definition itself is not unlike that used by many academicians. There are, however, at least two characteristics of this definition worthy of note.

First, the use of the term *unlawful* restricts the application to criminal conduct. The FBI has resisted demands by some members of Congress to expand its application of the concept to *potentially* politically subversive groups. FBI Director William Webster told a congressional subcommittee in 1987 that the most important characteristic of the FBI's definition of terrorism "is emphasizing the criminal aspect of it. . . . I have some resistance to reinjecting into the equation political motivation unnecessarily."⁶ Second, while FBI officials focus on a criminal's conduct during the course of an

investigation, it is the *motivation* of the perpetrator that determines the intensity of that investigation. Terrorism, as most would agree, involves some effort to invoke "political or social change." However, this salient feature of terrorism—political motivation—overshadows all efforts to criminalize terroristic behavior. Unlike most alleged offenders investigated by the FBI, those identified as terrorists have committed, or are suspected of having committed, crimes for political reasons. While motive is not normally recognized as an intrinsic element of any criminal offense, it is the *motivation* of the terrorist that allows the FBI to elevate investigation of his or her crimes to the highest governmental priority.

The persons eventually arrested and indicted for acts of terror are not formally charged with "terrorism." While some states have created "terroristic threatening" statutes,⁷ no federal crime called "terrorism" exists. The inclusion of the motive of the offender as an essential part of the crime precludes a legally acceptable definition. Consequently, indicted terrorists are charged with a plethora of traditional and, occasionally, exotic criminal offenses. Given the ambiguity of any definition of terrorism (including the government's), one of the most intriguing aspects of the government's response to terror involves an examination of the decision-making process by which some persons are labeled as terrorists, while others who commit similar crimes avoid that label.

The FBI and the Politics of Terrorism

The FBI has the responsibility to investigate ongoing or suspected acts of terrorism.⁸ In addition, the agency itself has the onerous task of deciding which incidents merit this designation. How those decisions are made reflect the tremendous political pressure put on the FBI to combat politically subversive groups. During the heyday of the Hoover era of the FBI, the bureau enjoyed an untarnished, almost glorified image as America's elite crime-fighting organization. During the late 1960s and early 1970s, however, the FBI experienced a dramatic reversal of reputation. The Senate Watergate hearings in 1973 revealed extensive FBI misconduct from the 1940s through the late 1960s.⁹

Changes in the FBI during the 1970s and early 1980s as a result of the Watergate hearings dramatically affected the investigation and capture of known terrorists in the United States as well as having an impact on subsequent levels of terrorist activity. The collection of intelligence information on U. S. citizens was severely

limited as the FBI dismantled its domestic intelligence units in the wake of post-Watergate reaction.¹⁰ The number of domestic security investigations declined from more than 20,000 in 1973 to less than 300 by the end of 1976.¹¹ That decline mirrored Congressional and public dissatisfaction with the role of the FBI as a 'political police' agency. Congressional inquiries during that period led to the adoption of the Levi Guidelines on April 5, 1976. Named after Attorney General Edward Levi, the new guidelines identified the standards by which an internal security investigation could be initiated as well as the length of the investigation. Furthermore, the guidelines divided investigations into three levels (preliminary, limited, and full) and specified the type of investigative techniques appropriate to each level.¹²

In August 1976, FBI Director Clarence Kelley further pacified congressional critics by moving investigations of terrorist organizations from the Intelligence Division to the General Investigative Division.¹³ Previously, the investigation of domestic terrorism cases fell under the Intelligence Division, where norms regarding the rule of law "had been nonexistent."¹⁴ The effect of this move was to limit the types of techniques that could be used to investigate terrorism cases to the standards used for traditional criminal cases. Although some of these changes were modified in the 1980s, the decision to treat terrorism cases as traditional crimes signaled the transition to a clearly defined strategy in the prosecution of terrorists. To further distance the agency from public criticism, succeeding FBI Director William Webster changed the title of these investigations from "domestic security" to "terrorism". While these semantic alterations clearly indicated an effort to improve public perceptions of the FBI, the changes were not merely cosmetic.

With the election of Ronald Reagan to the presidency in 1980, congressional criticism of FBI abuses of due process diminished. Instead of being critical of the extensive nature of FBI investigations of dissident political groups, congressional subcommittees lamented the lack of FBI resources expended on domestic security.¹⁵ In particular, Congressman Joseph Early of Massachusetts and Senator Jeremiah Denton of Alabama were harshly critical of the low priority given to terrorism and domestic security by Director Webster. Fearing that the FBI might once again become embroiled in the issue of political policing, Webster resisted the new Republican leadership's efforts to increase spending for domestic terrorism investigations and to relax the Levi Guidelines. He eventually lost on both counts.

Although FBI resources committed to domestic security/terrorism account for only a small fraction of the investigations conducted by the FBI, the publicity surrounding such cases leaves the impression that these investigations represent the bulk of FBI work. With the image of the FBI beginning to improve after the ravages of Watergate, Webster resisted congressional efforts to allocate more resources to the counterterrorism program for fear it would undermine the reforms of the mid-1970s. In the late 1970s, in fact, Webster routinely returned appropriations for this function to Congress.¹⁶ Pressure from the administration and conservative congressional leaders continued, but Webster remained committed to decreasing the role of the FBI in domestic security/terrorism—until the fall of 1981.

At the appropriations hearings for fiscal year 1982, the FBI proposed that the counterterrorism program be decreased by over \$250,000 and that twenty-one positions be either reallocated or eliminated.¹⁷ While Webster argued before a Senate subcommittee on security and terrorism that “there is no known coalescing of an ideological synthesis among (domestic terrorist) groups, nor do we have any sense that they have become effective,”¹⁸ other events were taking shape that would undo his efforts to restrict FBI involvement in domestic security.

In October 1981, long-forgotten members of the Weather Underground (WU), the Black Liberation Army (BLA) and the Black Panther party emerged as the newly formed May 19th Communist Organization (M19CO). The robbery of a Brinks armored truck in Nyack, New York, that left two police officers and a security guard dead renewed concern about terrorism. Evidence obtained during the ensuing investigation revealed an even broader coalescence. By Thanksgiving 1981, investigators learned that not only had these groups merged for specific missions but that they had also provided assistance to the Armed Forces of National Liberation (FALN), a violent Puerto Rican extremist group. These revelations, which cast doubt on Webster’s previous comments, encouraged further administration and congressional demands for expansion of domestic security programs. Webster was embarrassed further when on December 21, 1981 members of the United Freedom Front (UFF), a left-wing terrorist group that had operated with impunity since 1976, killed New Jersey state trooper Philip Lamonaco along a rural stretch of interstate highway during a routine traffic stop.¹⁹

The public response was predictable: the news media talked of the reemergence of the radicalism of the late 1960s, and public support for FBI intervention increased. Only one year after recom-

mending a reduction in program allocations for terrorism investigations, the FBI elevated its counterterrorism program from a Priority 3 program to the highest investigative priority—Priority 1.²⁰ To further the government's new goals, Attorney General William French Smith, in a memorandum to William Webster on March 7, 1983, issued new guidelines for domestic security/terrorism investigations.²¹ Contending that the old Levi Guidelines were too restrictive, Smith streamlined the investigative process and gave greater flexibility to FBI field offices with the new guidelines.

The impact of these changes on the FBI cannot be overstated. Within three years after the elevation of the FBI's counterterrorism program to Priority 1 and the issuance of the new investigative guidelines, the FBI scored dramatic successes against terrorists in the United States. A law enforcement task force consisting of local, state, and federal agencies sharing intelligence information was created in February 1983 to snare members of the UFF. Most of the members, who had been on the FBI's Ten Most Wanted list since 1976, were captured in November 1984. Two remaining members, Thomas and Carol Ann Manning, were arrested in April 1985.²² By May 1985 the leader of M19CO, Marilyn Buck, and nearly twenty others involved in the Nyack, New York, armored truck robbery and murders had been arrested. Two years after the Levi Guidelines were revised, almost all members of the major left-wing terrorist groups had been captured and were awaiting trial.

By sheer coincidence, about the time the counterterrorism program was elevated to Priority 1 and the Smith Guidelines issued, right-wing extremists also turned violent. On June 3, 1983, just three months after Attorney General Smith issued his guidelines, Gordon Kahl was killed in a firefight with state and federal agents in northwest Arkansas. The death of Kahl, a staunch member of the Sheriff's Posse Comitatus (SPC)—a violent, anti-tax group—signaled the beginning of a move toward violence among right-wing groups. Declaring "War in '84," Robert Mathews formed the Order in September 1983. During the next two years, the Order, the Aryan Nations, SPC, the Arizona Patriots, the White Patriot party (WPP), and the CSA became household words. For adherents of the extreme right, right-wing terrorism could not have picked a worse time to rear its head. The violent fringe of the Christian Identity Movement, to which most of these groups were related, was crushed in a wave of federal indictments and successful prosecutions that lasted until 1987. Richard Butler, head of the Aryan Nations, commenting on the failure of the Order, said: "Mathews made his move too soon."²³ In view of the changes in federal policy just discussed, perhaps Butler should have said: "he

made his move too late." Mathews, James Ellison, the leader of CSA and Frazier Glenn Miller, leader of the White Patriot Party, and other leaders of extreme right terrorist groups never knew what hit them. The reemphasis on domestic security caused a wholesale housecleaning of American terrorist groups—Left and Right—during the mid-1980s.

The Attorney General's Guidelines

In many ways procedures to determine who the FBI could investigate and under what circumstances are as important as its definition of terrorism in determining who was ultimately labeled "terrorists." Two sets of guidelines provide authority and direction to the FBI in its investigation of terrorism. Investigation of international terrorism is provided by the "Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations."²⁴ These guidelines are classified, however, and not available for public dissemination. It is known that the FBI is authorized under these guidelines to investigate acts that involve "terrorist activity committed by groups or individuals who are foreign-based and/or directed by countries or groups outside the United States or whose activities transcend national boundaries."²⁵ Generally, these guidelines allow the FBI greater latitude in investigative techniques and in the length and scope of such investigations than do the guidelines that direct domestic security investigations.

Domestic terrorism investigations are conducted under the provisions of the "Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations."²⁶ These guidelines provide insight into the manner in which the FBI ultimately categorizes some offenses as terroristic. A number of characteristics that determine the groups and types of behaviors investigated emerge within the guidelines:

1. *Use of violence*—The guidelines specify that the group endorses and utilizes "activities that involve force or violence."²⁷ Within this framework, the behaviors of non-violent political dissident groups would not qualify for investigation as terrorism. However, as the second characteristic demonstrates, violence does not have to actually occur, nor does it have to be recent.
2. *Political motivation*—The 1983 Smith Guidelines incorporate criminal enterprises and terrorism under a single set

of directives. Consequently, identification of a political motive is not necessary to initiate a criminal investigation. Identification of a political motive allows investigation under the domestic security/terrorism subsection rather than the racketeering subsection. The distinction is important. Terrorism investigations may remain open even though a group "has not engaged in recent acts of violence, nor is there any immediate threat of harm—yet the composition, goals and prior history of the group suggests the need for continuing federal interest."²⁸

3. *Focus on groups rather than individuals*—While the activities of individual citizens acting alone may result in a criminal investigation, they will seldom be designated as an act of terror. The guidelines are specific: terrorism investigations are "concerned with the investigation of *entire enterprises, rather than individual participants*."²⁹ In addition, terrorism investigations may not even be initiated unless "circumstances indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals . . . that involve force or violence and a violation of the criminal laws of the United States."³⁰
4. *Claimed responsibility*—In recent years the FBI has tended not to include bombings as acts of terrorism unless a claim of responsibility by a terrorist group was made or the FBI could positively identify such a group as responsible.

Consequently, crimes like the assassination of federal judge Robert Vance in December 1989 were not labeled "terroristic." Although an anonymous caller claimed to have committed the bombing for a group calling itself "Citizens for a Competent Judicial System," the assassin, Walter Moody, apparently acted independently of the influence of any organizations. This particular crime is not even mentioned as a possible suspected terrorist incident in FBI annual reports. Other bombings, including those of abortion clinics, appear to fit the same pattern—they are the result of decisions made by individuals without the conspiratorial support of others. These characteristics emphasize the FBI approach to countering terrorism—the 'decapitation' of the leadership of terrorist organizations in an effort to gain 'early interdiction of unlawful violent activity.'³¹ The arrest and conviction of persons actually committing officially designated acts of terror are viewed as a less

effective strategy than destroying the organization that spawned the violence.

Needles in the Haystack: Terrorists in the Justice System

The study of terrorism presents unique problems to those who try to empirically examine the phenomenon. Selective enforcement, higher priorities, greater allocations of resources, the use of non-legal criteria, and the lack of a specific crime of terrorism confound efforts to adequately study the extent of terrorism in America. For example, if a researcher wants to study people who commit robbery, offenders are easily identified as those who have been charged with a specific offense in the criminal code appropriate to the jurisdiction. By contrast, since there is no specific crime of terrorism, terrorists are charged with scores of different violations of federal law. Unless the persons who have been labeled as terrorists can be identified, finding terrorists in the criminal justice system becomes an almost impossible task. To further complicate the work of researchers, some terrorists have a history of criminal behavior that predates or coincides with their lives as terrorists. Should all of the criminal acts committed by terrorists be considered terroristic? Obviously not. How, then, can one distinguish between the terroristic behaviors and non-terroristic crimes committed by persons alleged to be terrorists? The question is not easily answered. Consequently, this study examines the behaviors of persons indicted, as a result of FBI investigations, of officially designated acts or suspected acts of terror. It is apparent that most of the crimes for which terrorists are indicted as a result of these investigations are not terroristic in themselves. Instead, they tend to be crimes committed in support of the group's survival or in efforts to procure materials for the commission of terrorist acts.

After extensive discussions with the FBI's Terrorist Research and Analytical Center, an analyst was assigned to identify the names of persons indicted since 1980 as a result of FBI terrorism investigations. All of the persons eventually identified were indicted in federal court. The list included the names of persons indicted under the counterterrorism program from 1980–1989, as well as the specific offenses for which the persons were charged, and the date and place of indictment. This original list included the names of approximately 170 persons.

The list on page 14 (table 1.1), was supplemented with the names of persons identified from the FBI's annual report on terror-

Table 1.1 Indictments from the FBI's Counterterrorism Program: 1980–1989 (Compared with Sample Cases)

TERRORIST ORGANIZATION	TOTAL NUMBER OF PERSONS	NUMBER INCLUDED IN SAMPLE
Domestic		
1. Aryan Nations	4	3
2. Arizona Patriots	10	10
3. Covenant, Sword, and Arm of the Lord	22	22
4. Ku Klux Klan	1	1
5. The Order	48	48
6. The Order II	5	5
7. Sheriff's Posse Comitatus	5	5
8. White Patriot Party	9	9
9. El Rukns	10	7
10. Macheteros	20	20
11. FALN	6	5
12. May 19 Communist Organization	20	11
13. United Freedom Front	11	9
14. Republic of New Africa	1	0
15. New African Freedom Fighters	9	9
16. Provisional Party of Communists	1	1
17. Jewish Defense League	4	0
18. Earth First	5	5
19. Individual Act ^a /Group Unknown	4	3
Subtotal	195	173
International		
1. Armenian Secret Army for the Liberation of Armenia	4	0

Table 1.1 *Continued*

TERRORIST ORGANIZATION	TOTAL NUMBER OF PERSONS	NUMBER INCLUDED IN SAMPLE
2. Justice Commandos of the Armenian Genocide	5	0
3. Ejercito Revolucionario Del Pueblo	8	0
4. Indian Sikhs	2	0
5. Irish National Liberation Army	1	0
6. Japanese Red Army	1	1
7. Libyans	10	7
8. Omega 7	9	7
9. Palestinian/Syrian	4	4
10. Provisional Irish Republican Army	26	21
11. Individual Act ^a /Group Unknown	<u>23</u>	<u>0</u>
Subtotal	93	40
TOTALS	288	213

a. For years 1983 and prior, the acts of some individuals were classified as terrorism. In subsequent years, in accordance with the new guidelines, only persons affiliated with terrorist groups were listed.

ism in the United States. Most of the investigations are mentioned in these annual reports, and the persons involved are identified. The names and places of indictment, where omitted, were then obtained from the Terrorist Research and Analytical Center. The final list included the names of 213 persons indicted for nearly 1,400 different violations of federal law. They represented twenty-one different terrorist organizations: sixteen domestic groups and five groups that had committed acts of international terrorism.

This list should not be taken as complete, however.³² To check the validity of the list, annual reports of the FBI's counterterrorism program were used to identify other persons who had been in-

dicted but not included in the original list. An examination of these reports revealed an additional seventy-five names for which data could not be collected. The complete list was compared with the list for which information regarding indictment was available (table 1.1). Case files were examined for approximately 90 percent of the known indictments against domestic terrorists from 1980–1989. The data set includes virtually all of the indicted right-wing terrorists, as well as the vast majority of the most famous left-wing group members from the 1970s and 1980s. Among domestic groups, criminal case histories were not located for four members of the Jewish Defense League indicted in 1987.

Locating the criminal case files of persons indicted for acts of international terrorism was more difficult. Many of the cases were several years old and had already been removed from local federal district courts. Fewer than half of the international cases were examined. In particular, no information was gathered on members of Armenian or Turkish independence groups who committed bombings on the West Coast in the early 1980s. Nor was information gathered on international terrorists whom the FBI designated as belonging to an “unknown group.” Of international terrorists belonging to a known group, nearly three-fifths (57 percent) of the case files were examined. Cases against Armenian terrorists and members of *Ejercito Revolucionario del Pueblo* (ERP) represent the only major cases omitted from the analysis. Overall, nearly three-fourths (74 percent) of the persons indicted under the FBI’s counterterrorism program from 1980–1989 are included in the sample. The completed data set contains information about the type of terrorist group in addition to demographic, case outcome, and sentencing information on the 213 indicted terrorists.³³