NEW CANARIES, OLD COAL MINES: *UNITED STATES V. JESSICA RAE REZNICEK* (2022), A CASE STUDY ON THE CREEPING EXPANSION OF THE FEDERAL TERRORISM SENTENCING ENHANCEMENT

Vincent M. Benlloch*

I am not a political person. I am certainly not a terrorist. I am simply a person who cares deeply about an extremely basic human right that is under threat: Water. Indigenous tradition teaches us that water is life. Scripture teaches that in the beginning, God created the waters and the earth and that it was good. And even with these strongly held beliefs, going forward I would not repeat my prior actions.

–Jessica Reznicek, from a 2021 court statement submitted to her sentencing judge[1]

I. INTRODUCTION

In 2021 Jessica Reznicek, an Iowa-based environmental activist and committed member of the Des Moines Catholic Worker,[2] was sentenced to eight years in federal prison for vandalizing construction sites associated with the Dakota Access Pipeline (DAPL) that were owned and operated by Energy Transfer Partners (ETP).[3] On election night 2016, Reznicek and Ruby Montoya—a fellow climate activist and pre-school teacher—gained access

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*Vincent Benlloch is an attorney at Morrison Foerster. Vincent earned his J.D. from UCLA School of Law. Vincent would like to thank UCLA Law Professor Ingrid Eagly for all her support and guidance. This paper would not exist if not for her encouragement, input, and wealth of helpful comments and ideas. Vincent would also like to thank the other students in Prof. Eagly's Sentencing Law and Policy Seminar for their feedback and wonderful contributions.

1.Naveena Sadasivam, *Jessica Reznicek Set Fire to Dakota Access Pipeline Construction. Is She a Terrorist?*, GRIST (May 18, 2022), https://grist.org/protest/jessica-reznicek-sentence-dakota-access-pipeline-terrorism/.

2. *See Gambling at Casinos: a Sin for Catholics?*, DES MOINES CATHOLIC WORKER, http://www.dmcatholicworker.org/ (last visited Mar. 14, 2024) (The Des Moines Catholic Worker Community is an affiliate of the Catholic Worker movement founded by Dorothy Day and Peter Maurin in 1933. The Catholic Worker community is "grounded in the firm belief in the God-given dignity of every person, [and] the movement is committed to nonviolence, voluntary poverty, and the Works of Mercy as a way of life.") ("The Des Moines Catholic Worker community, founded in 1976, is a response to the Gospel call to compassionate action as summarized by the Sermon on the Mount. In the spirit of the Catholic Worker tradition, we are committed to a simple, nonviolent lifestyle as we live and work among the poor. We directly serve others by opening our home for those in need of food, clothing, bedding, a shower, or a cup of coffee and conversation. We also engage in activities that foster social justice."); *see also* DES MOINES CATHOLIC WORKER http://www.dmcatholicworker.org/ (last visited Mar. 14, 2024) ("The Des Moines Catholic Worker community, founded in 1976, is a response to the Gospel call to compassionate action as summarized by the Sermon on the Mount. In the spirit of the Catholic Worker tradition, we are committed to a simple, nonviolent lifestyle as we live and work among the poor. We directly serve others by opening our home for those in need of food, clothing, bedding, a shower, or a cup of coffee and conversation. We also engage in activities that foster social justice.").

3. Press Release, U.S. Atty's Off., S. Dist. Of Iowa, Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline (June 30, 2021), https://www.justice.gov/usao-sdia/pr/des-moines-woman-sentenced-eight-years-prison-conspiracy-damage-dakota-access-pipeline.

to an unoccupied pipeline worksite in Newell, Iowa and used coffee cans filled with motor oil to set fire to four excavators, a bulldozer, and a large portable crane.[4] After this initial act of sabotage against DAPL's infrastructure, Reznicek and Montoya set out on a coordinated direct action campaign against other DAPL work sites through the spring of 2017.[5] Moving across multiple counties in Iowa and one in South Dakota, Reznicek and Montoya used oxy-acetylene cutting torches to damage pipeline valves at several DAPL worksites, as well as igniting tires to sabotage electrical conduits connected to the pipeline.[6]

Despite their concerted efforts to halt DAPL's flow, the pipeline remained functional, leading Reznicek and Montoya to stage a public confession outside of the Iowa Public Utilities Board in July 2017 as a last-ditch effort to raise public awareness regarding DAPL's detrimental effects on the Midwest's waterways and soil.[7] At the public confession, Reznicek and Montoya took full responsibility for their acts of eco-sabotage and explained their reasoning for targeting ETP's worksites:

We are speaking publicly to empower others to act boldly, with purity of heart, to dismantle the infrastructures which deny us our rights to water, land and liberty. We as civilians have seen the repeated failures of the government and it is our duty to act with responsibility and integrity, risking our own liberty for the sovereignty of us all. Some may view these actions as violent, but be not mistaken. We acted from our hearts and never threatened human life nor personal property. What we did do was fight a private corporation that has run rampant across our country seizing land and polluting our nation's water supply. You may not agree with our tactics, but you can clearly see the necessity of them in light of the broken federal government and the corporations they protect.[8]

Notwithstanding the clarity and public nature of their July 2017 confession, neither Reznicek nor Montoya were arrested or formally charged until 2019.[9]

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4. *See* Julia Shipley, *You Strike a Match*, GRIST (May 26, 2021), https://grist.org/protest/dakota-access-pipeline-activists-property-destruction/.

5. Plea Agreement at *4, United States v. Reznicek, No. 21-2548, 4:19-cr-00172-RGE-HCA (S.D. Iowa Jan. 6, 2021); *see also* Shipley, *supra* note 4.

6. Plea Agreement, *supra* note 5, at 4; *see also* Shipley, *supra* note 4.

7. *See* Shipley, *supra* note 4; *see also* Sadisvam, *supra* note 1.

8. Jessica Reznicek & Ruby Montoya, *Why We Acted*, 41 VIA PACIS , Oct. 2017, at 1, https://viapacis.files.wordpress.com/2017/10/2017-oct-vp1.pdf; *see also* Alleen Brown, *Dakota Access Pipeline Activists Face 110 Years in Prison, Two Years After Confessing Sabotage*, THE INTERCEPT (Oct. 4, 2019, 6:01 AM), https://theintercept.com/2019/10/04/dakota-access-pipeline-sabotage/.

9. *See* Brown, *supra* note 8.

When Reznicek's indictment finally came down, she was met with nine separate felony counts amounting to over 100 years in prison if found guilty on all charges.[10] Rather than risk over a century's imprisonment by going to trial, Reznicek took a plea deal and plead guilty to a single charge of conspiracy to damage an energy facility.[11] The sentencing range for that offense absent the application of any enhancements, variances, or departures is normally thirty-seven to forty-six months.[12] However, as a consequence of Reznicek's plea, she was forced to recognize that her sentencing judge could consider "whether the offense involved or was intended to promote a federal crime of terrorism pursuant to USSG § 3A1.4" as a factor in calculating Reznicek's final sentencing range.[13] If USSG § 3A1.4—otherwise known as the "federal terrorism enhancement"—is found to apply, then a defendant's acts will be labeled "crimes of terrorism," and their advisory length of sentence will be between 210 and 262 months at the minimum, absent subsequent sentence-decreasing enhancements or the consideration of mitigating factors.[14]

Reznicek's sentencing judge, Rebecca Goodgame-Ebinger, did in fact apply the §3A1.4(a) terrorism enhancement to Reznicek's sentence, which pushed her recommended sentence range to between 210 and 262 months.[15] Reznicek received an actual sentence of 96 months, or eight years, in federal prison.[16] In addition to her lengthy sentence, she must serve three years of supervised release after her sentence concludes, and she must pay a staggering $3,198,512.70 in restitution.[17]

Reznicek promptly, yet unsuccessfully, appealed her sentence to the Eighth Circuit in 2021.[18] At the Eighth Circuit, Reznicek argued that the terrorism enhancement was inapplicable to her actions because her offense could only qualify as a federal crime of terrorism if it was "calculated to influence or affect the conduct of government by intimidation or coercion, or

10. *See* Reznicek Indictment at 1-6, United States v. Reznicek, 2021 BL 4:19-cr-00172-RGE-HCA; *see also Iowa Activists Face Up to 110 Years in Prison for Dakota Access Pipeline Sabotage*, DEMOCRACY NOW! (Oct. 4, 2019), https://www.democracynow.org/2019/10/4/headlines/iowa_activists_face_up_to_110_years_in_prison_for_dakota_access_pipeline_sabotage.

11. *See generally* Reznicek Indictment, *supra* note 10.

12. Brief of Appellant at 27, United States v. Reznicek, No. 21-2548 (8th Cir. Nov. 5, 2021).

13. *See* Plea Agreement, *supra* note 5, at 5.

14. Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MI. L. REV. 1333, 1358-59 (2019).

15. Brief of Appellee at 23, 29, United States v. Reznicek, No. 21-2548 (8th Cir. Feb. 28, 2022).

16. *Id.*

17. *Id.* at 13.

18. *Id.*

to retaliate against government conduct."[19] Reznicek's theory was grounded in the fact that her conduct was solely directed at a private entity, Energy Transfer Partners, and against ETP's private corporate conduct as a means of halting DAPL's construction.[20] A three-judge panel on the Eighth Circuit upheld her sentence, holding that even if the terrorism enhancement was erroneously applied, it was harmless error because the district court expressly stated that Reznicek's sentence of 96-months would be the same length regardless of whether or not the district court had applied the enhancement.[21] The court also held that Reznicek's sentence was not substantively unreasonable because the district court considered the appropriate mitigating and aggravating factors and did not commit any clear errors in their judgment.[22]

Reznicek's case garnered a decent degree of media attention. Media sources sympathetic to her case focused on the patent outrageousness of her length of sentence,[23] the fact that her Eighth Circuit panel was comprised of Trump-appointed "right wing" justices, and the curious timing of her prosecution, having come after 84 Congressional representatives wrote to Attorney General Jeff Sessions requesting domestic terrorism charges for pipeline protesters.[24] Oil and gas industry representatives were deeply critical of Reznicek and Montoya's actions, with Energy Transfer Partners CEO Kelcy Warren going so far as to remark, "You're talking about somebody who needs to be removed from the gene pool."[25] In the aftermath of Reznicek's conviction and imprisonment, petitions for commutations and pardons were submitted to President Joe Biden,[26] and supporters of Reznicek and other embattled water protectors created a website to support Reznicek

19. Brief of Appellant, *supra* note 12, at 8; *see also* 18 U.S.C. § 2332b(g)(5)(A).

20. Brief of Appellant, *supra* note 12, at 15-24.

21. United States v. Reznicek, No. 21-2548, 2022 WL 1939865, at 1 (8th Cir. June 6, 2022).

22. *Id.* at 2.

23. *See* Charlotte Grubb, *A Tale of Two Damages: Double Standard for Jessica Reznicek and Energy Transfer Partners,* COMMON DREAMS (Oct. 25, 2021), https://www.commondreams.org/views/2021/10/25/tale-two-damages-double-standard-jessica-reznicek-and-energy-transfer-partners.

24. *See* Natasha Lennard, *Right Wing Judges Say It's Harmless to Label Climate Activist A Terrorist,* THE INTERCEPT (June 8, 2022, 8:30 A.M.), https://theintercept.com/2022/06/08/dakota-pipeline-protester-jessica-reznicek-terrorism/.

25. Molly Dorozenski, *CEO Behind Dakota Access Pipeline Says Protesters Should Be Removed From the Gene Pool*, GREENPEACE (Mar. 15, 2018), https://www.greenpeace.org/usa/ceo-behind-dakota-access-pipeline-says-protesters-removed-gene-pool/.

26. Free Jessica Reznicek, *Water Protectors Not Terrorists: Repeal Jessica Reznicek's Terrorist Enhancement*, ACTION NETWORK, https://actionnetwork.org/petitions/protecting-water-is-never-terrorism-repeal-jessica-rezniceks-terrorist-enhancement (last visited Mar. 25, 2024).

during her incarceration and to spread awareness about the water protector movement writ large.[27]

However, there has been little scholarly attention paid to her case within the legal academy.[28] This paper hopes to remedy that absence of attention by presenting Reznicek's sentencing as a case study situated within the larger critical debate over the terrorist sentencing regime in the United States. *U.S. v. Reznicek* deserves such attention due to the novel application of the 3A1.4 in this case. As argued by Reznicek's defense team on appeal, Reznicek's conduct cannot be considered "retaliatory" against the government nor properly defined as intended to "influence" or "affect" government conduct by intimidation or coercion precisely because the main actor targeted by and harmed by Reznicek and Montoya's actions was Energy Transfer Partners, rather than the state of Iowa or the Federal government.[29] The novelty of this application of 3A1.4 is also borne out by prior scholarly analysis of the terrorism enhancement in the domestic terrorism context, which found that in "all reported appellate decisions applying the enhancement to domestic terrorism, the cases involved 'some form of violent activity or conspiracy to commit violence.'"[30] Conversely, Reznicek's acts of property destruction were defined as domestic terrorism even though only private property was destroyed, and her actions were explicitly intended to slow down the function of a private infrastructure project.[31]

This troubling application of §3A1.4 begs for further analysis and scholarly attention for multiple reasons. First, Reznicek's case allows us to interrogate the way in which the terrorism enhancement intersects with the function of plea deals in the federal criminal system. Specifically, the case presents an example of how 3A1.4's application can blunt or wipe out the basic value of a plea deal—reduction in possible sentence length—after the

27. SUPPORT JESSICA REZNICEK, http://supportjessicareznicek.com/ (last visited May 10, 2023).

28. At the time of my initial drafting of this paper in the early spring of 2023, there were no legal academic articles focusing on Reznicek's case. However, on April 12, 2023, Madeline Johl, a fellow law student at Fordham Law, published the following note: Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465 (2023). Johl's article focuses in part on Reznicek's case as an illustrative example of the problematic uses of the enhancement as applied to acts of social and civil disobedience. Johl's article and my piece share a core criticism of the enhancement, and it is heartening to see other legal scholars bring light to Reznicek's case and to levy criticism against the current terrorism sentencing regime in the U.S.

29. *See* Brief of Appallent, *supra* note 12, at 14 ("Appeals courts do not appear to have analyzed cases where, as here, the purportedly retaliatory offenses targeted only private property, but the logic of the cases cited suggests that such targeting cannot qualify as retaliation against government conduct.").

30. Sinnar, *supra* note 14, at 1360.

31. *See* Grubb, *supra* note 23; Reznicek & Montoya, *supra* note 8, at 1.

deal has become finalized and irrevocable. Second, Reznicek's case offers an analytic moment to question whether sentencing judges ought to have the discretion and authority to unilaterally categorize criminal acts as "terrorism." Finally, Reznicek's case occasions us to consider why questions of what conduct constitutes "terrorism" ought to be reserved for the jury and not decided by the sentencing judge alone.

II. THE FEDERAL TERRORISM SENTENCING ENHANCEMENT

Prior to analyzing *United States v. Reznicek* in depth, it is first necessary to understand how the federal terrorism sentencing enhancement—USSG §3A1.4—functions generally. Part II.A presents a short summary of the history and architecture of the enhancement, so that the reader can understand how the enhancement applies, how the enhancement drastically alters sentencing outcomes, and what type of conduct and criminal charges the enhancement can attach to. Part II.B presents recently available data regarding the application of the enhancement, as well as surveys some of the broad criticisms levied against 3A1.4.

A. A Brief Overview of U.S. Sentencing Guidelines Manual § 3A1.4

U.S. Sentencing Guidelines Manual §3A1.4 is rooted in three of the most significant legislative acts undertaken by Congress to shape criminal justice policy writ large and to address international, and later domestic, terrorism: The Violent Crime Control and Law Enforcement Act of 1994, The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, and the PATRIOT Act of 2001.[32] The genesis of *U.S. Sentencing Guidelines Manual* §3A1.4 was a mandate from Congress to the Sentencing Commission in 1994 to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime."[33] The passage of AEDPA in 1996 in response to the Oklahoma City bombing further extended the scope of the enhancement to reach domestic acts of terrorism as well.[34] Finally, the PATRIOT ACT of 2001 authorized a transformative change to the class of crimes the then mandatory enhancement would attach to, including: "a) harboring or concealing a terrorist, b) obstructing an

32. Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OH. ST. L. J. 477, 499-502 (2014).

33. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796 (1994).

34. Johl, *supra* note 28, at 477.

investigation into federal crimes of terrorism, c) crimes that involve terrorism, but do not conform to the federal crime of terrorism definition, and d) crimes that were intended to influence a government's conduct by intimidation or coercion, retaliate against government conduct, or influence a civilian population by intimidation or coercion."[35] Each subsequent legislative act expanded the range of §3A1.4, thereby creating an ever-widening class of conduct both domestic and international, violent and non-violent, that could be sanctioned by the enhancement.[36]

To apply the enhancement, the predicate offense must be "a felony that involved, or was intended to promote, a federal crime of terrorism."[37] To conform to this "federal crime of terrorism" definition, an offense must satisfy a two-prong test.[38] To satisfy the first prong, the offense must either be one that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[39] For the second prong, the offense must be a violation of one of panoply of federal criminal statutes.[40] In the case at hand, prong two is satisfied by Reznicek's subject offense—conspiracy to damage an energy facility in violation of 18. U.S.C. §1366(a)—and prong one is satisfied if the sentencing judge finds that Reznicek harbored the specific intent to influence, affect, or retaliate against government conduct when committing the subject offense.[41]

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35. Said, *supra* note 32, at 500-01.

36. *See* James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 MINN. J. OF LAW & INEQ. 51, 51, 68 (2010) ("[E]vents since its inception have stretched U.S.S.G. section 3A1.4 far beyond its roots in international terrorism, giving it far-reaching power and leading to devastating consequences.").

37. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018 § 3A1.4(a) (U.S. SENT'G COMM'N 2018).

38. 18 U.S.C. § 2332b(g)(5) (2015).

39. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018, *supra* note 37, at 349 (stating that "federal crime of terrorism" is defined pursuant to 18 U.S.C. § 2332b(g)(5)); 18 U.S.C. § 2332b(g)(5)(A).

40. *See* Sinnar, *supra* note 14, at 1358 (explaining the full scope of offense categories covered by 3A1.4) ("This sentencing enhancement affects three categories of offenses: (1) federal terrorism crimes that are 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and that violate any of more than fifty separate criminal provisions; (2) the harboring or concealing of terrorists or obstruction of a federal terrorism investigation; and (3) non-enumerated offenses "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,' as well as enumerated offenses intended to "intimidate or coerce a civilian population" rather than to affect government conduct.").

41. Plea Agreement, *supra* note 5, at 2-3; *see also* 18 U.S.C.A. § 1366 (The elements of conspiracy to damage an energy facility are as follows: "Whoever knowingly and willfully damages or attempts or conspires to damage the property of an energy facility in an amount that in fact exceeds or would if the attempted offense had been completed, or if the object of the conspiracy had been achieved, have exceeded $100,000, or damages or attempts or conspires to damage the

If found to apply, § 3A1.4 severely alters a sentence in two ways. First, § 3A1.4(a) mandates an increase of 12 levels to the baseline offense level, or an offense level of 32, whichever is greater.[42] Second, § 3A1.4(b) commands that a given defendant's criminal history category will increase to Category VI.[43] If a sentencing court finds that § 3A1.4(a) applies, then the minimum sentencing range available for a defendant will be 210 to 262 months, absent the applicable statutory maximum for the offense or any available reductions or downward variances.[44] In Reznicek's case, she was originally assessed a base offense level of 23, due to the conduct involving arson or property damage by use of explosives and because it led to a loss exceeding $550,000.[45] However, her offense level in this case was set to be reduced by three points to offense level 20 due to her acceptance of responsibility.[46] By combining her offense level of 20 with her original criminal history category of II, Reznicek's advisory guidelines range absent the enhancement would have been 37 to 46 months.[47] Even though Reznicek was ultimately sentenced to 96 months,[48] the enhancement clearly altered the sentencing judge's guidelines calculus, as her actual sentence functionally doubles the upper range of her original length of sentence.

B. Some Initial Critical Perspectives on § 3A1.4

Due to how 3A1.4 adjusts the relevant guidelines variables, the enhancement has been labeled a "draconian" sanction with "far-reaching power" that produces "devastating consequences" on the lives of defendants.[49] As noted by legal scholar Shirin Sinnar, 3A1.4 "produces its

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property of an energy facility in any amount and causes or attempts or conspires to cause a significant interruption or impairment of a function of an energy facility, shall be punishable by a fine under this title or imprisonment for not more than 20 years, or both").

42. U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018, *supra* note 37.

43. *Id.*; *see also* Said, *supra* note 32, at 501 ("[U]nder section 3A1.4 a convicted defendant's criminal history category is Category VI, the most extreme classification usually reserved for career criminals, regardless of whether the individual being sentenced has ever committed a crime."); Sinnar, *supra* note 14, at 1358-59 ("[I]t assigns defendants the most serious criminal history level available, thus treating even first-time offenders like individuals with extensive criminal records.").

44. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018, ch. 5, pt. A at 406-407 (U.S. SENT'G COMM'N 2021).

45. Brief of Appallent, *supra* note 12, at 6.

46. *See id.*

47. *See id.* at 27; *see* U.S. SENT'G COMM'N, GUIDELINES MANUAL 2021, *supra* note 44, at 407.

48. Brief of Climate Defense Project et al. as Amici Curiae Supporting Appellant, United States v. Reznicek, No. 21-2548, (8th Cir. June 6, 2022).

49. *See* McLoughlin, *supra* note 34, at 51, 76 ("One must ask what U.S.S.G. section 3A1.4 adds to the equation that improves sentencing or anti-terrorism policy when it creates such

most significant impact on individuals who have committed less serious offenses and who have a minimal criminal past."[50] Within this context, Reznicek's lengthy sentence due to the application of 3A1.4 is not anomalous. While Reznicek's expanded sentence is representative of other sentences received under the enhancement, her sentence is nonetheless striking when compared to the average length of sentence for offenders convicted of unauthorized exportation of arms (29 months) or for offenders convicted of financial transactions-based terrorism (17 months).[51]

The available data confirms the enhancement's unyielding severity. In a 2021 review of sentencing for "national defense offenses,"[52] the U.S. Sentencing Commission identified a stark disparity in average length of sentence between national defense offenders who did not receive the enhancement (40 months) and those offenders that did receive the enhancement (152 months).[53] A 2017 review also conducted by the Sentencing Commission found a similarly blunt difference in average sentence length for non-enhanced (66 months) versus enhanced sentences (176 months).[54] These clear disparities are often attributed to 3A1.4(b)'s adjustment of a defendant's criminal history category to level VI, which automatically equates the defendant to a career criminal offender for purposes of the guidelines.[55] As the data demonstrates, the architecture of the enhancement is relatively straightforward to apply and its sanction exceedingly severe.

Critics of the enhancement have identified a host of other functional issues with the way 3A1.4 operates within the larger federal criminal law

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draconian anomalies that (in the case of defendants who are foreign nationals) become newsworthy in the countries from which the defendants have come fostering a belief that the U.S. justice system is biased and fundamentally unfair.").

50. Sinnar, *supra* note 14, at 1359.

51. *See Quick Facts: National Defense Offenders*, U.S. SENT'G COMM'N (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY21.pdf, (last visited May 10, 2023).

52. *See id.* (The U.S. Sentencing Commission characterizes "national defense cases" as including those cases in which the offender received a sentencing enhancement under 3A1.4).

53. *See id.*

54. *See Quick Facts: Offenses Involving National Defense*, U.S. SENT'G COMM'N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/National_Defense_FY17.pdf, (last visited May 10, 2023).

55. *See* McLoughlin, *supra* note 36, at 53, 111; *see also* U.S. SENT'G GUIDELINES MANUAL 2021 at 395 ("A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense . . . A career offender's criminal history category in ever case under this subsection shall be Category VI").

regime, only a few of which have been highlighted here. First, whether the enhancement ultimately applies is purely discretionary, which can lead to "dramatically disparate sentences" for identical conduct depending on the caprice of a district judge.[56] Sentencing judges retain this discretion due to the watershed sentencing case *United States. v. Booker*.[57] In *Booker*, the Supreme Court held that the federal sentencing guidelines are "effectively advisory" rather than mandatory, such that the sentencing judge retains a "broad discretion" to decide which guidelines may or may not apply to the imposition of a given sentence.[58] This dramatic disparity in sentencing based on discretionary use of the enhancement produces two other corollaries: the increase in length of sentence for less serious offenses and the blurring of severity of punishment for violent versus nonviolent crimes.[59] In sum, the heightened level of discretion reserved for the sentencing judge, when coupled by the capaciousness of 3A1.4's "federal crimes of terrorism" category, can capture a wide range of conduct and sanction it heavily under the banner of terrorism.

Second, once the enhancement attaches, it will almost certainly survive any appeal from a criminal defendant.[60] Under the "abuse of discretion" standard required for appellate review of federal sentences after *Gall v. United States*, appellate courts approach sentencing review with an exceedingly deferential posture, regardless of whether the sentence imposed is within or outside the guidelines range.[61] Courts within the terrorist sentencing context deploy this standard to shield the applicability of 3A1.4 from greater scrutiny, rendering the enhancement functionally appellate-proof.[62] The *Gall* standard lends finality to applications of the enhancement

56. *See* McLoughlin, *supra* note 36, at 92-93 ("Whether courts apply U.S.S.G. section 3A1.4 or not determines whether defendants receive dramatically disparate sentences for the very same conduct."); *see also* Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government's Powers to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775, 832 ("The effect of § 3A1.4 is such that even less serious offenses that meet § 2331(5) can result in lengthy prison sentences.").

57. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

58. *Id.* at 233, 245.

59. *See* Said, *supra* note 32, at 501 ("When section 3A1.4 is applied, though, the distinction between the sentences for violent and non-violent crimes can narrow, exposing a fundamental inconsistency between the penalties Congress has promulgated and the actual sentencing levels terrorism defendants are exposed to, regardless of violent conduct").

60. *See generally id.* at 503-04.

61. *See* Gall v. United States, 552 U.S 38, 55-60 (2007) ("But it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.").

62. *See* Said*, supra* note 32, at 503-04.

by foreclosing meaningful appellate review, thus reinforcing and protecting the scope of 3A1.4 as it expands and reaches new forms of activity.[63]

Third, sentencing judges can deploy 3A1.4 in order to upwardly adjust what the "middle-of-the-road" would look like for a given length of sentence, even if they ultimately decide to downwardly depart from the enhancement's sentencing range of 210 to 262 months.[64] Legal scholar Wadie E. Said identified this sentencing sleight of hand in *United States v. Ashqar*.[65] In *Ashqar* the guidelines sentence absent the enhancement was 24 to 30 months, whereas the enhanced sentence would be 210 to 262 months.[66] The sentencing judge in *Ashqar* selected a "middle-of-the-road" sentence length of 135 months, which the appellate court found was reasonable both because it was less than the enhanced guidelines range and because it would be reasonable, absent the enhancement, under an individualized application of the §3553(a) factors.[67] Similarly, the Eighth Circuit held in *United States v. Reznicek* that her 96-month sentence would be reasonable both as an application of the terrorism enhancement and if the enhancement was never applied due to the district court's application of 3553(a), simply because the district court judge stated that Reznicek's length of sentence would have been the same regardless of whether the enhancement was applied or not.[68]

The problem here is that a sentencing judge is allowed to simply borrow their reasoning for downwardly departing below the enhanced guidelines range as a comparable justification for imposing a sentence that essentially triples or quadruples what the guidelines range would be absent the enhancement. This 'justification-borrowing' is both significant and problematic because it ignores a key provision of 3553(a), "the parsimony provision," which requires that a federal district judge "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection [retribution, deterrence,

63. *See* Joshua M. Divine, *Booker Disparity and Data-Driven Sentencing*, 69 HASTINGS L.J. 771, 785-86 (2018) ("But in bringing back wide judicial discretion, the Court also destroyed any sense of meaningful appellate review. Not only is the reasonableness review of *Booker* a highly unusual standard for reviewing district court decisions, but the Court promoted judicial discretion by removing the central functions of ordinary appellate review . . . The Court has essentially created a safe harbor for within-range sentences, *Rita*; has prohibited courts from rigorously defining proportional justification requirements for departures, *Gall v. United States*; and has permitted virtually limitless discretion based solely on judicial philosophy, *Kimbrough/Spears*.").

64. *See* Said, *supra* note 32, at 504-05.

65. *Id.*; *see also* United States v. Ashqar, 582 F.3d 819, 821 (7th Cir. 2009).

66. *See id.*

67. *See* Said, *supra* note 32, at 504-05; *see also Ashqar*, 582 F.3d at 821; 18 U.S.C. § 3553(a) (listing the relevant factors that a sentencing judge shall consider when deciding to impose a given sentence).

68. *Reznicek,* WL 1939865, at *1-2.

incapacitation, and rehabilitation]."[69] Unlike the application of a guideline enhancement like 3A1.4, which is purely discretionary, a federal sentencing judge must comply with the mandate of 3553(a) which requires an individualized analysis of multiple factors coupled with the mandate of the parsimony provision, among other elements of the statute.[70] It follows then that both a sentencing judge and a reviewing appellate court should not be able to consider whether a given sentence is reasonable based on an enhancement that they are purporting need not apply in order to reach the same ultimate length of sentence. Nevertheless, in both *Ashqar* and *Reznicek*, sentencing judges were able to skirt their mandate to follow the parsimony provision by simply invoking the terrorism enhancement, re-setting the upper end of the guidelines range, and imposing a longer sentence than what they would likely be able to justify absent the specter of 3A1.4.[71]

III. RECONSTRUCTING THE *REZNICEK* SENTENCING LITIGATION

Given the overview and critiques of how 3A1.4 functions in general, it is now possible to consider how the sentencing litigation in *U.S. v. Reznicek* unfolded at the Eighth Circuit. Part III.A reproduces the prosecution's central arguments as to why Reznicek's conduct ought to trigger application of 3A1.4. Part III.B summarizes Reznicek's defense and their attacks on the applicability of the terrorism enhancement. Finally, Part III.C presents the Eighth Circuit's pithy opinion, which upheld both the application of 3A1.4 to Reznicek's sentence and the substantive reasonableness of the 96-month length of Reznicek's sentence.

A. The Prosecution's Theory

The appellate litigation surrounding Reznicek's sentence focused on two issues: 1) whether the USSG § 3A1.4(a) enhancement was correctly applied to her sentence, and 2) whether the district court abused its discretion in sentencing Reznicek to 96 months' imprisonment.[72] On the first issue, the prosecution argued that Reznicek and her co-conspirator, Ruby Montoya, viewed the government as the ultimate "target of their destructive conduct," thereby characterizing the stopping of DAPL through property damage as an

69. *See* 18 U.S.C § 3553(a); *see also* Erica Zunkel, *18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "the Most Effective Manner"*, 9 NOTRE DAME J. OF INT'L & COMPAR. L. 49, 54 (2019).

70. *See* Pepper v. United States, 562 U.S. 476, 488-491 (2011).

71. *See Ashqar*, 582 F.3d at 821; *Reznicek,* WL 1939865, at *1-2.

72. Brief of Appellant, *supra* note 12, at ii.

immediate and intermediary step in that process.[73] The prosecution focused on five distinct pieces of evidence to demonstrate that Reznicek acted with the specific intent required to trigger §3A1.4's application: an intent to either "influence," "affect," or "retaliate" against government conduct.[74]

First, the prosecution signaled to statements made by Reznicek and Montoya in their public confession, narrowing specifically on language including "state-sanctioned brutality," "the government's injustices," the complicity of federal courts, and the view that "the federal government and Energy Transfer Partners colluded together to lie and withhold vital information to the public."[75] Second, the prosecution viewed the both the location of the public confession—outside of the Iowa Utilities Board—and the vandalism of a government sign at that location as indicative of the intent to influence, affect, or retaliate against government conduct.[76] Specifically, the prosecution characterized the site of their confession as evidence that Reznicek and Montoya "wanted to influence or affect public opinion and therefore future government conduct and policy."[77] Third, the prosecution offered the timing of Reznicek and Montoya's acts, which began on the election night of 2016, as further proof of their specific intent.[78] Fourth, the prosecution presented an April 2017 article authored by Reznicek in *Via Pacis*, a publication of the Des Moines Catholic Worker.[79] The prosecution's selections from the article focused on Reznicek's criticism of the U.S. government as an "oppressive regime" and her call to engage in "property destruction" as a means of "dismantling this blood-sucking beast that is killing everything we love and honor."[80] Finally, the prosecution compiled statements made by Reznicek and Montoya during two public speaking engagements they conducted in August 2017 and September 2017.[81] The prosecution characterized the presentations as inducements to the audience to engage in "property destruction" as a means of stopping DAPL, as

73. Brief of Appellee, *supra* note15, at 16-17.

74. *Id.* at 15.

75. *Id.* at 17.

76. *Id.* at 19.

77. *Id.*

78. *Id.*

79. *Id.* at 20-21.

80. *Id.* at 21. *See also* Jessica Reznicek, *Uncomfortable*, 41 VIA PACIS, Apr. 2017, at 1 (The prosecution also introduced the following quote from the *Via Pacis* piece, "Why We Acted," which in my view presents a system-level criticism levied primarily at corporate, rather than solely governmental actors: "I believe the days of marching past infrastructures whose businesses specializes in killing everything and everyone who stands in its way of a dollar are over. It is time to dismantle the White House! And then on to our Statehouses and then to the oil refineries, and then to Monsanto. Tear it all down and rebuild a work of beauty.").

81. Brief of Appellee, *supra* note15, at 22.

opportunities to justify burning the machinery, and as occasions for Reznicek and Montoya to "brag" about evading prosecution.[82] In sum, the prosecution argued that this evidence is sufficient to demonstrate that when Reznicek conspired to damage ETP's privately-owned machinery, she did so with the specific intent to "influence," "affect," or "retaliate" against government conduct, thereby satisfying § 3A1.4(a)'s requirements.[83]

On the second issue, whether the district court abused its discretion at sentencing by imposing a substantively unreasonable sentence,[84] the prosecution argued that the sentence was appropriate because the district court adequately weighed the § 3553(a) factors, recognized relevant mitigation evidence, and fully considered the applicability of the terrorism enhancement to Reznicek's actions.[85] The prosecution also highlighted two countervailing rationales provided by the district court at sentencing, both of which the prosecution argued are supposed to indicate the sentence's reasonableness, albeit for different reasons.[86] The first rationale is that 96 months is a reasonable sentence because it was a downward variance from the advisory guidelines range of 210 to 240 months triggered by terrorism enhancement.[87] The second rationale offered by the district court is that Reznicek's sentence "would be the same sentence imposed if the Court did not apply the terrorism adjustment in this case because of the applicable 3553(a) factors."[88]

B. The Defense's Theory

Reznicek's defense team pushed to overturn her sentence on two grounds: 1) that the federal terrorism enhancement was wrongly applied in her case, and 2) the sentence imposed was not an instance of harmless error but was instead substantively unreasonable and thus an abuse of the sentencing court's discretion.[89]

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82. *Id.* at 22-23.

83. *Id.* at 22.

84. *See* United States v. Miner*,* 544 F.3d 930, 932 (8th Cir. 2008) (The relevant standard for abuse of discretion at sentencing in the 8th Circuit is as follows: "a district court abuses its sentencing discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors"); *see also* United States v. Red Cloud*,* 966 F.3d 886, 888 (8th Cir. 2020).

85. Brief of Appellee, *supra* note 15, at 26-29.

86. *Id.* at 29.

87. *Id.*

88. *Id.*

89. Brief of Appellant, *supra* note 12, at ii.

On the first issue, Reznicek's defense team argued that her conduct satisfied neither the "retaliation" nor the "influence or affecting" prongs of the "federal crime of terrorism" definition.[90] Reznicek's conduct could not be "retaliatory" because it was aimed squarely against a private company, ETP, and their construction of a pipeline, and her acts of property damage never reached any government-owned property.[91] Rather, Reznicek actions were meant to remedy government inaction and fill a vacuum left by missing state or federal intervention "in the form of closer regulatory oversight or more meaningful avenues for democratic participation."[92] Such remedial conduct against a private actor via damage to private property does not conform to the narrow definition of "retaliation" as defined by persuasive authority from other circuits: "the conduct that the defendant retaliates against must objectively be government conduct."[93] At the appellate level, the defense could not identify a single case where retaliatory conduct against only private property was found to support the "retaliation" prong of the federal crimes of terrorism definition under 3A1.4.[94] The defense also distinguished Reznicek's actions from those of other ecological activists who targeted federal facilities[95] as well as from defendants who committed property damage in concert with threatening violence against police officers.[96] In toto, Reznicek's actions against ETP's pipeline infrastructure could be not considered sufficiently retaliatory because the conduct it targeted or opposed was not "objectively" government conduct.[97]

Reznicek's defense also argued that her conduct cannot satisfy the "influence or affect by intimidation or coercion" prong of 3A1.4's terrorism

90. *Id.* at 11-15.

91. *Id.* at 11-12 ("the immediate occasion of their action was a private company's privately financed and executed building of a private pipeline").

92. *Id.* at 12.

93. *Id.* at 13 (citing United States v. Ansberry, 976 F.3d 1108, 1129 (10th Cir. 2020)); *see Ansberry* 976 F.3d at 1129 (The Tenth Circuit reversed an application of 3A1.4 to a defendant's sentence, where the defendant had attempted to bomb a police station because the marshal had killed his friend. Even though the attempted bombing had been aimed at a governmental official and targeted government property, the enhancement could not apply because the marshal had not killed the defendant's friend in his official capacity, and therefore, the defendant was found to be retaliating against private, rather than governmental conduct).

94. Brief of Appellant, *supra* note 19, at 14.

95. *Id.* at 13-14; *see* United States v. Tubbs, 290 F. App'x 66, 68 (9th Cir. 2008) (holding that 3A1.4 applies to retaliatory targeting of federal facilities by ecological activists due to a belief that the facilities degraded the environment and allowed for the cruel treatment of animals).

96. Brief of Appellant, *supra* note 12, at 14 (citing to United States v. Harris, 434 F.3d 767, 774 (5th Cir. 2005)); *see Harris,* 434 F.3d at 774 (3A1.4 was held to apply on retaliation grounds where the defendant threw a Molotov cocktail into a municipal building after threatening to kill a municipal police officer during an arrest days earlier).

97. Brief of Appellant, *supra* note 12, at 14.

definition.[98] First, Reznicek acted in order to in "influence or affect" ETP and the functioning of the Dakota Access Pipeline, not any government actor, precisely because Reznicek believed that the state of Iowa and the federal government abdicated their roles and abandoned their constituents.[99] Furthermore, none of Reznicek and her co-conspirator's stated aims in support of their actions conform with this prong of the specific intent requirement: increasing the marginal cost for ETP of pipeline construction in Iowa by destroying infrastructure, slowing the functioning of DAPL, and raising public awareness regarding DAPL's effects on the environment.[100] On the defense's analysis of the relevant caselaw, the specific intent requirement built into 3A1.4 is only applicable "where individuals have directly targeted or harmed governments in an effort to affect their behavior, or have had changing government behavior a clear, specific aim of the criminal actions taken against private people or entities."[101] Conversely, Reznicek's actions were targeted directly at private actors due to government inaction and can only be considered "merely political" or as occasioning broad "social consequences" with downstream effects on government action, none of which not satisfy 3A1.4's specific intent requirement. To read 3A1.4's intent requirement more broadly, as the district court did in sweeping Reznicek's actions under its purview, is to risk "sweeping in all political crimes as terrorism."[102] Finally, the defense noted that none of the commentary on the terrorism enhancement defines a corporate actor as a potential victim, whereas both governments and civilian populations are mentioned.[103] This omission, when coupled with the other interpretive problems that come with attempting to include "politically motivated acts of private vandalism against private corporations" within the "federal crimes of terrorism" definition, signals that the enhancement is a poor and overly punitive sanction for Reznicek's conduct.[104]

On the second issue, the defense viewed the sentence as an instance of harmful error that exceeded the reasonable bounds of the district court's discretion at sentencing.[105] First, the defense challenged the district court's

98. *See* 18 U.S.C. § 2332b (g)(5)(A).

99. Brief of Appellant, *supra* note 12, at 15.

100. *Id.* at 15-16.

101. *Id.* at 16.

102. *Id.* at 22.

103. *Id.* at 26.

104. *Id.* ("The unenhanced guidelines, by contrast, are sufficient to protect and deter against politically motivated acts of vandalism against private corporations. *See* USSG § 3A1.4, cmt. N.4. There is no public good inherent in the courts' enhanced use of the criminal sanction merely to defend the interests of capital.").

105. *Id.* at 27.

logic that Reznicek's 96-month sentence would have been the same length regardless of whether 3A1.4 applied, arguing instead that a proper application of the unenhanced guidelines could not have produced that same extreme result.[106] As previously stated, Reznicek's original guidelines range was 37 to 46 months, placing the district court's 96-month sentence at double the high end of the original guidelines range.[107] According to the defense's brief, the district court provided a lean rationale for this upward variance, justifying the variance "because of the applicable 3553(a) factors" without additional explanation.[108] Returning to the sentencing judge's discussion at the initial hearing to unpack that rationale, the defense identified the following factors as significant: 1) the risk to others created by Reznicek's conduct; 2) the temporal scope and number of acts of vandalism; 3) Reznicek's view that her acts were not morally wrong; 4) general deterrence to avoid others from acting similarly; 5) the court's view that Reznicek wanted others to vandalize property as a means of protesting the destruction of the environment.[109] The defense argued that the district court's reliance on these factors was insufficient to support such an extreme upward variance because 3553(a) requires that the district court consider the correctly calculated guidelines range as a factor in its analysis.[110] Had the district court properly considered the original guidelines range, it would have found that the above factors, which the court viewed as aggravating, were already incorporated into Reznicek's guideline range based on her subject offense and do not themselves adequately justify the upward variance.[111]

Second, the defense argued that Reznicek's sentence was substantively unreasonable due to how the district court considered or weighed the 3553(a) factors.[112] For example, the district court did not adequately weigh the fact that Reznicek neither harmed or intended to harm any person, and that she was successful in avoiding harm to human life.[113] Additionally, the defense argued that the district court overweighed general deterrence and used this rationale as a guise for punishing Reznicek "disproportionately" due to her beliefs in the values of nonviolent political action and the necessity of climate protest.[114] Finally, the defense highlighted Reznicek's community ties and

106. *Id.* at 27-28.
107. *Id.* at 27.
108. *Id.*
109. *Id.* at 27-28.
110. *Id.* at 28; *see also* 18 U.S.C. § 3553(a)(4)(A)(i).
111. Brief of Appellant, *supra* note 12, at 28.
112. *Id.* at 31-32.
113. *Id.* at 32.
114. *Id.*

involvement that were underappreciated by the district court, especially her commitment to the Catholic Worker community, her prior work with the St. Scholastica Monastery, and the fifty-plus letters of support submitted in her case.[115]

C. The Eighth Circuit's Conclusion

In a pithy, unreported opinion, the Eighth Circuit in *United States v. Reznicek* affirmed Reznicek's sentence, holding both that the application of the terrorism enhancement, if erroneous, was harmless error and that her sentence length did not amount to abuse of discretion.[116] Absent from the court's analysis was any discussion of whether and to what extent action directed solely against a private company conforms with the specific intent requirements under 3A1.4. Instead, the court seemed to uncritically accept the district court's rationale that Reznicek's sentence would have been 96 months regardless of the enhancement:

> Reznicek argues that the enhancement should not have applied because her actions were directed at a private company, rather than the government. Even if that is right, any error was harmless. The district court expressly stated that its sentence "would be the same sentence imposed if the Court did not apply the terrorism adjustment." Where a district court makes clear that it would have imposed the same sentence even if an enhancement did not apply, any error in applying the enhancement is harmless.[117]

In holding that Reznicek's sentence was also substantively reasonable, and therefore not an abuse of discretion, the Eighth Circuit considered it sufficient that the district court considered both mitigating and aggravating factors in its application of 3553(a).[118] Once again, the court failed to provide any additional analysis or explication as to why it believed the factors considered were given their appropriate consideration or why it found that no improper factor or inappropriate weighing took place in this case.[119]

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115. *Id.* at 32-33.

116. *Reznicek,* WL 1939865, at *2-3.

117. *Id.*

118. *Id.*

119. *Id.* (In essence, the court seemed to have analyzed Reznicek's sentence only under the third prong of the Eighth Circuit's abuse of discretion standard from United States v. Feemster, even though the defense presented arguments as to improper consideration or weighing and as to the fact that the sentencing judge did not adequately consider Reznicek's original guidelines length of sentence); *see* United States v. Feemster*,* 572 F.3d 455, 461 (8th Cir. 2009) ("A district court abuses its discretion when it (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment" (quoting United States v. Kane, 552 F.3d 748, 752 (8th Cir. 2009)).

IV. THE POTENTIAL CONSEQUENCES AND PRECEDENTIAL EFFECTS OF *UNITED STATES V. REZNICEK*

This final section allows us to consider what *United States v. Reznicek* reveals about the terrorist sentencing regime in its current form, as well as what the case might portend for future applications of the terrorism enhancement to acts of eco-sabotage and eco-activism against private actors. Part IV.A points to *Reznicek* as an example of how 3A1.4's application can blunt or wipe out the basic value of a plea deal—reduction in possible sentence length—after the deal has become finalized and irrevocable, much to the detriment of criminal defendants and federal defenders alike. Part IV.B offers an analytic moment to question whether sentencing judges ought to have the discretion and authority to unilaterally categorize criminal acts as "terrorism," given both the absence of a prior jury determination and the political and ideological significance of labeling criminal conduct as "terrorism." Finally, Part IV.C allows us to consider the extent to which the application of 3A1.4 to a given sentence ought to be a question for juries alone and whether our current terrorist sentencing regime violates the 6th Amendment as understood by *Apprendi, Blakely*, and *Booker.*

A. Worse Than a "Hobson's Choice?" 3A1.4 Erodes the Already Limited Value of a Plea

The federal criminal system in which 3A1.4 operates is a system of high frequency plea deals (97.3% plea rate), where defendants are seldom given the opportunity to fight their case in front of a jury.[120] Post-*Booker*, the discretionary sentencing guidelines themselves are one of the leading contributors to this high-frequency plea system, as the guidelines "supply excessively harsh sentencing ranges" which judges rarely feel a need to depart from.[121] Due to the shift from trials to pleas, the site for a defendant's advocacy necessarily shifts from the trial to the sentencing hearing: "post-*Booker*, defense counsel have a critical role to play at sentencing."[122] Given that 3A1.4 is effectively 'appeal-proof',[123] the application of 3A1.4 forces both criminal defendants and their advocates to confront a stark question

120. Walter I. Goncalves, Jr., *Crushing the Soul of Federal Public Defenders: The Plea Bargaining Machine's Operation and What to Do About It*, 49 FORDHAM URB. L.J. 699, 707 (2022).

121. *Id.* at 706.

122. *See* Zunkel, *supra* note 69, at 55; *see also* Goncalves, Jr., *supra* note 120, at 711.

123. *See* Said, *supra* note 32, at 503 ("Once the enhancement is applied, it is very likely to be upheld on appeal. A review of the reported decisions available electronically indicates that in approximately thirty-one instances the application of the enhancement was affirmed on appeal. There are only three reported decisions where the court's application of the enhancement was reversed on appeal [as of 2014].").

without the subsequent remedy of meaningful appellate review: how can sentencing advocacy be effective when a back-end enhancement can effectuate a total wipeout of the value originally incurred by a plea deal—a reduction in sentence length?

Like other sentencing enhancements within this system, 3A1.4 serves both a front-end (prosecutorial) and back-end (judicial) function. On the front-end, the terrorism enhancement serves as "bargaining chip [for a prosecutor] to strong-arm a desired result," as a threat to induce pleas and deter trials, and as a punitive device to discipline defendants who default on cooperation agreements.[124] Prior to *Reznicek*, this front-end prosecutorial function of 3A1.4 presented a "Hobson's choice" for a criminal defendant already induced to plea and already subject to a sentencing judge's near insurmountable discretion:

A prosecutor's threat to seek a sentence enhancement under U.S.S.G. section 3A1.4 can force a defendant into a Hobson's choice between pleading guilty to a terrorism offense to secure a shorter sentence, or risking life imprisonment if he or she is convicted at trial and the judge determines by a preponderance of the evidence that the defendant had the requisite intent to commit a federal crime of terrorism.[125]

Under the above framework, the plea is supposed to secure a reduction in sentence length by assuming guilt for the target offense and foreclosing the application of the enhancement in exchange for less time.

Reznicek demonstrates the back-end judicial function of 3A1.4, wherein even a cooperative defendant who waives their right to a jury trial and accepts a plea under inducement by the prosecution must still reckon with the potential application of the terrorism enhancement by their sentencing judge. Reznicek's sentencing presents such a situation. As outlined in her case, a defendant can agree to a plea deal, with the intent to reduce their overall sentence length, but she must still be forced to leave open the potential applicability of 3A1.4, thereby accepting that a judge may ultimately double or triple her actual sentence notwithstanding the plea.[126] The original value of Reznicek's plea was based on the reduction in the number of criminal counts—from nine to one—and their concomitant decrease in potential time in prison. While the count-reduction survived sentencing, both the actual and potential time incarcerated that Reznicek was confronted with increased exponentially notwithstanding her willingness to plea. In sum, *Reznicek*

124. *See* Johl, *supra* note 28, at 484.

125. *See* McLoughlin, *supra* note 36, at 93.

126. *See* Plea Agreement, *supra* note 5, at 5 (Reznicek's plea knocked out Counts 2 through 9 of her indictment but did not bar the sentencing judge from considering the applicability of 3A1.4 to her case).

exemplifies how 3A1.4 further erodes the already limited value of a plea deal within the federal system by allowing a sentencing judge to diminish whatever prior advocacy occurred to secure the plea and craft a sentence far greater than what the target offense would have likely called for absent the enhancement.

B. Sentencing as an Expressive Act: Should Judges Decide What Terrorism Means?

Shortly after Reznicek's sentence was handed down in 2021, the U.S Attorney's Office issued a celebratory press release that depicted Reznicek's sentence as a clear victory for the U.S. in the war on terror, including the following statement from FBI Agent Kowel:

Protecting the American people from terrorism – both international and domestic – remains the FBI's number one priority. We will continue to work with our law enforcement partners to bring domestic terrorists like Jessica Reznicek to justice. Her sentence today should be a deterrent to anyone who intends to commit violence through an act of domestic terrorism.[127]

In addition to its brazenness, Agent Kowel's statement is remarkable for a few reasons. First, it reaffirms that in the eyes of the national security apparatus, Reznicek is rightfully considered a domestic terrorist whose destruction of private property ought to be considered an act of violence. Second, it signals to the key role that the sentencing judge plays within the larger national security project of identifying, defining, and condemning "terrorists."

Defining "terrorism" for conceptual, let alone legally cognizable purposes is a notoriously complex and fraught task.[128] Neither the international legal community nor domestic law presents much consensus or conceptual clarity.[129] For example, U.S. federal law alone deploys 22 separate and distinct definitions of terrorism and related terms.[130] On the one

127. U.S. ATTY'S OFF., S. DIST. OF IOWA, *Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline* (June 30, 2021), https://www.justice.gov/usao-sdia/pr/des-moines-woman-sentenced-eight-years-prison-conspiracy-damage-dakota-access-pipeline.

128. *See generally* Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1 (2011).

129. Brief of Center for Constitutional Rights and Dean Sudha Setty as Amici Curiae Supporting Appellant at 6, United States v. Reznicek, No. 21-2548, 2022 WL 1939865 (8th Cir. 2022) ("The quest to establish a universal definition of terrorism is entangled in questions of law, history, philosophy, morality, and religion. Many believe that the definitional question is, by nature, a subjective one that eludes large-scale consensus.").

130. Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails,* 30 J. LEGIS. 249, 249-50 (2004).

hand, 3A1.4 is just one potential interpretive mechanism through which terrorist activity can be defined and clarified. On the other hand, 3A1.4 is a particularly powerful mechanism because of "the breadth of its applicability, and its severity" and the fact that its application is shielded from scrutiny or retraction by *Gall*'s deferential review standards.[131] It is no wonder then that 3A1.4 is considered a "key component of the U.S. government's anti-terrorism arsenal."[132]

Reznicek thus serves as stark reminder of the violence and brutality embedded within the act of imposing a sentence. When a judge issues a sentence or an appellate court upholds a sentence as "reasonable," these judicial actors are not simply disposing of an adjudicative task in their docket or resolving a bounded legal question. Rather, they are engaging in interpretive and expressive acts that fundamentally alter the life of a criminal defendant, signify a commitment to certain ideological projects, and initiate the force of precedent so that their interpretations can persist through future caselaw. In the context of criminal sentencing, these expressive acts are inextricable from state-sanctioned violence:

> Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.[133]

The interplay between violence and interpretation is especially salient in the context of terrorist prosecutions.[134] When a sentencing judge, especially one operating without the prior guidance of jury's determination, decides to apply the terrorism enhancement to an individual, their sentencing decision serves a broader function within the architecture of "national security" by

131. *See* McLoughlin, *supra* note 36, at 54; *see also* Hanna & Halliday, *supra* note 56, at 832.

132. *See* McLoughlin, *supra* note 36, at 54.

133. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 8, 1601, 1601 (1986).

134. Said, *supra* note 32, at 517 ("By virtue of its existence, section 3A1.4 indicates that terrorism is different, and worthy of greater than normal punishment, reflecting society's heightened concern about terrorists operating in its midst. In that vein, the mechanism of sentencing terrorists includes an expressive component; it allows a court to make a statement against their depredations in a general sense.").

implicating the sovereignty of our nation under the banner of general deterrence.[135]

Namely, federal judges can "demonstrate their participation in the project of protecting national security" by invoking the "terrorist" label and deploying the maximum punishment allowable by law for a given individual, thereby accessing a heightened sense of justification greater than what is normally considered deterrence for purposes of 'ordinary' criminal law.[136] It follows then that each time a sentencing judge successfully applies 3A1.4, the application of the terrorism enhancement serves as another opportunity to identify, condemn, and confirm new actions and new actors as "terrorism" or "terrorists," through the mechanism of sentencing. The level of discretion and potential for unchecked conceptual drift embeds a "potentially dangerous function" within 3A1.4: "the possibility of courts engaging in the politically cost-free exercise of enhancing the sentence of those society considers dangerous with limited oversight."[137] *United States v. Reznicek* exemplifies this danger by expanding the scope of which actors—private energy corporations—ought to be protected by federal judicial intervention and which conduct—damage to private infrastructure—ought to be sanctioned not just as an instance of ordinary criminality, but as acts that challenge the sovereignty of the U.S. as a political entity. As argued by scholar Madeline Johl in her prescient analysis of *Reznicek*, the application of 3A1.4 to acts of private property damage by environmentalists, "[r]ather than punishing terrorism, here [3A1.4] punishes dissent."[138]

Such a political sanction, handed down by a judicial officer with near unchecked discretion, begins to resemble an act of inquisition rather than of neutral adjudication. The federal criminal system writ large has already been criticized as inquisitorial, where a single governmental actor investigates, finds facts, and makes crucial decisions.[139] However, outside the context of

135. *See id.* at 495–96 ("A heavy sentence is an appropriate means of bringing to the attention of prospective terrorists that they are not welcome to bomb and kill in this country. They are on notice that our police forces will do all they can to obtain the requisite evidence of their crimes and to hunt them down anyplace in the world. Should they be found guilty after a fair trial, they should realize that they will be punished to the full extent of the law. Terrorist activities such as those revealed in this case, even when bombs do not explode, wreak great havoc. They disturb the peace and tranquility of all our citizens, requiring future security measures that are both costly and hobbling to the free spirit of our open democratic society. The court must also consider the strong national and international policies against terrorists." (quoting United States v. El-Jassem, 819 F. Supp. 166, 170 (E.D.N.Y. 1993)).

136. *Id.* at 481.

137. *Id.* at 517.

138. Johl, *supra* note 28, at 486.

139. *See* David E. Patton, *Federal Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2590 (2013).

sentencing, the "inquisitor" label is often applied to prosecutors rather than the sentencing judge.[140] Nevertheless, both the effects of *Booker* and the particular way in which the 3A1.4 functions are found to have allocated these inquisitorial capabilities to the district court judge at sentencing.[141] The language from Reznicek's own plea agreement highlights the true and singular authority a sentencing judge retains:

> Defendant understands that the final sentence, including the application of the Sentencing Guidelines and any upward or downward departures, is within the sole discretion of the sentencing judge, and that the sentencing judge is not required to accept any factual or legal stipulations agreed to by the parties. Any estimate of the possible sentence to be imposed, by a defense attorney or the Government, is only a prediction, and not a promise, and is not binding. Therefore, it is uncertain at this time what the Defendant's actual sentence will be.[142]

In closing, *Reznicek* demonstrates how judges who utilize sentencing as an instance of identifying "terrorists" and wielding the power of maximal criminal sanctions against those individuals via 3A1.4 can begin to resemble inquisitors in service of a political project rather than neutral arbiters in the administration of legal outcomes.[143]

C. Should Terrorism Be A Question for the Jury Alone?

The previous two sections have painted a rather stark picture regarding the incentives to apply 3A1.4 and the lack of enforceable boundaries for the scope of its sanction. For prosecutors, the enhancement is a key weapon in their arsenal to induce pleas, narrow a defendant's bargaining leverage, and curtail a federal defender's capacity for sentencing advocacy.[144] For the sentencing judge, the enhancement provides a moral and political

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140. *Id.*

141. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1658 (2009) ("Because it is cumbersome to have juries make findings for purposes of sentencing, it was clear from the outset that the practical effect of *Blakely* and *Booker* would be to turn sentencing rules into sentencing suggestions. This was particularly clear in *Booker*, because the remedy imposed by the Court explicitly made the federal sentencing guidelines advisory rather than mandatory. The rhetoric in these cases was all about the allocation of power between judges and juries, but the actual consequence was a reallocation of power from legislatures and their administrative delegates back to judges."); *see also* Said*, supra* note 32, at 490 ("The Court reacted strongly to these efforts in the *Booker* decision by declaring the *Guidelines* advisory, reducing prosecutorial control over sentencing. Therefore, the decisions can be read as the Supreme Court returning a modicum of power to the local district judge to decide on an appropriate sentence.").

142. *See* Plea Agreement, *supra* note 5, at 7-8.

143. *See* Patton, *supra* note 139, at 2590.

144. *See supra* Part III.A.

opportunity to condemn conduct that they view as not only violative of the law but also as an existential threat to the functioning of the U.S. as a sovereign entity.[145] For the appellate court, the *Gall* "abuse of discretion" standard constrains the degree of scrutiny they can apply to a given sentence, plus such courts also retain similar political and moral incentives to align with the greater ideological project of national security by upholding applications of the terrorism enhancement.[146]

However, there is one judicial actor that has been conspicuously silent: the jury. As mentioned above, the federal criminal regime functions as a system of high frequency plea deals (97.3% plea rate), which severely limits the role of the jury by diverting most cases from trial.[147] Nevertheless, key Supreme Court caselaw has reserved a required role for the jury in the context of federal criminal sentencing. In *Apprendi v. New Jersey*, a case decided in the mandatory sentencing era pre-*Booker,* the court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[148] Key to the court's logic was a conception of the 6th Amendment right to a jury trial that required that a jury decide "the truth of every accusation."[149] Underpinning the *Apprendi* court's view of jury trial right was also a deep concern that the government could evade a jury trial by defining a fact as a part of a "sentence enhancement" rather than an element of a criminal offense.[150] A subsequent case, *Blakely v. Washington*, further expounded on *Apprendi*'s protections for the role of the jury in federal sentencing: "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[151] Finally, the *Booker* court, in addition to rendering the sentencing guidelines "advisory" rather than mandatory, also held that the *Apprendi* and *Blakely*

145. *See supra* Part III.B.

146. *See* Gall v. United States, 552 U.S. 38, 55-60 (2007) ("But it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.").

147. *See* Goncalves, Jr., *supra* note 120, at 707.

148. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

149. *Id.* at 477 (quoting Duncan v. Louisiana, 391 U.S. 145, 151 (1968)); *see also* Note, *The Occasions Clause Paradox*, 136 HARV. L. REV. 711, 714 (2022).

150. *Apprendi,* 530 U.S. at 476; *see also The Occasions Clause Paradox*, *supra* note 144, at 714.

151. Blakely v. Washington, 542 U.S. 296, 303 (2004); *see also* Said, *supra* note 32, at 485.

rules regarding what categories of facts must be determined by a jury also apply to the now discretionary United States Sentencing Guidelines.[152]

Considering *Booker*'s import of *Apprendi* and *Blakely* to the federal sentencing guidelines, critics of the terrorism enhancement have argued that 3A1.4's specific intent requirement—which requires a determination that the predicate offense was done either "to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"[153]—violates the 6th Amendment as interpreted by *Apprendi-Blakely.*[154] The crux of this argument is that *Apprendi-Blakely* as applied to the terrorism enhancement should require either a jury determination that the defendant had demonstrated the specific intent element of 3A1.4 as proven beyond a reasonable doubt or an admission by the defendant during their plea that they harbored this intent.[155] Conversely, the Sentencing Commission and multiple appellate courts have approved only a preponderance of the evidence standard for judicial applications of the enhancement.[156] This current approach approved by the Commission and the circuit courts seems to directly contradict *Booker*'s direct reliance on *Apprendi-Blakely*, as evinced by the court's reasoning that "[r]egardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable."[157] Under this approach, the sentencing judges is able to seize the defendant-protective and constitutionally-required fact finding role

152. United States v. Booker, 543 U.S. 220, 243-44 (2005); *see also* Said, *supra* note 32, at 486; McLoughlin, *supra* note 36, at 82.

153. U.S. SENT'G COMM'N, GUIDELINES MANUAL 2018, *supra* note 37, at 349.

154. *See* McLoughlin, *supra* note 36, at 83 ("After *Booker* and *Blakely*, there is a serious argument that unless a jury finds beyond a reasonable doubt that a defendant had the intent required to apply U.S.S.G. section 3A1.4, there is a violation of the Due Process Clause of the Fifth Amendment and the Trial by Jury Clause of the Sixth Amendment as interpreted in Apprendi. U.S.S.G. section 3A1.4 can be distinguished from the statute at issue in Apprendi only on the grounds that U.S.S.G. section 3A1.4 is 'discretionary.' But even after these cases the Sentencing Commission has continued to support a preponderance of the evidence standard for Guidelines application.").

155. *See* Said, *supra* note 30, at 512 ("Finally, the application of section 3A1.4 raises the critical issue of what to do with judge-found facts in the sentencing context, the original point of dispute that gave rise to the Court's holding in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Court further narrowed those parameters: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" These two proclamations, taken together, would seem to render the application of the terrorism enhancement impossible without facts found by a jury beyond a reasonable doubt or those agreed upon in a sworn plea bargain.").

156. *See* Said, *supra* note 32, at 511-512; *see also* McLoughlin, *supra* note 36, at 83.

157. *Booker,* 543 U.S. at 239; *see also* Said, *supra* note 32, at 514.

reserved for the jury under *Apprendi-Blakely* and conduct arbitrary and appeal-proof determinations of a defendant's intent.[158]

Reznicek exemplifies these constitutional criticisms over 3A1.4's specific intent requirement regarding who the proper finder-of-fact should be and what the applicable standard of proof ought to be. The logic behind *Reznicek* is particularly abhorrent if we consider the fact that the application of 3A1.4 was done in Reznicek's case without prior controlling authority to guide the judge's determinations.[159] Here, the caprice of a single judge—without the backstop of either a prior jury determination, an admission of intent by Reznicek, or even proof beyond a reasonable doubt provided by the prosecution—was all that was required to transform Reznicek's acts of dissent and disobedience into "crimes of terrorism." In toto, *Reznicek* represents one of the fundamental flaws of our current sentencing regime, insofar as it allows for novel applications of vague and discretionary sanctions to occur unchecked by appellate courts, unsupported by juries, and in contravention of the core principles of our Constitution.[160]

V. CONCLUSION

In closing, it is necessary to consider for a moment the potential scope of the *Reznicek* court's interpretation of 3A1.4 and what it might portend for future acts of civil disobedience and property damage against private actors. As *Reznicek* attests to, the terrorism enhancement's capaciousness is only matched by a certain form of judicial minimalism, wherein both a district judge and an appellate court were quick to confirm new actions and actors as terrorists but remained tight-lipped or imprecise in explaining why a given act amounted to terrorism. Thus, 3A1.4 has embedded within it both the force of judicial discretion and the capaciousness of the term "terrorist,"

158. *See* Said, *supra* note 32, at 517 ("Based on a belief that defendants are dangerous terrorists, and informed by a belief about what constitutes terrorism, courts have in general displayed an unwillingness to carefully parse through the facts as they accept the government's characterization of a given defendant's threat level, even in
complicated material support cases. But these decisions may be heading into constitutionally questionable territory, as they approve a sentencing scheme that authorizes the district court to drastically increase a sentence beyond what the jury's verdict authorizes on a judge's finding by a preponderance of the evidence.").

159. *See generally* Brief of Appellant, *supra* note 12.

160. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) ("[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."); *see also* Said, *supra* note 32, at 514.

neither of which allow us to adequately resolve a foundational issue with the juridical punishment of terrorism: what must one do to be labeled a terrorist?

Unfortunately, *Reznicek* leaves us only with questions regarding its ultimate scope. However, the Center for Constitutional Rights and scholar Sudha Setty have charted out some potential acts that could be considered crimes of terrorism post-*Reznicek*: "[A] sit-in style protest near train tracks, a demonstration at a military exercise, or opposition to government immigration policies at airports around the country might next be subject to the label of terrorism."[161] After *Reznicek*, these acts, and countless other instances of civil and political disobedience, are at risk of increased punishment under the banner of "counter-terrorism." While the scope of *Reznicek* and its interpretation of 3A1.4 will only be determined by future litigation, the case has the potential to imperil our civil liberties and associational rights if taken as persuasive authority and followed by courts across the country.

161. Brief of Center for Constitutional Rights and Dean Sudha Setty as Amici Curiae Supporting Appellant *supra* note 129, at 23.