

## *Online Essay*

### CONSIDERING A DOMESTIC TERRORISM STATUTE AND ITS ALTERNATIVES<sup>†</sup>

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**ABSTRACT**—Recent years have seen an increase in right-wing extremist violence within the United States, which has highlighted the disparities in law enforcement’s handling of “international” as opposed to “domestic” terrorism. Public, legal, and law enforcement commenters have begun calling for a “domestic terrorism statute,” arguing that the lack of such a statute is the largest hurdle in prosecuting domestic terrorists. This Essay explains that the primary cause of the disparity in prosecutions between domestic and international terrorists is not a lack of a domestic terrorism statute but rather the lack of a generalized terrorism statute and the failure to designate right-wing organizations as “terrorists.” Law enforcement pursuing international terrorists rely on these designations and material support statutes far more than on any statutes prohibiting terrorist acts, largely because the acts prohibited are so limited that they are rarely useful, even in the international context.

But the two options of designating domestic terrorist organizations or creating a broad terrorism statute are highly problematic. This Essay discusses the barriers to prosecuting domestic terrorists as terrorists, including the problems with current terrorism statutes in responding to modern, small scale attacks and the tactics used to prosecute international terrorists. It then explores the problems with broad, generalized terrorism statutes that have been passed at the state level and drafted in Congress, and the problems with simply applying the international framework for terrorist designations to domestic terrorists. Finally, it suggests several alternative options to lessen the disparity between the handling of right-wing and other domestic terrorists, and international terrorists.

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## INTRODUCTION

In October of 2018, the FBI arrested four members of the Rise Above Movement (RAM), a white supremacist, neo-Nazi gang that was heavily involved in violence at several political protests, including the infamous Charlottesville “Unite the Right” protest.<sup>1</sup> Despite the group’s clear extremist ideological stance, open commitment to supporting their ideology through violence, and criminal indictments for actual violent conduct,<sup>2</sup> they have not been and will not be charged with terrorism. Similarly, James Alex Fields Jr., the white supremacist who killed Heather Heyer at that protest,

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<sup>1</sup> Complaint, United States v. Rundo, No. 18-MJ-02791 (C.D. Cal. Oct. 20, 2018), <https://int.nyt.com/data/documenthelper/421-robert-rundo-complaint/0f1e76cdeef814133f24/optimized/full.pdf> [<https://perma.cc/C2AU-6WM3>]; Indictment at 1, United States v. Rundo, No. 18-CR-00759-CJC (C.D. Cal. Nov. 1, 2018), <https://www.courthousenews.com/wp-content/uploads/2018/11/RAM-rioting-INDICTMENT36063.pdf> [<https://perma.cc/BBU9-GK8M>].

<sup>2</sup> Complaint, *supra* note 1; Indictment, *supra* note 1, at 3–14.

was not charged with terrorism, despite the parallels between his attack and recent ISIS-associated attacks that were classified as terrorism.<sup>3</sup>

In June of 2019, Representative Alexandria Ocasio-Cortez made headlines after questioning FBI Counterterrorism Division Assistant Director Michael McGarrity on the inconsistencies in treatment between domestic and international terrorism investigations in the FBI.<sup>4</sup> While questioning McGarrity and other high-ranking U.S. officials, Representative Ocasio-Cortez highlighted the FBI's failure to charge domestic cases under terrorism statutes, even when they agreed it was terrorism, unless the crimes were committed by Muslims.<sup>5</sup> She pointed out that white supremacist organizations have international connections—just like al Qaeda does—thus undermining the FBI's argument that domestic white supremacist violence cannot be charged under the same internationally-focused statutes as global jihadist terrorism.<sup>6</sup> She noted that “the civil rights program policy instructs agents to open parallel terrorism investigations whenever any suspect of a hate crime investigation has any nexus to a white supremacist group.”<sup>7</sup> Why, then, are these extremists so rarely charged under terrorism statutes?

This question has arisen many times in recent years.<sup>8</sup> Articles in the popular press tend to conclude, as did Assistant Director McGarrity in response to Representative Ocasio-Cortez's questioning, that these incidents

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<sup>3</sup> Trevor Aaronson, *Terrorism's Double Standard*, INTERCEPT (Mar. 23, 2019, 7:34 AM), <https://theintercept.com/2019/03/23/domestic-terrorism-fbi-prosecutions> [<https://perma.cc/M44E-65L3>] (finding that the Justice Department applied anti-terrorism laws against only 34 of 268 right-wing extremists prosecuted in federal court after 9/11, compared to more than 500 international alleged terrorists). Specifically, see also the case of Sayfullo Saipov, who was charged with terrorism for killing pedestrians on a New York City street by driving a truck into a pedestrian area. Indictment, *United States v. Saipov*, No. 17-CR-00722 (S.D.N.Y. Nov. 21, 2017), <https://www.justice.gov/opa/press-release/file/1013341/download> [<https://perma.cc/52FJ-VZNH>].

<sup>4</sup> Mike Levine, *Rep. Alexandria Ocasio-Cortez Appears to Conflate Two Types of FBI Cases in Viral Video*, ABC NEWS (June 7, 2019, 4:10 PM), <https://abcnews.go.com/Politics/rep-alexandria-ocasio-cortez-appears-conflate-types-fbi/story?id=63542165> [<https://perma.cc/93TE-H4CE>]; Charles P. Pierce, *Congress Still Has No Domestic Terrorism Statute on the Books. Still.*, ESQUIRE (June 4, 2019), <https://www.esquire.com/news-politics/politics/a27733112/domestic-terrorism-law-congress-white-supremacists> [<https://perma.cc/9SD9-9JY7>].

<sup>5</sup> *Confronting White Supremacy (Part II): Adequacy of the Federal Response: Hearing on Federal Response to White Supremacy Before the Subcomm. on Civil Rights and Civil Liberties*, 116th Cong. (2019), <https://www.c-span.org/video/?461379-1/hearing-federal-response-white-supremacy> [<https://perma.cc/C9ZC-KSYT>] [hereinafter “White Supremacy Hearing”].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Aaronson, *supra* note 3; Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [<https://perma.cc/ZUU7-S488>]; Samantha Michaels, *Why So Many Violent White Supremacists Aren't Charged with Domestic Terrorism*, MOTHER JONES (Apr. 26, 2019), <https://www.motherjones.com/crime-justice/2019/04/why-so-many-violent-white-supremacists-arent-charged-with-domestic-terrorism> [<https://perma.cc/VZ4X-6RE4>].

were not prosecuted under terrorism statutes “because the United States Congress doesn’t have a statute for us for domestic terrorism like we do on a foreign terrorist organization like ISIS, al Qaeda, [or] al Shabaab.”<sup>9</sup> Indeed, it is true that the terrorism chapter of the United States Code does not contain any statutes that cover a mass shooting that was not inspired by the ideology of a designated Foreign Terrorist Organization (FTO).<sup>10</sup> But while some respond to this problem by calling for a domestic terrorism statute, in order to achieve parity of prosecutions for white supremacist terrorism,<sup>11</sup> others warn that such a statute would be both harmful to civil liberties and unnecessary.<sup>12</sup> Since August, several bills have been drafted in the Senate<sup>13</sup> and in the House of Representatives,<sup>14</sup> in response to the increasing number of domestic attacks, but none have become law to date.

This Essay asks whether a domestic terrorism statute is necessary in order to achieve charging parity between domestic and international terrorism. If so, what would such a statute look like? If it is not needed, what lesser statutory or policy changes might fix the gap in law enforcement’s toolkit? I argue that a domestic terrorism statute is less necessary and far more problematic than its proponents are willing to acknowledge. Unless it is carefully limited, a domestic terrorism statute is likely to criminalize low-level political disruption as well as the violent attacks proponents seek to

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<sup>9</sup> White Supremacy Hearing, *supra* note 5.

<sup>10</sup> 18 U.S.C. § 2333 (2012); *see also Foreign Terrorist Organizations*, U.S. DEP’T ST., <https://www.state.gov/foreign-terrorist-organizations> [<https://perma.cc/6QTQ-S3L4>] (listing designated FTOs).

<sup>11</sup> *See, e.g.,* McCord, *supra* note 8; Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 259 (2017).

<sup>12</sup> *See, e.g.,* Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1333 (2019); Michael German, *Why New Laws Aren’t Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), <https://www.brennancenter.org/blog/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously> [<https://perma.cc/B3T2-PCHA>]; Harsha Panduranga & Faiza Patel, “Domestic Terrorism” Bills Create More Problems Than They Solve, JUST SECURITY (Aug. 28, 2019), <https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve> [<https://perma.cc/6KYH-WXQ5>].

<sup>13</sup> Republican Senator Martha McSally of Arizona has circulated a discussion draft of a possible domestic terrorism statute. *See To Penalize Acts of Domestic Terrorism, and for Other Purposes*, 116th Cong. (Discussion Draft, 2019), <https://www.mcsally.senate.gov/sites/default/files/2019-08/Discussion%20Draft%20DT.pdf> [<https://perma.cc/4CQL-JAWZ>] [hereinafter “McSally Bill”]; *see also* Burgess Everett, *GOP Sen. Martha McSally Drafts Bill Making Domestic Terrorism a Federal Crime*, POLITICO (Aug. 14, 2019, 10:59 AM), <https://www.politico.com/story/2019/08/14/martha-mcsally-domestic-terrorism-1462301> [<https://perma.cc/7VFT-9HZX>].

<sup>14</sup> One such bill was introduced by Democratic Representative Adam Schiff of California. *See Confronting the Threat of Domestic Terrorism Act*, H.R. 4192, 116th Cong. (2019) [hereinafter “Schiff Bill”]. Another was introduced by a bipartisan coalition of Texas Representatives: Republican Representatives Randy Weber and Michael McCaul and Democratic Representative Henry Cuellar. *See Domestic Terrorism Penalties Act of 2019*, H.R. 4187, 116th Cong. (2019) [hereinafter “Weber Bill”].

respond to. Truly leveling the playing field between prosecutions of domestic and international terrorists would almost certainly encroach upon pure political speech. And worse yet, even limited domestic terror statutes are likely to be misused and applied disproportionately against minority and disfavored political groups.

The goal of this Essay is to present the wide variety of possible responses to domestic terrorism, from changes in policy to statutory changes. I begin by briefly restating law enforcement's dilemma in charging domestic terrorism cases. I then discuss several different potential responses that might address the charging disparities between domestic and international terrorism attacks. I further explain the risks these strategies entail. I conclude by warning that each of these options and their effects and pitfalls should be analyzed and understood before any statute is adopted.

#### I. THE PROBLEM: WHY CURRENT TERRORISM STATUTES FAIL TO COVER ATTACKS BY DOMESTIC TERRORISTS

The disparity between treatment of “domestic” terrorists and treatment of “international” (really, al Qaeda inspired) terrorists has been in the public and scholarly focus for years.<sup>15</sup> Complaints focus primarily on the fact that domestic extremists are charged as terrorists exceedingly rarely. Persons charged as terrorists receive longer sentences and may be subject to more aggressive investigations with less oversight.<sup>16</sup> Worse, the rhetoric used—mainly labeling Islamist violence “terrorism” while violent acts by white

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<sup>15</sup> See generally Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213 (2018); Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017); Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33 (2013). For explorations of the legal divide, other than the three articles discussed here, see Katie Dilts, *One of These Things Is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711, 713 (2019); Dianne Webber, *Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?*, 34 AM. U. INT'L. L. REV. 205, 206 (2018) (suggesting the United States needs a preparatory statute such as those used in the United Kingdom); Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism*, 92 ST. JOHN'S L. REV. 393, 395 (2018); Adam Goldman, *F.B.I., Pushing to Stop Domestic Terrorists, Grapples with Limits on Its Power*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/us/politics/fbi-domestic-terrorism.html> [<https://perma.cc/P3GY-WDCK>] (describing ongoing debate); Marcy Wheeler, *Dylann Roof Should Be Tried as a Terrorist: America's Disturbing Double-Standard on Political Violence (and Why It Matters)*, SALON (July 24, 2015, 3:58 PM), [https://salon.com/2015/07/24/dylann\\_roof\\_should\\_be\\_tried\\_as\\_a\\_terrorist\\_americas\\_disturbing\\_double\\_standard\\_on\\_political\\_violence\\_and\\_why\\_it\\_matters/](https://salon.com/2015/07/24/dylann_roof_should_be_tried_as_a_terrorist_americas_disturbing_double_standard_on_political_violence_and_why_it_matters/) [<https://perma.cc/57K7-AXLM>].

<sup>16</sup> Sinnar, *supra* note 12, at 1343–49, 1360 (discussing differences in investigation and sentencing).

extremists are “hate crimes” or various conventional criminal violations—both reflects and encourages racism and othering.<sup>17</sup>

It is important to note that these complaints generally do not claim that it may be impossible to criminally incarcerate domestic terrorists.<sup>18</sup> Many of the articles focus in particular on cases, such as that of Dylann Roof (who opened fire in a predominantly Black church and killed nine churchgoers in an effort to start a race war),<sup>19</sup> where a domestic extremist was prosecuted and received a harsh sentence, but was not charged as a terrorist or called a terrorist by certain law enforcement representatives.<sup>20</sup> Rather than a failure to prosecute, the problem is that there is a disparity in public acknowledgment of the risk posed by domestic terrorism, and a hyper focus on terrorism committed by a specific religious group, which leads to disparate treatment by law enforcement and encourages stereotypes in the public.<sup>21</sup>

Assistant Director McGarrity, and the above conversation, suggest that the problem is a lack of a *domestic* terrorism statute, but it is possible that this debate is better viewed as whether the United States should pass a terrorism statute, period. Currently, there is no general criminal statute prohibiting “acts of terrorism” or “violent actions taken to promote terrorism.” Rather than criminalizing terrorism per se, federal criminal law prohibits certain, very specific, activities. Those activities are crimes, whether they are committed for purposes of terrorism or merely to get revenge on a cheating spouse. Moreover, the activities are so specific and limited that they fail to account for many of the typical tactics of modern terrorists. In the following two sections I will summarize the existing framework for prosecuting terrorists, and then apply the framework, in order to show how and why the framework fails in the context of domestic terrorism. The problem is not, as is often described, a lack of statutes.<sup>22</sup> Instead, it is the specific activities that are criminalized, the specific criminal prohibitions that are labeled “crimes of terrorism,” the fact that domestic terrorists are not using the same tactics that traditional international terrorists have used, and the lack of material support statutes that make prosecution of domestic terrorists *as terrorists* so difficult.

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<sup>17</sup> See Norris, *supra* note 11, at 262; see also Sinnar, *supra* note 12, at 1343–49.

<sup>18</sup> But see Webber, *supra* note 15.

<sup>19</sup> Norris, *supra* note 11, at 260–61.

<sup>20</sup> See, e.g., Norris, *supra* note 11 at 263, Wheeler, *supra* note 15.

<sup>21</sup> Norris, *supra* note 11, at 283; Sinnar, *supra* note 12; Webber, *supra* note 15.

<sup>22</sup> See White Supremacy Hearing, *supra* note 5, and accompanying text.

*A. The Terrorism Statutes: “Federal Crimes of Terror,” Lack of a Generalized Terrorism Statute, and Prosecution Through Designation*

Federal criminal statutes are found in Title 18 of the U.S. Code, which contains an entire chapter on terrorism, Chapter 113B.<sup>23</sup> Fittingly, the chapter begins with a definition of terrorism (both international and domestic), and then continues on to prohibit certain activities in a series of criminal statutes.<sup>24</sup> An examination of the Code and typical prosecutions shows that the real difference between domestic and international terrorists is largely relegated to the ability to use material support statutes to pursue defendants who were inspired by FTOs, rather than a lack of a “domestic terror statute.”

*I. Terrorism Statutes in the U.S. Code*

The Code defines both international and domestic terrorism as violent criminal acts that “appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping . . . .”<sup>25</sup> But this statute is only a definition, with no criminal penalties attached—no statute in the code attaches criminal penalties to engaging in terrorism, per se, whether international or domestic. A per se terrorism statute would criminalize *any* violent or otherwise unlawful acts committed in order to intimidate or coerce a civilian population or government. Dozens of states have passed such general terrorism statutes since 2001.<sup>26</sup> As an example, Idaho defines terrorism as:

activities that:

- (a) Are a violation of Idaho criminal law; and

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<sup>23</sup> 18 U.S.C. §§ 2331–2339D (2012).

<sup>24</sup> *Id.*

<sup>25</sup> 18 U.S.C. §§ 2331(1), (5).

<sup>26</sup> As of May of 2019, the following states have such statutes: ALA. CODE § 13A-10-151 (2019); ARIZ. REV. STAT. ANN. § 13-2308.01 (2019); ARK. CODE ANN. § 5-54-205 (West 2019); COLO. REV. STAT. ANN. § 24-33.5-1602 (West 2019); D.C. CODE ANN. § 22-3153 (West 2019); FLA. STAT. ANN. § 775.33 (West 2019); GA. CODE ANN. § 16-11-221 (West 2019); IDAHO CODE ANN. § 18-8102 (West 2019); 720 ILL. COMP. STAT. ANN. 5/29D-14.9 (West 2019); IND. CODE ANN. § 35-31.5-2-329 (West 2019); IOWA CODE ANN. § 708A.1 (West 2019); KAN. STAT. ANN. § 21-5421 (West 2019); KY. REV. STAT. ANN. § 525.045 (West 2019); LA. STAT. ANN. § 14:128.1 (2019); MICH. COMP. LAWS ANN. § 750.543m (West 2019); MINN. STAT. ANN. § 609.714 (West 2019); N.J. STAT. ANN. § 2C:38-2 (West 2019); N.Y. PENAL LAW §§ 490.05, 490.20, 490.25 (McKinney 2019); N.C. GEN. STAT. ANN. § 14-10.1 (West 2019); OHIO REV. CODE ANN. § 2909.24 (West 2019); OKLA. STAT. ANN. tit. 21, § 1268.1 (West 2019); 18 PA. STAT. AND CONS. STAT. ANN. § 2717 (West 2019); S.C. CODE ANN. §§ 16-23-710, 715 (2019); S.D. CODIFIED LAWS § 22-8-12 (2019); TENN. CODE ANN. §§ 39-13-801, 805 (West 2019); UTAH CODE ANN. § 76-5-107.3 (West 2019); VA. CODE ANN. § 18.2-46.5 (West 2019); WASH. REV. CODE ANN. § 70.74.285 (West 2019); W. VA. CODE ANN. § 61-6-24 (West 2019).

- (b) Involve acts dangerous to human life that are intended to:
- (i) Intimidate or coerce a civilian population;
  - (ii) Influence the policy of a government by intimidation or coercion; or
  - (iii) Affect the conduct of a government by the use of weapons of mass destruction, as defined in section 18-3322, Idaho Code.<sup>27</sup>

The Idaho statute also attaches penalties (up to life in prison) to anyone who commits or conspires to commit any such act.<sup>28</sup> But no comparable statute exists in the U.S. Code.<sup>29</sup>

The federal terrorism statutes included in Chapter 113B differ from the terrorism statutes adopted by states in two important ways. First, as discussed in Section I.A.2, terrorist intent is not a required element of the federal terrorism crimes. Second, as opposed to Idaho's inclusion of *any* criminal act that is dangerous to human life, only very specific acts, as discussed in Section I.A.3, are eligible for qualification as "acts of terrorism" in the U.S. Code. These two differences make federal terrorism crimes quite different from the general public's understanding of terrorism.

## 2. *Crimes of Terrorism, Independent of Terrorist Intent*

While the terrorism chapter of the U.S. Code contains several criminal statutes, none of them require that a defendant act to "intimidate or coerce a civilian population," "influence the policy" or "affect the conduct of a government" to be held liable—as is required under the definition of terrorism.<sup>30</sup> Crimes such as "[a]cts of nuclear terrorism" may be deemed terrorism with no reference to the actor's political intent or motivation, rather relying on the combination of certain acts with intention to cause a certain minimum level of harm.<sup>31</sup> It is true that the federal government has what

<sup>27</sup> IDAHO CODE ANN. § 18-8102(5).

<sup>28</sup> IDAHO CODE ANN. §§ 18-8103(4), (5).

<sup>29</sup> The state statutes have been rarely used thus far and, even if they were utilized more frequently, the statement made by the use of state statutes would not even out the disparity at the federal level (and national attention) of federal prosecutions.

<sup>30</sup> 18 U.S.C. §§ 2331(1)(B), (5)(B) (2012).

<sup>31</sup> *Id.* § 2332i. No terrorist intent is necessary to violate this section. As § 2332i states:

Whoever knowingly and unlawfully—

(A) possesses radioactive material or makes or possesses a device—

(i) with the intent to cause death or serious bodily injury; or

(ii) with the intent to cause substantial damage to property or the environment; or

(B) uses in any way radioactive material or a device, or uses or damages or interferes with the operation of a nuclear facility in a manner that causes the release of or increases the risk of the release of radioactive material, or causes radioactive contamination or exposure to radiation—

might be considered an international terrorism statute—“Acts of terrorism transcending national boundaries.”<sup>32</sup> But that statute is itself based on jurisdictional requirements: that the conduct transcends national boundaries and involves or affects mail, interstate or foreign commerce, or federal employees or property.<sup>33</sup> There is no requirement that the perpetrator act with any kind of terrorist intent, whether under § 2331’s definition or any other. In other words, *any* conduct creating a risk of serious bodily injury may be considered international terrorism under the statute, so long as the conduct transcends national boundaries. No political connection is necessary. For example, presumably, bringing a gun onto an airplane during an international flight and threatening to shoot someone would qualify, even if the threat is only to aid in a robbery and has no connection to terrorism.

This is how nearly all of the federal terrorism statutes in the terrorism chapter of the U.S. Code are designed.<sup>34</sup> Perhaps the best example is § 2332a, titled “Use of Weapons of Mass Destruction.” As a terrorism statute, included in the corresponding chapter, and focusing on an activity classically associated with terrorism (use of explosive devices), one might expect that this would be a statute used only to prosecute terrorists. However, nothing in the statute itself requires terroristic intent, and the statute has been used to prosecute other crimes, for instance, a man who “made numerous bomb threats intending to influence the government such that it would pay him money in order to stop making bomb threats.”<sup>35</sup>

Additionally, 18 U.S.C. § 2332b(g)(5) provides a list of “federal crime[s] of terrorism,” for which the FBI (presumably the counterterrorism division) is granted authority to investigate when the crimes are committed with the added intent “to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct . . . .”<sup>36</sup> The list includes dozens of statutes that generally spring to mind as the types

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(i) with the intent to cause death or serious bodily injury or with the knowledge that such act is likely to cause death or serious bodily injury;

(ii) with the intent to cause substantial damage to property or the environment or with the knowledge that such act is likely to cause substantial damage to property or the environment; or

(iii) with the intent to compel a person, an international organization or a country to do or refrain from doing an act,

shall be punished as prescribed in subsection (c).

<sup>32</sup> *Id.* § 2332b. It is this statute that Mary McCord has suggested should be the basis for a domestic terrorism statute. McCord, *supra* note 8.

<sup>33</sup> § 2332b.

<sup>34</sup> With the exception of material support statutes. *See infra* notes 38–51 and accompanying text.

<sup>35</sup> *United States v. Garey*, 546 F. 3d 1359, 1361 (11th Cir. 2008).

<sup>36</sup> 18 U.S.C. § 2332b(g)(5). This intent approximates but does substantially differ from the definition of terrorism in 18 U.S.C. § 2331.

of acts terrorists commit as part of terrorism, including sections relating to destruction of communication lines, stations, or systems;<sup>37</sup> injury to buildings or property within special maritime and territorial jurisdiction of the United States;<sup>38</sup> destruction of an energy facility;<sup>39</sup> Presidential and Presidential staff assassination and kidnaping;<sup>40</sup> and many more.<sup>41</sup> Offering support or resources for the commission of any of these crimes may also be prosecuted under 18 U.S.C. § 2339A (“Providing material support to terrorists”).<sup>42</sup> This list of federal crimes of terrorism is also used to determine whether an individual, once convicted, may be subjected to the Terrorism Sentencing Enhancement,<sup>43</sup> an extremely harsh enhancement that applies to any crime committed in order to promote one of the listed crimes.<sup>44</sup> But the federal crimes of terrorism are themselves predicate offenses; some fall under the terrorism chapter but most are just conventional crimes that jump to the mind as classic terrorist activities, such as the use of weapons of mass destruction<sup>45</sup> or hostage taking.<sup>46</sup> While nearly every one of these statutes *could* be used to prosecute domestic terrorists, they exist independently as conventional (federal) crimes.

### 3. *The Lack of a Generalized Terrorism Statute and the Use of a Terrorist Designation: Why and How International Prosecutions Differ from Domestic Prosecutions*

The crimes listed as federal crimes of terrorism represent both a more stereotypically international form of terrorism and an older form of terrorism, involving attacks that tend to be the product of careful planning by a sophisticated organization (such as bombings, hijackings, or use of chemical or biological weapons). They are less representative of modern and domestic terrorism, which tends to involve crimes perpetrated through the

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<sup>37</sup> *Id.* § 1362.

<sup>38</sup> *Id.* § 1363.

<sup>39</sup> *Id.* § 1366(a).

<sup>40</sup> *Id.* § 1751(a)–(d).

<sup>41</sup> *Id.* § 2332b(g)(5).

<sup>42</sup> *Id.* § 2339A.

<sup>43</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2018).

<sup>44</sup> The enhancement is quite severe. It requires increasing the offense level by twelve levels, to a minimum level of thirty-two, while increasing the criminal history category to Category VI. *Id.* As a result, for example, one sentence went from under five years to 155 years. WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 125 (2015). And sentences may jump from ten years to life. Norris, *supra* note 11, at 278–79.

<sup>45</sup> See, e.g., 18 U.S.C. § 2332a (“Use of weapons of mass destruction”); *id.* § 2332i (“Acts of nuclear terrorism”).

<sup>46</sup> *Id.* § 1203 (“Hostage taking”).

use of firearms or motor vehicles to attack pedestrians.<sup>47</sup> There is no federal crime of terrorism prohibiting the use of motor vehicles to attack pedestrians, nor are mass shootings included in the list of terrorism crimes. These operational differences between older federal crimes of terrorism and more modern methods of terrorism highlight the true statutory division between international and domestic terrorism—the lack of ability to prosecute domestic terrorists for material support of a terrorist organization.

In the international terrorism context, the U.S. can and does rely heavily on 18 U.S.C. § 2339B, which prohibits material support of an organization if the organization has been designated an FTO by the Secretary of State.<sup>48</sup> Any act committed to support an FTO, from providing funds to translating documents to using a van to attack pedestrians, may fall under the prohibition of § 2339B.<sup>49</sup> In truth, most international terrorists are not prosecuted under federal crimes of terrorism. Instead, most “terrorism prosecutions” are material support prosecutions under § 2339B.<sup>50</sup> Exemplifying this point, the Center on National Security has found that over 66% of ISIS prosecutions have been § 2339B prosecutions, while another 15% did not involve a charge

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<sup>47</sup> See, e.g., MARK S. HAMM & RAMÓN SPAALI, *THE AGE OF LONE WOLF TERRORISM* 35–58 (2017); Glenn E. Robinson, *The Four Waves of Global Jihad, 1979–2017*, 24 MIDDLE E. POL’Y 70, 72, 83–84 (2017) (describing the current wave of global jihadist terrorism as the fourth wave, consisting of an online network urging likeminded individuals to small scale, self-directed attacks); Katie Worth, *Lone Wolf Attacks Are Becoming More Common—And More Deadly*, FRONTLINE (July 14, 2016), <https://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly> [<https://perma.cc/4UVS-ECQ3>] (noting that lone wolf attacks are becoming more common, chiefly rely on firearms rather than bombs, and that both jihadist and white supremacist movements are turning to inspiring lone wolf attacks rather than directing major operations); see also HEATHER J. WILLIAMS ET AL., *TRENDS IN THE DRAW OF AMERICANS TO FOREIGN TERRORIST ORGANIZATIONS FROM 9/11 UNTIL TODAY* 22–24 (2018), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2500/RR2545/RAND\\_RR2545.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2500/RR2545/RAND_RR2545.pdf) [<https://perma.cc/55PL-JA6Y>] (discussing al Qaeda and ISIL’s strategy to turn domestic actors within the U.S. against the U.S., and the corresponding rise of homegrown violent extremists: domestic attackers, acting without direction from a centralized organization); Beau D. Barnes, Note, *Confronting the One-Man Wolf Pack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism*, 92 B.U. L. REV. 1613, 1649 (2012) (describing al Qaeda’s “shift to online activities” encouraging smaller scale attacks as part of a response to perceived strengths and weaknesses of law enforcement).

<sup>48</sup> 18 U.S.C. § 2339B.

<sup>49</sup> See *infra* notes 56–68.

<sup>50</sup> See CTR. ON NAT’L SEC. AT FORDHAM LAW, *THE AMERICAN EXCEPTION: TERRORISM PROSECUTIONS IN THE UNITED STATES—THE ISIS CASES* 27–28 (Karen J. Greenberg ed., 2017), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/59cf980ae45a7c855f673bca/1506777101200/The+American+Exception+9-17.pdf> [<https://perma.cc/ZYH6-TU7D>] (finding that out of 135 ISIS-related federal cases, over 100 were charged under material support statutes and over 90 of those were charged under 18 U.S.C. § 2339B); see also *supra* note 48; *infra* notes 50–53 and accompanying text.

of any of the statutes listed as federal crimes of terrorism.<sup>51</sup> This suggests that other federal crimes of terrorism account for no more than 20% of federal terrorism prosecutions. The Transactional Records Access Clearinghouse at Syracuse University (TRAC) reports vastly different numbers, but with the same final result. Rather than looking only at ISIS cases, TRAC looks at all cases where U.S. Attorneys report that the case was brought in connection with a terrorism investigation.<sup>52</sup> According to TRAC's analysis, § 2339B was the second most common individually used statute for terrorism and national security investigations in 2019.<sup>53</sup> The most commonly used statute was 18 U.S.C. § 875 (transmitting threats in interstate

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<sup>51</sup> CTR. ON NAT'L SEC. AT FORDHAM LAW, *supra* note 50, at 28, 31. There is a broad range of statutes other than federal crimes of terrorism that are used to prosecute defendants in terrorism cases. According to the Center on National Security, "ISIS cases charged solely under more general criminal statutes most often involved firearms violations (such as 18 U.S.C. § 922), transmitting threats in interstate communications (18 U.S.C. § 875), and making false statements in a federal matter (18 U.S.C. § 1001)." *Id.* at 31.

<sup>52</sup> *Who Is a Terrorist? Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Sept. 28, 2009), <https://trac.syr.edu/tracreports/terrorism/215> [<https://perma.cc/T486-UCPR>]. This method is problematic, as numerous studies, by TRAC itself and by government watchdogs, have shown that government self-reporting of terrorism cases is faulty and unreliable. TRAC states:

During the last five-and-a-half years, one out of three (34%) of the defendants who were charged in federal court for one or [sic] more specific terrorism offenses were not categorized as having any connection to terrorism by the federal prosecutors.

On the other hand, during the same period, one out of four (26%) of the defendants on a list of terrorism matters prepared by the National Security Division (NSD)—an office in the Justice Department—were not classified as having anything to do with terrorism by the prosecutors who actually brought the cases.

Furthermore, a comparison of all of the terrorism cases listed by three separate and independent agencies—the courts, the prosecutors and the NSD—found that there were only 4% of the defendants in common. Even when the very extensive federal prosecutors' list is constrained to just those connected with international terrorism or terrorist related finance, there is still only an 8% overlap—just 66 defendants—among the lists.

*Id.* For the analyses of the Department of Justice on the accuracy of its own internal reporting, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-266, JUSTICE DEPARTMENT: BETTER MANAGEMENT OVERSIGHT AND INTERNAL CONTROLS NEEDED TO ENSURE ACCURACY OF TERRORISM-RELATED STATISTICS 14 (2003); AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT 07-20, THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER TERRORISM REPORTING, at iv (2007), <http://www.justice.gov/oig/reports/plus/a0720/final.pdf> [<https://perma.cc/5G5U-L2XY>]; AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT 12-37, FOLLOW-UP AUDIT OF THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER REPORTING OF TERRORISM-RELATED STATISTICS: THE NATIONAL SECURITY DIVISION, at i-ii (2012); AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT 13-34, FOLLOW-UP AUDIT OF THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER REPORTING OF TERRORISM-RELATED STATISTICS: THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, at ii (2013).

<sup>53</sup> *National Internal Security/Terrorism Convictions for 2019*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Oct. 26, 2019), <https://tracfed.syr.edu/results/9x665db4424c4b.html> [<https://perma.cc/V5KM-5DX3>].

commerce), which is not on the list of federal crimes of terrorism.<sup>54</sup> Following § 2339B was § 844, pertaining to arson and explosives. While some subsections of § 844 are on the list of federal crimes of terrorism, only three of the eleven relevant indictments described by TRAC charged those subsections.<sup>55</sup>

This does not mean that all of these § 2339B prosecutions have been nonviolent. Instead, it shows the way that FTO designation and material support statutes offer opportunities to bring terrorism charges in the “global jihadist” sphere that are not available in the sphere of white supremacist terrorism. The prosecution of Sayfullo Saipov is one example. Saipov drove a truck onto a bike and pedestrian area in New York City, killing eight civilians.<sup>56</sup> While this activity did not violate any statutes criminalizing specific terrorist acts, Saipov was charged under § 2339B for providing “services and personnel (including himself)” to ISIS.<sup>57</sup> This is how § 2339B and FTO designation allows the government to reach beyond the limits of specific acts of terrorism in the case of certain specific terrorist ideologies.

Section 2339B has been billed as central to counterterrorism because it is “preventive,”<sup>58</sup> but what this means in practice is that it gives the federal government an opening to prosecute behavior as terrorism that would not otherwise be criminal, or would not otherwise be considered terroristic, when that behavior is associated with an FTO. As examples, defendants have been prosecuted under § 2339B for providing medical care;<sup>59</sup> “opening social media accounts [e.g., Twitter and Facebook] for the use, benefit and

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<sup>54</sup> *Id.*; 18 U.S.C. § 2332b(g)(5).

<sup>55</sup> § 2332b(g)(5) lists 18 U.S.C. §§ 844(f)(2) (causing injury or substantial risk of injury through arson or explosives), (f)(3) (causing death), and (i) (using arson or explosives to damage property used in interstate or foreign commerce) as federal crimes of terrorism. Three of TRAC’s listed indictments charged § 844(i). The rest charged §§ 844(h)(1) (use of explosives in a felony), (d) (transporting explosives with knowledge or intent that they will be used to cause damage or death), or (e) (threats of arson using or affecting interstate commerce), none of which are listed in § 2332b(g)(5). TRAC lists one indictment as charging § 844(n), which is a pure penalty clause and likely is not the substantive charge.

<sup>56</sup> Indictment at 10–11, *supra* note 3.

<sup>57</sup> *Id.* at 10.

<sup>58</sup> See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 436 (2007); Francesca Laguardia, *The Nonexceptionalism Thesis: How Post-9/11 Criminal Justice Measures Fit in Broader Criminal Justice*, 19 NEW CRIM. L. REV. 544, 550 (2016); Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L. SEC. L. & POL’Y 297, 301 (2008).

<sup>59</sup> See *United States v. Farhane*, 634 F.3d 127, 149 (2d Cir. 2011) (“By coming to meet with a purported al Qaeda member on May 20, 1995; by swearing an oath of allegiance to al Qaeda; by promising to be on call in Saudi Arabia to treat wounded al Qaeda members; and by providing private and work contact numbers for al Qaeda members to reach him in Saudi Arabia whenever they needed treatment, Sabir engaged in conduct planned to culminate in his supplying al Qaeda with personnel . . . .”)

promotion of ISIS;<sup>60</sup> buying airline tickets and attempting to travel to another country to join a terrorist training camp;<sup>61</sup> recording “short videos of symbolic and infrastructure targets for potential terrorist attacks in the Washington, D.C., area;<sup>62</sup> and, of course, sending money, or in some cases, socks;<sup>63</sup> or any other form of support for an FTO. A defendant need not have knowledge or intent to aid in any particular attack, and certainly need not have attempted an attack.<sup>64</sup> Following the theory that FTOs should be made “radioactive,” § 2339B criminalizes nearly any association, and certainly any aid, to designated organizations.<sup>65</sup> The statute thus transforms legal behavior and conventional criminal activity into “crimes of terrorism,” not because it is committed with terrorist intent, but because it is committed to aid an FTO.

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<sup>60</sup> E.g., Press Release, Office of Pub. Affairs, Dep’t of Justice, Alleged ISIS Supporter Indicted for Attempting to Provide Material Support to Foreign Terrorist Organization (July 21, 2017), <https://www.justice.gov/opa/pr/alleged-isis-supporter-indicted-attempting-provide-material-support-foreign-terrorist> [<https://perma.cc/T2P3-PSCF>].

<sup>61</sup> E.g., Press Release, U.S. Attorney’s Office of the Southern District of Ohio, Columbus Man Pleads Guilty to Attempting to Provide Material Support to ISIS (July 6, 2017), <https://www.justice.gov/usao-sdoh/pr/columbus-man-pleads-guilty-attempting-provide-material-support-isis> [<https://perma.cc/TL5G-3VP5>].

<sup>62</sup> E.g., Press Release, Office of Pub. Affairs, Dep’t of Justice, Atlanta Defendant Found Guilty of Supporting Terrorists (Aug. 12, 2009), <https://www.justice.gov/opa/pr/atlanta-defendant-found-guilty-supporting-terrorists> [<https://perma.cc/ZZV7-QZ6P>].

<sup>63</sup> In *United States v. Hammoud*, Mohamad Hammoud was sentenced to 155 years for evading taxes on cigarettes, selling them at a reduced cost, and sending the profits to Hizballah. 381 F.3d 316, 325–27 (4th Cir. 2004), *vacated by* 543 U.S. 1097 (2005). In *United States v. El-Mezain*, “officers and directors of the Holy Land Foundation for Relief and Development (HLF), formerly the nation’s largest Muslim charity . . . were convicted of materially supporting the FTO Hamas through monetary donations to religious charitable organizations called zakat committees operating in the West Bank and Gaza Strip.” Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 509 (2014) (citing 664 F.3d 467, 485 (5th Cir. 2011)). The defendants received sentences ranging from fifteen to sixty-five years. *Id.* at 510. Syed Hashmi was charged with providing material support to an FTO, convicted, and sentenced to fifteen years after providing socks, blankets, and \$300 to an al Qaeda operative. Colin Moynihan, *U.S. Man Draws 15 Years for Plot to Supply Al Qaeda*, N.Y. TIMES (June 9, 2010), <https://www.nytimes.com/2010/06/10/nyregion/10hashmi.html> [<https://perma.cc/85CP-JE9P>]; see also Francesca Laguardia, *Special Administrative Measures: An Example of Counterterrorism Excesses and Their Roots in U.S. Criminal Justice*, 51 CRIM. L. BULL. 4 (2015) (discussing Hashmi).

<sup>64</sup> See Webber, *supra* note 15, at 218. If a defendant did intend to aid in a particular attack, he might be charged with 18 U.S.C. § 2339A (2012) instead. These prosecutions are far less common than § 2339B prosecutions. *Id.*

<sup>65</sup> See, e.g., Michael Price et al., ‘Material Support’: US Anti-Terrorism Law Threatens Human Rights and Academic Freedom, 28 ANTHROPOLOGY TODAY 3 (2012) (“[T]he goal is clearly to deter contact with designated groups, to make them ‘radioactive . . . .’”); *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Andrew McCarthy, Senior Fellow, Foundation for the Defense of Democracies), <https://www.judiciary.senate.gov/imo/media/doc/McCarthy%20Testimony%20042005.pdf> [<https://perma.cc/TP3K-KZP9>].

*B. Application of the Statutes: How Designation Makes the Difference Between Federal Terrorism Charges and Conventional Criminal Charges*

Returning to the white supremacist RAM indictment<sup>66</sup> allows us to see how the current statutory scheme limits prosecution of modern terrorism, but then broadens it again in international (but not domestic) cases. The indictment asserts “RAM and its members used the Internet to post videos and pictures of RAM members conducting training in hand-to-hand combat, often interspersed with pictures and video clips of RAM members assaulting people at political events, accompanied by messages in support of RAM’s white supremacist ideology.”<sup>67</sup> Were RAM a designated organization, this activity alone might well be sufficient to support a prosecution under § 2339B.<sup>68</sup> Moreover, the criminal complaint associated with the case states that the defendants traveled overseas in order to train with the Azov Battalion, “a paramilitary unit of the Ukrainian National Guard which is known for its association with neo-Nazi ideology and use of Nazi symbolism, and which is believed to have participated in training and radicalizing United States-based white supremacy organizations.”<sup>69</sup> Were the Azov Battalion a designated FTO, traveling overseas to obtain training would be a prosecutable (terrorism) offense under § 2339B and § 2339D (“Receiving military-type training from a foreign terrorist organization”).<sup>70</sup> But neither RAM nor the Azov Battalion is an FTO, and the violence RAM has engaged in has been hand-to-hand combat, not long plotted strikes involving bombs or kidnapping.<sup>71</sup> Such low-level attacks are traditionally state crimes, and even when they implicate federal offenses (such as riot or hate crimes), they are not listed as federal crimes of terrorism, no matter their intent.<sup>72</sup>

Association with an FTO allows the government to call activity “terrorism,” bring terrorism charges, and obtain high sentences (thanks to the Terrorism Sentencing Enhancement), even in cases that involve no violence

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<sup>66</sup> See Indictment, *supra* note 1.

<sup>67</sup> *Id.* at 1–2.

<sup>68</sup> See Plea Agreement at 3, United States v. Elfgeeh, 14-CR-6147EAW (W.D.N.Y. Dec. 17, 2015), <https://www.justice.gov/opa/file/800486/download> [<https://perma.cc/4AGE-RPLV>] (describing Elfgeeh’s criminal conduct as maintaining social media websites to inspire and encourage others to join a designated FTO).

<sup>69</sup> Complaint, *supra* note 1, at 8.

<sup>70</sup> 18 U.S.C. § 2339D(a) (2012) (“Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State . . . as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both.”).

<sup>71</sup> According to the Rundo complaint, RAM members train in hand-to-hand combat, and the complaint (which lists several violent interactions) only refers to punching and kicking. Complaint, *supra* note 1, at 4, 10–12.

<sup>72</sup> 18 U.S.C. § 2332b(g)(5) (hand-to-hand combat not included on list).

(i.e. pure terrorist financing cases).<sup>73</sup> This almost never occurs in domestic cases.<sup>74</sup> Association with an FTO also brings investigative authority that substantially differs from domestic cases. Once an individual has been associated with an ideology that is spread by an FTO, particularly if that individual has associated with the FTO online, an international nexus is created that lowers standards of proof, broadens federal authority to conduct surveillance (particularly through the Foreign Intelligence Surveillance Act of 1978 (FISA)<sup>75</sup>), and authorizes greater secrecy in that surveillance.<sup>76</sup> It also lessens oversight of federal informants.<sup>77</sup> And the fact that domestic cases with no connection to FTOs so rarely qualify for charges under federal crimes of terrorism may make it less likely that federal agents and representatives use the word “terrorism” to describe even violent attacks.<sup>78</sup>

These differences both undermine the federal government’s ability to confront a steadily increasing domestic threat and create inequality in the treatment of terror suspects based on race and religion.<sup>79</sup> As Professors Norris and Sinnar have each pointed out, the disparity in treatment is not only fundamentally unfair, it also reinforces stereotypes, creates an inaccurate view of the threat, and allows the government to avoid acknowledging its failure to stem domestic terrorism.<sup>80</sup> It is for these reasons that so many have called for a domestic terrorism statute. But is such a statute really necessary? The following Part offers brief descriptions of several options that might lessen the disparate treatment of domestic and international cases. Creating a domestic terrorism statute is one option, but not the only one, and the idea of creating such a statute has been subject to criticism. The concerns raised in regard to a domestic terrorism statute may also apply to most other options, but in varying degrees.

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<sup>73</sup> See *supra* note 63 and accompanying text.

<sup>74</sup> Sinnar, *supra* note 12, at 1360.

<sup>75</sup> 50 U.S.C.A. §§ 1801–1885c (2015).

<sup>76</sup> Sinnar, *supra* note 12, at 1335–36, 1344–48 (describing the use of FISA in international terrorism investigations).

<sup>77</sup> *Id.* at 1350 (“Justice Department guidelines do, however, require less oversight over informants in international terrorism investigations than in other contexts, allowing the FBI to use special and long-term informants without the approval of a special committee of Justice Department and FBI attorneys.”).

<sup>78</sup> *Id.* at 1337.

<sup>79</sup> Norris, *supra* note 11; Sinnar, *supra* note 12.

<sup>80</sup> See *supra* notes 16, 19 and accompanying text.

## II. POSSIBLE SOLUTIONS

### A. *A Domestic Terrorism Statute*

The first and most commonly suggested solution to this disparity between federal crimes of terrorism and more modern methods of terrorism is to create a domestic terrorism statute that increases federal investigative and prosecutorial authority.<sup>81</sup> But while proponents of a new statute focus on the need to equalize resources, rhetoric, and attention between domestic (typically right-wing) and international terrorist threats,<sup>82</sup> opponents warn that increasing federal authority will, most likely, only lead to additional disparities affecting minorities and disfavored political groups within the United States.<sup>83</sup> Critics charge that the political preferences of the current Administration limit the national focus on white supremacist organizations (despite their prevalence), while encouraging investigations on other groups such as “Black Identity Extremists,” anti-Trump protestors, and journalists.<sup>84</sup> It seems likely that increasing law enforcement authority to investigate political groups (in the interests of preventing political extremism) would lead to problematic, politically motivated prosecutions of opposition groups within the United States.

Of course, the extent of invasive authority granted would be determined by the reach and language of the statute. In February 2019, Mary McCord—former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security at the U.S. Department of Justice—and Jason Blazakis—former Director of the Office of Counterterrorism Finance and Designations at the U.S. Department of State—recommended drafting a domestic statute based on the existing international terrorism statute, 18 U.S.C. § 2332b.<sup>85</sup> The basic concept behind such a statute would be to criminalize any such conduct, whether or not it transcends national

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<sup>81</sup> See McCord, *supra* note 8; McCord & Blazakis, *infra* note 85; Michaels, *supra* note 8; Norris, *supra* note 11, at 259.

<sup>82</sup> See *supra* note 81.

<sup>83</sup> MICHAEL GERMAN & SARA ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM 2 (2018), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Wrong\\_Priorities\\_Terrorism.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf) [<https://perma.cc/B67K-Q2TS>] (“Further, within the field of domestic terrorism, the Justice Department has a history of minimizing far-right violence while aggressively targeting minority activists and far-left protest movements.”); Panduranga & Patel, *supra* note 12 (stating “a new domestic terrorism statute will undoubtedly magnify the impact of existing enforcement disparities, raising serious civil rights and liberties concerns” and noting the FBI’s focus on “black identity extremists”); see Sinnar, *supra* note 12, at 1333.

<sup>84</sup> GERMAN & ROBINSON, *supra* note 8383, at 2; Panduranga & Patel, *supra* note 12.

<sup>85</sup> Mary B. McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019, 8:00 AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism> [<https://perma.cc/UJQ4-MWVQ>].

boundaries, in circumstances where the conduct is committed in connection with an intent to engage in terrorism.<sup>86</sup> But the conduct criminalized in 18 U.S.C. § 2332b is far broader than what most of the public think constitutes “terrorism,” including crimes ranging from property damage (that causes substantial risk of serious injury) to murder.<sup>87</sup>

*1. Proposed Terrorism Statutes and Their Troubling Breadth*

Three U.S. legislators have proposed statutes to specifically criminalize domestic terrorism. All three proposed statutes appear to follow McCord and Blazakis’ recommendation—federalizing crimes ranging from property damage to murder—but adding a requirement of some version of what might be considered “terrorist intent” (which is not required under § 2332b). In August 2019, Republican Senator Martha McSally of Arizona circulated a discussion draft of a possible domestic terrorism statute, prohibiting conduct ranging from threatening to create “a substantial risk of serious bodily injury to any other person by intentionally destroying or damaging any structure, conveyance, or other real or personal property,” to actually creating that risk, to assault, kidnapping, and murder “with the intent to intimidate or coerce a civilian population or influence, affect, or retaliate against the policy or conduct of a government.”<sup>88</sup> Democratic Representative Adam Schiff of California proposed H.R. 4192, the Confronting the Threat of Domestic Terrorism Act, prohibiting the same conduct, “with the intent to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>89</sup> A bipartisan group of Texas Congressmen—Representative Randy Weber, Representative Michael McCaul, and Representative Henry Cuellar—proposed H.R. 4187, the Domestic Terrorism Penalties Act of 2019, which omits the requirement that

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<sup>86</sup> *Id.*

<sup>87</sup> 18 U.S.C. § 2332b (2012) reads:

Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

*Id.* § 2332b(a)(1).

<sup>88</sup> McSally Bill, *supra* note 13.

<sup>89</sup> Schiff Bill, *supra* note 14.

property damage cause a substantial risk of serious injury and also uses Senator McSally's intent requirement.<sup>90</sup>

In this draft legislation, these actions would not merely become federal crimes, they would be labeled as terrorism. Under at least one proposed statute it would seem, therefore, that scratching a swastika into the wall of a post office would be considered terrorism, subject to up to twenty-five years in prison.<sup>91</sup> An argument could be made regarding this type of vandalism that the offender damaged a structure with "intent to intimidate or coerce a civilian population"—the requirement under the approach recommended by Representatives Weber, McCaul, and Cuellar's proposed legislation.<sup>92</sup> While the other two proposals maintain a requirement that the property damage carry with it a substantial risk of serious bodily injury, would these statutes call it terrorism to throw a brick through a window, provided there were a swastika on it?

The low level of damage required for a charge of terrorism renders the three proposed statutes frighteningly extreme, particularly considering the maximum penalties of ten years to life in prison.<sup>93</sup> But the way that these proposals envision terroristic intent is even more concerning. The question of what exactly constitutes terrorist intent is hotly debated.<sup>94</sup> Nevertheless, the federal provisions for international terrorism—§ 2331 and § 2332b(g)(5)—have arguably already crystalized an accepted definition. As

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<sup>90</sup> Weber Bill, *supra* note 14.

<sup>91</sup> *Id.*

<sup>92</sup> The Weber Bill reads:

(a) Offenses and penalties.—Whoever, with respect to a circumstance described in subsection (b), and with the intent to intimidate or coerce a civilian population or influence, affect, or retaliate against the policy or conduct of a government— . . .

(5) destroys or damages any structure, conveyance, or other real or personal property, shall be imprisoned not more than 25 years, fined under this title, or both . . .

(b) Circumstance described.—A circumstance described in this subsection is, with respect to an offense under subsection (a), that the offense is committed—

(1) against any person or property within the United States, and— . . .

(B) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce . . .

*Id.*

<sup>93</sup> Schiff Bill, *supra* note 14, states that any violation should be punished under § 2332b(c), which lays out minimum penalties of ten years and maximum of life in prison, depending on the level of damage caused. Weber Bill, *supra* note 14, lays out punishments of twenty-five years to life in prison. McSally Bill, *supra* note 13, creates punishments of ten years (for threats) to life in prison.

<sup>94</sup> See, e.g., BRUCE HOFFMAN, *INSIDE TERRORISM* 35–36 (rev. & expanded ed. 2006); Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 *POL. PSYCHOL.* 405, 406 (2000); Norris, *supra* note 11, at 505 (stating that any politically motivated violence is "terrorism"); Alex Schmid, *Terrorism—The Definitional Problem*, 36 *CASE W. RES. J. INT'L L.* 375, 381–84 (2004).

was previously noted, 18 U.S.C. § 2331 defines terrorism as violent criminal acts that “appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;”<sup>95</sup> while § 2332b(g)(5)(A) defines crimes of terrorism as crimes committed “to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>96</sup>

These two intent requirements are substantially different. On the one hand, § 2331 accounts for intimidation of a civilian population, while § 2332b is only concerned with affecting government. On the other hand, § 2332b allows for a terrorism designation based purely on intent to retaliate—i.e., acting out of anger. This seems to broaden the possible intent by a great deal (as is discussed in the hypotheticals below). Furthermore, many state statutes on terrorism have already followed the federal lead, rendering crimes terrorism if they are committed with the intent envisioned in § 2331’s definition of terrorism.<sup>97</sup> If a domestic terrorism statute was passed that adopted this federal intent, then the line between destruction of property and terrorism will turn on whether or not a defendant committed the destruction as part of an effort to change government policy *by intimidating or coercing a government or civilian population*.<sup>98</sup> This definition reflects an apparent consensus in the academic field that terrorism is to be distinguished from guerilla warfare or insurgency, wherein combatants seek to overpower a hostile government through military force; from traditional warfare (which may also be understood as a form of political violence); and from efforts to target individuals.<sup>99</sup> Instead, scholars seem to agree that the point of terrorism

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<sup>95</sup> 18 U.S.C. § 2331 (2012), discussed *supra* note 25.

<sup>96</sup> *Id.* § 2332b(g)(5)(A).

<sup>97</sup> See, e.g., COLO. REV. STAT. ANN. § 24-33.5-1602 (West 2019) (defining an “Act of Terrorism” as having “the same meaning set forth in 18 U.S.C. sec. 3077(1) and 28 CFR 0.85(l),” each of which refers back to the definition in 18 U.S.C. § 2331). Other states have created definitions mirroring § 2331, as in Alabama’s antiterrorism statute, ALA. CODE § 13A-10-151 (2019):

An act or acts constituting a specified offense as defined in subdivision (4) for which a person may be convicted in the criminal courts of this state, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States which contains all of the essential elements of a specified offense, that is intended to do the following:

- a. Intimidate or coerce a civilian population.
- b. Influence the policy of a unit of government by intimidation or coercion.
- c. Affect the conduct of a unit of government by murder, assassination, or kidnapping.

<sup>98</sup> § 2331; § 2332b(g)(5)(A).

<sup>99</sup> Connor Huff & Joshua D. Kertzer, *How the Public Defines Terrorism*, 62 AM. J. POL. SCI. 55, 69 (2018).

is to use violence to send a threatening message to the broader public or government.<sup>100</sup>

This definition is accepted in Representative Schiff's proposed legislation but broadened in the other two proposals. The drafted legislation by Senator McCaul and Representatives Weber, McCaul, and Cuellar appears to lean towards § 2332b, by including intent to "influence, affect, or retaliate against the policy or conduct of a government."<sup>101</sup> This approach opens the door to the federal criminalization of any conduct motivated by any level of anger or resentment (or desire for political expression) that also damages property. Would a college student who throws a brick through the window of a federal ICE detention center in anger over recent immigration policies be considered a terrorist under the reasoning that they have "damaged a structure" with the intent to "influence . . . or retaliate against the policy or conduct of a government"?<sup>102</sup> Even murder that is committed out of anger and political retaliation is a far cry from what has been accepted as terrorism by most scholars, states, or nations, let alone adding vandalism to the mix.

Adopting 18 U.S.C. § 2331's definition (and more limited intent requirement) would not eliminate the risks posed by these proposed statutes. Even if domestic terror legislation adopted the more limited intent requirement, how would that intent be proven? As a country, we have accepted that al Qaeda and other organizations that have followed its ideological lead are terrorist organizations, in part because many of the most prominent leaders and recruiters seem to have eagerly accepted the label,<sup>103</sup> and in part because FTO designation allows us to sidestep arguments about the label (because these are foreign relations, the Secretary of State is

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<sup>100</sup> See *supra* note 94 and accompanying text; Huff & Kertzker, *supra* note 99, at 57 ("Most of our academic models of terrorism emphasize 'victim-target differentiation,' or the notion that terrorism is a communicative act . . . directed at broader audiences.").

<sup>101</sup> McCaul Bill, *supra* note 13, § 2339E(a); Weber Bill, *supra* note 14, § 2339E(a).

<sup>102</sup> *Supra* note 101.

<sup>103</sup> See, e.g., *Interview: Osama bin Laden*, FRONTLINE (May 1998), <https://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html#video> [<https://perma.cc/D637-MTS7>] (quoting Osama bin Laden as saying "[t]he terrorism we practice is of the commendable kind . . . Terrorizing [aggressors] and punishing them are necessary measures to straighten things and to make them right"); *Imam's E-mails to Fort Hood Suspect Tame Compared with Online Rhetoric*, DALL. MORNING NEWS (Nov. 28, 2009, 11:58 AM), <https://www.dallasnews.com/news/texas/2009/11/28/imam-s-e-mails-to-fort-hood-suspect-tame-compared-with-online-rhetoric> [<https://perma.cc/Q23D-5TCH>] (quoting Anwar al Awlaki, recruiter for al Qaeda in the Arabian Peninsula, as saying in a recorded speech: "Some Muslims say the way forward for this ummah [the Muslim people] is to distance itself from terrorism and spend their time in becoming good in business, good in technology, agriculture and the rest; and this is how we can compete with the rest of the world.' But the Prophet Muhammad 'said that this is wrong.'").

allowed to make this determination).<sup>104</sup> But we have not had the opportunity to make this argument about white supremacist organizations. Those who have tried to make the argument that, for instance, Dylann Roof is “clearly” a terrorist, rely on simplifications of the definition of terrorism to mean any type of politically or ideologically motivated violence,<sup>105</sup> or a baseline understanding that killing a certain number of people should always qualify as terrorism.<sup>106</sup> Roof’s manifesto stated he wanted to spark a war—but he did not claim a desire to be involved with terrorism, to inspire terrorism, to intimidate the African American population or the civilian population in general, or even to retaliate against government policies.<sup>107</sup> What would a jury want to see to answer such a question? Due to the language of our current statutes, which have avoided requiring terroristic intent, prosecutors to date have never had to prove whether or not terrorism defendants intended to intimidate or coerce a population or government.

Perhaps worse yet, it might never need to be proven. An enraged public might easily jump to an assumption of this intent, despite the fact that the label carries huge implications in terms of public response as well as severity of punishment. Worryingly, proponents of a domestic terrorism statute seem to like the idea that the jury might look at the intent question simplistically, arguing for a less specific definition of terrorism, or in some cases a lower standard of proof.<sup>108</sup> Of course, such a problematic inquiry lends itself to biased results. This is particularly true if there is no shared understanding of what is required to prove terroristic intent. Our society should be wary of conditioning a defendant’s conviction upon whether his particular radicalism is considered heroic or distasteful in his particular community (and jury

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<sup>104</sup> The Secretary of State is empowered to designate Foreign Terrorist Organizations under 8 U.S.C. § 1189 (2012).

<sup>105</sup> See, e.g., Norris, *supra* note 11, at 505.

<sup>106</sup> See, e.g., Moustafa Bayoumi, Opinion, *What’s a ‘Lone Wolf’? It’s the Special Name We Give White Terrorists*, GUARDIAN (Oct. 4, 2017, 7:19 AM), <https://www.theguardian.com/commentisfree/2017/oct/04/lone-wolf-white-terrorist-las-vegas> [<https://perma.cc/W5XY-4Q7Y>]; Press Release, N.Y. State Senate, State Legislators: School Shootings Are Acts of Domestic Terrorism (Mar. 1, 2018), <https://www.nysenate.gov/newsroom/press-releases/terrence-murphy/state-legislators-school-shootings-are-acts-domestic> [<https://perma.cc/J7W4-V2GM>] (“All perceived violence that threaten the lives of others, whether at a concert, place of worship or school, are terrorist threats, and must be handled in the same manner.”).

<sup>107</sup> Kevin Sack & Alan Blinder, *No Regrets from Dylann Roof in Jailhouse Manifesto*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/us/no-regrets-from-dylann-roof-in-jailhouse-manifesto.html> [<https://perma.cc/M3NL-GNK8>].

<sup>108</sup> Norris, *supra* note 11, at 505–07. Specifically, Professor Norris argues that terrorism should be defined as any politically motivated violence and suggests that, even without a domestic terror statute, prosecutors should be encouraged to seek a Terrorism Sentencing Enhancement, which he notes approvingly could probably be obtained without proof beyond a reasonable doubt that the defendant was engaging in terrorism. *Id.* at 521–22.

pool). A more limited intent requirement, such as adopting § 2331, might limit these risks somewhat, but it will not erase them.

## 2. *Limiting the Proposals Through Minimum Harm Requirements*

The risks might be limited further by increasing the damage required (or the intended or threatened damage required) as elements of the crime. The three proposed statutes discussed above open the door to terrorism prosecutions for vandalism. A more limited application might be achieved by writing, for instance, a statute that specifically criminalizes mass murder. Professor Shirin Sinnar has argued that Supreme Court precedent would allow the scale of damage entailed in mass killings to justify federal authority in these areas, even without additional jurisdictional requirements.<sup>109</sup> Sinnar notes, first, that many domestic extremists cross state lines in order to commit their violent acts, thus offering federal jurisdiction via the interstate commerce clause,<sup>110</sup> and that the Court has already noted that “[t]he Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering.”<sup>111</sup>

Such a statute could be written to be a terrorism statute by requiring terroristic intent. Alternatively, an independent mass murder statute could be added to existing federal criminal law, thereby partially satisfying critics’ contention that all mass shootings should be treated as terrorism,<sup>112</sup> as well as offering an opportunity to respond to a national epidemic of mass shootings both related and unrelated to political motivations. If Congress wrote a mass murder statute, Congress could also amend the list of federal crimes of terrorism to include that statute, so that it might be used as a predicate offence for the Terrorism Sentencing Enhancement or application of § 2339A if a terroristic motive is present.

However, requiring an intent of mass casualties rather than a single murder or property damage would limit, but by no means eradicate, the concerns associated with a new terrorism statute. It would add to our exceptionally punitive criminal justice system, and federalize every school shooting, many of which are perpetrated by juveniles or eighteen-year-olds, in addition to mass shootings by disgruntled employees or arising from domestic disputes. This is by no means an action to be taken lightly and,

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<sup>109</sup> Sinnar, *supra* note 12, at 1381.

<sup>110</sup> *Id.* at 1380.

<sup>111</sup> *Id.* at 1381 (quoting *Bond v. United States*, 572 U.S. 844, 864 (2014)).

<sup>112</sup> *Id.* at 1357.

given the fact that other statutes already exist<sup>113</sup> by which to pursue and incarcerate domestic neo-Nazis, it might not be worthwhile.

*B. Eradicate the List of Federal Crimes of Terrorism from Section 2339A*

Another alternative to a new domestic terrorism statute would be to simply eradicate the list of predicate offenses from § 2339A, the section of the U.S. Code that criminalizes providing material support for terrorism. (rather than for a designated FTO).<sup>114</sup> Currently, § 2339A applies only when a person materially supports a specific terrorist act—any of the crimes listed under § 2332b(g)(5) as federal crimes of terrorism.<sup>115</sup> Omitting the specified list of statutes and adopting instead, as so many state statutes have done, something to the effect of “any act of violence calculated to coerce a civilian population or government,” would allow the statute to reach more modern terrorist strategies.<sup>116</sup> However, like the statutes described above, this would wildly increase federal authority to arrest and punish by expanding the range of crimes that could be considered terrorism and thus exposing the alleged offenders to more intrusive investigations. It would also carry the same

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<sup>113</sup> Such as the hate crimes statute under which they are already prosecuted, 18 U.S.C. § 249 (2012). See *infra* note 146 and accompanying text.

<sup>114</sup> 18 U.S.C. § 2339A (2012).

<sup>115</sup> *Id.* § 2332b(g)(5).

<sup>116</sup> See, e.g., CONN. GEN. STAT. ANN. § 53a-300(a) (West 2019) (“A person is guilty of an act of terrorism when such person, with intent to intimidate or coerce the civilian population or a unit of government, commits a felony involving the unlawful use or threatened use of physical force or violence.”); FLA. STAT. ANN. § 775.30(1) (West 2019) (defining “terrorism” or “terrorist activity” as an activity that “(a) Involves: 1. A violent act or an act dangerous to human life which is a violation of the criminal laws of this state or of the United States; or 2. A violation of s. 815.06; and (b) Is intended to: 1. Intimidate, injure, or coerce a civilian population; 2. Influence the policy of a government by intimidation or coercion; or 3. Affect the conduct of government through destruction of property, assassination, murder, kidnapping, or aircraft piracy”).

Language such as this allows prosecutors to pursue terrorism charges against lower level attacks, as well as allowing flexibility. Rather than enumerating specific types of violent actions that might be considered terrorism, statutes such as these allow any type of violence to be classified as terrorism if sufficient intent is shown—whether it is using a car in a crime of violence, using a firearm, using a knife, or using a frying pan. For instance, in New York, James Jackson recently pleaded guilty under New York’s terrorism statute, N.Y. PENAL LAW § 490.25(1) (McKinney 2019), which states that “[a] person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.” Under N.Y. PENAL LAW § 490.05 (McKinney 2019), a specified offense includes any violent offense. Jackson had stabbed a Black man to death on the streets of New York as part of an effort to begin a race war, in hopes that “the U.S. government would pursue a ‘global policy aimed at the complete extermination of the Negro race.’” Jonathan Allen, *White Man Who Wanted Race War Pleads Guilty to New York Stabbing*, REUTERS (Jan. 23, 2019, 12:27 PM), <https://www.reuters.com/article/us-new-york-murder/white-man-who-wanted-race-war-pleads-guilty-to-new-york-stabbing-idUSKCN1PH2CO> [<https://perma.cc/399A-2PJL>]. It is worth noting, however, that Jackson pleaded guilty. *Id.* Here, too, prosecutors had no need to prove the intent to a jury.

questions regarding proving intent at a jury level, and the same wide opportunities for jurors' biases to control the process.<sup>117</sup> That said, these problems can be mitigated somewhat by limiting § 2339A to mass casualty efforts, as opposed to any crime, because it would narrow back down the range of available crimes.

### *C. Designation*

A third option to deal with the current gap in the federal statutory framework regarding domestic terrorist attacks is to designate groups with ties to domestic terrorism as terrorist organizations. Creating a list of domestic terrorist organizations has clear First Amendment problems, but if the true difference between domestic and international terrorism investigations is the ability to use material support statutes, designating white supremacist terrorist organizations would be the most direct way to even the field.

Of course, there are reasons that no domestic terrorist organization list exists. While First Amendment conflicts jump to mind most quickly as a problem with designation of domestic organizations, more direct political hurdles exist as well.

#### *1. First Amendment Concerns*

As Professor David Cole argues:

A liberal democracy requires that its citizens be free to speak their minds, criticize the government, and join forces with like-minded others in those pursuits. The ability to associate and speak with domestic organizations is therefore at the very core of the First Amendment's democratic purpose. . . . It is virtually impossible to imagine meaningful self-government if the state can prohibit speech in coordination with domestic political groups it disfavors. . . .<sup>118</sup>

The ability of a government to designate domestic political organizations as terrorists has potentially chilling implications, especially if any and all association with the organization could be considered material support, with no necessity that defendants intend to support illegal or violent efforts to obtain political change (as is the express purpose of § 2339B<sup>119</sup>). Freedom of association, even with political groups that oppose the current government (and perhaps particularly with groups that oppose the current government) is “a basic mechanism of the democratic process,” and “has

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<sup>117</sup> See *supra* Section II.A.

<sup>118</sup> David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 173 (2012) (citations omitted).

<sup>119</sup> See *supra* note 64 and accompanying text.

assumed even greater importance . . . [as] the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.”<sup>120</sup> This is because, in a democracy, the people must have every opportunity both to learn which social objectives they prefer and to advocate on behalf of those objectives to convince others and exert their political will.<sup>121</sup> Moreover, “[r]estriction of associational expression is likely to become, in practice, an effort to suppress a whole social or political movement.”<sup>122</sup>

In 1961 the Supreme Court recognized this necessity, holding that mere membership in an organization that pursued unlawful aims, including the use of violence to obtain its goals, could not be criminal.<sup>123</sup> Only if the individuals themselves specifically intended to further those unlawful goals, or to obtain the organization’s goals through violence, could their membership be criminalized.<sup>124</sup> In 1969, in *Brandenburg v. Ohio*, the Supreme Court expressly held that criminalizing advocacy of violence “as a means of accomplishing industrial or political reform” or criminalizing “assembly with others merely to advocate the described type of action” violated First Amendment protections.<sup>125</sup> Instead, “[s]tatutes affecting the right of assembly” need to be limited to prohibiting “incitement to *imminent* lawless action.”<sup>126</sup> Specifically, the Court stated that the First Amendment “do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>127</sup>

While *Holder v. Humanitarian Law Project* allowed § 2339B to interfere with political speech in the international context, the Court

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<sup>120</sup> Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 1 (1964).

<sup>121</sup> *Id.* at 2–3; see also Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 687–89 (2009) (suggesting that the right to advocate for lawbreaking might be a necessary aspect of self-government).

<sup>122</sup> Emerson, *supra* note 120, at 23; see also Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 385 (2017) (“[T]he early twentieth-century Supreme Court recognized that advocacy of unlawfulness has social value, even if its decisions did not always reflect that. Without some type of meaningful constitutional scrutiny, government regulation of such expression could realistically suppress or chill what we might recognize as pure expressions of ideology.”).

<sup>123</sup> *Scales v. United States*, 367 U.S. 203, 205–06 (1961).

<sup>124</sup> *Id.* at 229.

<sup>125</sup> 395 U.S. 444, 448–49 (1969) (internal quotations omitted).

<sup>126</sup> *Id.* at 449 n.4 (emphasis added).

<sup>127</sup> *Id.* at 447.

expressly limited its holding to association with foreign organizations.<sup>128</sup> If this holding applied to domestic organizations, criminalizing not just incitement to imminent lawless action, and not just advocacy for lawless action, but any type of support for any listed organization that the U.S. has deemed to be a terrorist organization, it would fundamentally alter our understanding of the right to speak about government.

Moreover, as in the context of proving terrorist intent, most domestic organizations do not claim to be “terrorists” or “committed to violent overthrow” the way that many designated foreign organizations have.<sup>129</sup> Can we allow the federal government to determine that an organization is advocating violent overthrow when that organization claims to be “preparing for civil war” or “training members for self-defense”?<sup>130</sup> If we allow the

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<sup>128</sup> 561 U.S. 1, 39 (2010).

<sup>129</sup> Leaders of RAM state that the group is not racist, and that it has a positive influence on its members. *Rise Above Movement*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/rise-above-movement> [<https://perma.cc/3ZND-GG5D>]. Similarly, the Ku Klux Klan “identifies itself today as a Christian ‘civil rights for whites’ organization.” Megan Ross et al., *White Extremist Groups Are Growing—And Changing*, CTR. FOR PUB. INTEGRITY (Sept. 5, 2018, 9:42 AM), <https://publicintegrity.org/federal-politics/white-extremist-groups-are-growing-and-changing> [<https://perma.cc/2AN6-PCW3>]. In general, many extremist groups appear to have attempted to soften their public image. *Id.* (describing both the express disavowal of terrorism by some groups, and the strategic efforts of other groups to appear to be acting defensively, when in fact they are aggressively planning violence); see also Jerome P. Bjelopera, *Domestic Terrorism: An Overview*, CONGRESSIONAL RES. SERV. 2 (Aug. 21, 2017), <https://fas.org/sgp/crs/terror/R44921.pdf> [<https://perma.cc/SK7B-TPED>] (“Aware of the lines between constitutionally protected speech and criminality, domestic terrorists often rope themselves off from ideological (above-ground) elements that openly and often legally espouse similar beliefs. In essence, the practitioners who commit violent acts are distinct from the propagandists who theorize and craft worldviews that could be interpreted to support these acts. Thus, in decentralized fashion, terrorist lone actors (lone wolves) or isolated small groups (cells) generally operate autonomously and in secret, all the while drawing ideological sustenance—not direction—from propagandists operating in the free market of ideas.”).

<sup>130</sup> RAM, for instance “portrays itself as a defense force for a Western civilization under assault by Jews, Muslims and brown-skinned immigrants from south of the Rio Grande.” A.C. Thompson, *Racist, Violent, Unpunished: A White Hate Group’s Campaign of Menace*, PROPUBLICA (Oct. 19, 2017, 2:01 PM), <https://www.propublica.org/article/white-hate-group-campaign-of-menace-rise-above-movement> [<https://perma.cc/HCX5-HYS4>]. RAM leaders specifically discourage using violent language online or adopting an aggressive (rather than defensive) posture regarding violence—which law enforcement claims is a strategy to avoid arrest. Complaint, *supra* note 1, at 5–6. RAM describes its violent intent at protests as providing “security.” *Id.* at 9. They continue to refer to “defend[ing] America” and “Da Goyim Know.” *Id.* at 10. This refers to a worldview that they are pushing back against a global Jewish conspiracy—again, a violent but defensive posture. The Proud Boys, whose members have also been arrested for violence at protests, specifically tells members to *respond* to violence (and to bait opposing protestors into initiating violence), and also specifically advises members “to only speak in terms of self-defense.” Andy Campbell, *Leaked Proud Boys Chats Show Members Plotting Violence at Rallies*, HUFFPOST (May 22, 2019, 2:44 PM), [https://www.huffpost.com/entry/proud-boys-chat-logs-premeditate-rally-violence-in-leaked-chats\\_n\\_5ce1e231e4b00e035b928683](https://www.huffpost.com/entry/proud-boys-chat-logs-premeditate-rally-violence-in-leaked-chats_n_5ce1e231e4b00e035b928683) [<https://perma.cc/CZ35-BMHL>]. Officially, the Proud Boys maintain that they are “a politically incorrect men’s club for ‘Western chauvinists’ and deny affiliations with far-right extremist groups that overtly espouse racist and anti-

government to determine when an organization is sufficiently dangerous, especially when that organization has not itself claimed to be intent on the use of terrorism or violence to achieve its political goals, that power to designate organizations may be abused quickly and easily.<sup>131</sup>

## 2. *Limiting First Amendment Conflicts by Designating Only Foreign Organizations*

The threat to domestic political activity might be limited somewhat by continuing to designate only foreign organizations but broadening the political types of foreign organizations that are designated. It has become increasingly clear that the white supremacist terror threat is a global one.<sup>132</sup> This suggests that foreign white supremacist organizations could be designated as FTOs and connections to those organizations, or mere inspiration from and support for those organizations, could be pursued in the same way that connections to al Qaeda are pursued—through prosecution under § 2339B (which prohibits material support of an organization if the organization has been designated as an FTO).<sup>133</sup> As one way to avoid the

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Semitic views.” Michael Kunzelman, *Chief: Officer’s Proud Boys Membership Didn’t Break Policy*, ASSOCIATED PRESS (Oct. 15, 2019), <https://apnews.com/12ece8cedbf045259dcddeb619141e7> [<https://perma.cc/VB6N-9UAN>].

If these two groups seem obviously disingenuous in their “defensive” posture, the hundreds of right-wing militias that are currently “training for civil war” and similarly provide “security” in preparation for left-wing violence at protests present a far more difficult question. Eleonore Sens, *I’m Prepared for Civil War’: In America’s South, Militias are Preparing for Battle*, BUS. INSIDER (Aug. 17, 2017, 8:40 AM), <https://www.businessinsider.com/afp-in-americas-south-militias-prepare-for-battle-2017-8> [<https://perma.cc/9V3Q-SKDT>]. Another right-wing militia group, the Three Percenters, say they are a strictly defensive force. *Why Armed Militia Groups Are Surging Across the Nation*, PBS NEWS HOUR (Apr. 19, 2017, 7:48 PM), <https://www.pbs.org/newshour/show/armed-militia-groups-surging-across-nation> [<https://perma.cc/Z8N2-6YKY>]. The group dropped a group member after discovering he had been involved in a bomb plot. Devlin Barrett, *Man Charged in Anti-government Bomb Plot in Oklahoma City*, WASH. POST (Aug. 15, 2017), [https://www.washingtonpost.com/world/national-security/oklahoma-man-charged-in-anti-government-bomb-plot/2017/08/14/97816686-80f9-11e7-ab27-1a21a8e006ab\\_story.html](https://www.washingtonpost.com/world/national-security/oklahoma-man-charged-in-anti-government-bomb-plot/2017/08/14/97816686-80f9-11e7-ab27-1a21a8e006ab_story.html) [<https://perma.cc/83YN-N8NL>]. Many of these groups, and less formally organized online extremist groups, have been associated with right-wing extremist violence. See, e.g., SETH G. JONES, CTR. FOR STRATEGIC & INT’L STUDIES, *THE RISE OF FAR-RIGHT EXTREMISM IN THE UNITED STATES* (Nov. 2018), <https://www.csis.org/analysis/rise-far-right-extremism-united-states> [<https://perma.cc/7B8R-4E74>]; *Terrorist Bomb Incidents in Minnesota and Illinois Linked to Militia Group*, ANTI-DEFAMATION LEAGUE (Mar. 16, 2018), <https://www.adl.org/blog/terrorist-bomb-incidents-in-minnesota-and-illinois-linked-to-militia-group> [<https://perma.cc/PU5J-2FSW>].

<sup>131</sup> See *supra* notes 118–122 and accompanying text.

<sup>132</sup> See White Supremacy Hearing, *supra* note 5 (Representative Ocasio-Cortez: “Is white supremacy not a global issue?” Assistant Director McGarrity: “It is a global issue.”); Weiyi Cai & Simone Landon, *Attacks by White Extremists Are Growing. So Are Their Connections.*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/interactive/2019/04/03/world/white-extremist-terrorism-christchurch.html> [<https://perma.cc/ND3V-XB5Q>]; see also Indictment, *supra* note 1, at 11.

<sup>133</sup> See Ali H. Soufan, Opinion, *I Spent 25 Years Fighting Jihadis. White Supremacists Aren’t So Different.*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/opinion/white-supremacy-terrorism.html> [<https://perma.cc/9ZXK-HCBL>]; see also SOUFAN CTR., *WHITE SUPREMACY*

delicate political questions surrounding which groups are designated as terrorist organizations, the U.S. could begin by designating groups listed by Canada,<sup>134</sup> and other countries with whom we have strong ties. Respecting other countries' determinations about the purpose and extremity of such groups might be easier than trusting our own government to make determinations about the level of radicalism of groups that are critical of it. This still would have heavy implications for free speech within the United States, as has § 2339B already,<sup>135</sup> but the implications are arguably less extreme when only international (or transnational) organizations are prohibited.

### 3. *Political Will as a Practical Hurdle to Expanded Designation*

Even if we determined that designating radical (transnational) political groups as FTOs was useful enough to justify the possible imposition on political speech, it is questionable whether there exists the political will to do so. Unlike statutory changes, the decision to designate an organization as a foreign terrorist group is purely within the discretion of the executive branch.<sup>136</sup> This means that the ability to designate foreign organizations as FTOs already exists. Were the political will present in the executive branch, presumably the organizations would be designated already. Some critics have charged that the executive branch has built up strong support in the right supremacist fringe, and therefore is slow to act to sanction such groups.<sup>137</sup> Others charge that white supremacists could already be treated as terrorists by law enforcement agencies, but that these agencies appear to have made a political choice not to focus on white supremacist organizations, and to concern themselves with “ecoterrorists” and “black identity extremists” instead.<sup>138</sup>

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EXTREMISM: THE TRANSNATIONAL RISE OF THE VIOLENT WHITE SUPREMACIST MOVEMENT 12 (2019), <https://thesoufancenter.org/wp-content/uploads/2019/09/Report-by-The-Soufan-Center-White-Supremacy-Extremism-The-Transnational-Rise-of-The-Violent-White-Supremacist-Movement.pdf> [<https://perma.cc/Y4UD-WK2S>].

<sup>134</sup> Harmeet Kaur, *For the First Time, Canada Adds White Supremacists and Neo-Nazi Groups to Its Terror Organization List*, CNN (June 28, 2019), <https://www.cnn.com/2019/06/27/americas/canada-neo-nazi-terror-organization-list-trnd/index.html> [<https://perma.cc/9QZY-9HEJ>].

<sup>135</sup> Sinnar, *supra* note 12, at 1368–72.

<sup>136</sup> 8 U.S.C. § 1189 (2012) (authorizing the Secretary of State to designate Foreign Terrorist Organizations).

<sup>137</sup> See Jonathan Lemire, *After Massacre, Trump Downplays White Nationalism Threat*, ASSOCIATED PRESS (Mar. 15, 2019), <https://www.apnews.com/a1fa7fd40d2a427fac6a04e0ba113f25> [<https://perma.cc/5FY8-8Y2N>].

<sup>138</sup> Panduranga & Patel, *supra* note 12.

The legislative branch, too, has been slow to determine that groups are extremist.<sup>139</sup> The Ukrainian Azov Battalion that trained the RAM assailants, as described at the beginning of this Essay,<sup>140</sup> has been the subject of legislative debate for years. For three years, “House-passed spending bills . . . included a ban on U.S. aid to Ukraine from going to the Azov Battalion, but the provision was stripped out before final passage each year.”<sup>141</sup> Only in 2018 did the ban make it through.<sup>142</sup> Until that point, the U.S. government was, to some extent, funding, arming, and even training the group as part of its support for Ukrainian security against Russian incursion.<sup>143</sup>

In sum, though designation might be a more effective and successful move in terms of equaling out both prosecution and investigation of terrorist organizations, it might also prove a larger hurdle to jump, given that it is a largely discretionary determination and those with the power to make the designation appear to have no interest in doing so. In an effort to surmount this hurdle, congressional action via the creation or amendment of statutes can give ammunition to federal agents who want to pursue domestic terrorists, without necessarily involving more politically hesitant executive actors. But the concerns of expanding the reach of § 2339B and its effect on political speech remain.<sup>144</sup> Designating domestic groups as FTOs is likely the only way to truly even out treatment of terrorists among those with right- or left-wing ideologies and those whose ideologies are in some way related to al Qaeda. But there is good reason to question whether we would want to expand the infringement on speech that already exists in the international sphere to organizations that are both domestic in origin and concerned with domestic activity, even if doing so would be “fair.”

#### D. Additions to the List of Federal Crimes of Terrorism

Yet another alternative to the problem at the heart of this Essay is to add more crimes the list of federal crimes of terrorism. The list of federal crimes of terrorism is outdated, both in terms of dealing with new, decentralized

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<sup>139</sup> Determinations that a group is a terrorist organization may affect decisions to provide funding to that group. See *infra* notes 141–143 and accompanying text.

<sup>140</sup> See *supra* note 69 and accompanying text.

<sup>141</sup> Rebecca Kheel, *Congress Bans Arms to Ukraine Militia Linked to Neo-Nazis*, HILL (Mar. 27, 2018, 1:42 PM), <https://thehill.com/policy/defense/380483-congress-bans-arms-to-controversial-ukrainian-militia-linked-to-neo-nazis> [<https://perma.cc/37WU-M46M>].

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; Will Cathcart & Joseph Epstein, *How Many Neo-Nazis Is the U.S. Backing in Ukraine?*, DAILY BEAST (Apr. 14, 2017, 10:36 AM), <https://www.thedailybeast.com/how-many-neo-nazis-is-the-us-backing-in-ukraine> [<https://perma.cc/5P6S-UEH6>].

<sup>144</sup> See *supra* notes 118–130 and accompanying text.

international terrorism and in regard to the threat of domestic terrorism.<sup>145</sup> Several statutes would seem to lend themselves as solutions.

**HATE CRIMES**—18 U.S.C. § 249 criminalizes “willfully caus[ing] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.”<sup>146</sup> The statute has often been used, rather than terrorism charges, in cases where onlookers believed the defendant should be charged “as a terrorist” (such as Roof’s).<sup>147</sup>

The relationship between hate crimes and terrorism is complicated. It is probable that not all hate crimes should be considered terrorism and some scholars think none should. Many scholars, for instance, think the terrorism label should be applied only when violence is indiscriminate, while others think terrorism is only a weapon of the weak, and hate crimes only a weapon of the socially powerful.<sup>148</sup> Others refer to hate crimes as “the original domestic terrorism,” and argue that all hate crimes should be considered terrorism,<sup>149</sup> or, at least, extremely closely related.<sup>150</sup>

But adding this statute to § 2332b(g)(5)’s list of federal crimes of terrorism would not make all hate crimes terrorism. The listed crimes become terrorism only if they are “calculated to influence or affect the

<sup>145</sup> See HAMM & SPAAJI, *supra* note 47, at 47 and accompanying text. Decentralized terrorism relies on independent, ideologically motivated actors who commit attacks without direct instruction or orders from central leadership of terrorist organizations. Bjelopera, *supra* note 129, at 2. This type of terrorism, relying on inspiring but not controlling independent actors, has become widespread in domestic and international terrorism in recent years. See MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY passim* (2008).

<sup>146</sup> 18 U.S.C. § 249 (2012).

<sup>147</sup> See Aaronson, *supra* note 3; Norris, *supra* note 11; Wheeler, *supra* note 15; White Supremacy Hearing, *supra* note 5.

<sup>148</sup> See, e.g., HOFFMAN, *supra* note 94, at 4 (terrorism is generally seen as indiscriminate violence, not targeted); *id.* at 26 (“Terrorists further argue that, because of their numerical inferiority, far more limited firepower, and paucity of resources compared with an established nation-state’s massive defense and national security apparatus, they have no choice but to operate clandestinely, emerging from the shadows to carry out dramatic (in other words, bloody and destructive) acts of hit-and-run violence in order to attract attention to, and ensure publicity for, themselves and their cause. The bomb in the rubbish bin, in their view, is merely a circumstantially imposed ‘poor man’s air force’: the only means with which the terrorist can challenge—and get the attention of—the more powerful state.”); Crenshaw, *supra* note 94, at 406; Kathleen Deloughery et al., *Close Cousins or Distant Relatives? The Relationship Between Terrorism and Hate Crime*, 58 CRIME & DELINQUENCY 663, 663 (2012) (“Terrorism is often an ‘upward crime,’ involving a perpetrator of lower social standing than the targeted group. By contrast, hate crimes are disproportionately ‘downward crimes,’ usually entailing perpetrators belonging to the majority or powerful group in society and minority group victims.”).

<sup>149</sup> Norris, *supra* note 11, at 262.

<sup>150</sup> Colleen E. Mills et al., *Extreme Hatred: Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are “Close Cousins” or “Distant Relatives,”* 63 CRIME & DELINQUENCY 1191, 1197 (2015).

conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>151</sup> This would allow some nuance and distinction in the use of the term “terrorism,” and in the application of § 2339A. It could enable the federal government to recognize that, at least sometimes, hate crimes are also terrorism—calculated not only to harm an individual who is hated based on his or her status, but also to intimidate and coerce others in that subgroup of the civilian population, and sometimes the civilian population as a whole.

Were hate crimes a possible federal crime of terrorism, defendants such as Dylann Roof, and James Alex Fields Jr.<sup>152</sup> could be prosecuted as terrorists. As the law currently stands, no terrorism statute prohibits their conduct—there is no federal crime of mass murder using a gun or a car.<sup>153</sup> Certainly, no such statute is included in the list of federal crimes of terrorism, nor is the hate crimes statute under which both men were prosecuted.<sup>154</sup> While the question might remain as to whether their intentions were broad enough to qualify as terrorists (to intimidate or coerce government, or a civilian population, or to retaliate against the government), that question could be put directly to the jury.

**RIOTS**—18 U.S.C. § 2101 prohibits interstate travel or the use of interstate commerce in order to commit, incite, promote, or aid in rioting.<sup>155</sup> The white supremacist RAM complaint suggests that violent activity as part of a protest is a calculated and organized effort by right-wing groups, which may be used to intimidate the civilian population and deter engagement in First Amendment activities.<sup>156</sup> Shared memes and white supremacist conversations recommending running down protestors also seem to carry an implication that such groups are interested in using violence to intimidate protestors not to come out and protest.<sup>157</sup> This would appear to fit the

<sup>151</sup> 18 U.S.C. § 2332b(g)(5)(A) (2012).

<sup>152</sup> Press Release, Office of Pub. Affairs, Dep’t of Justice, Ohio Man Sentenced to Life in Prison for Federal Hate Crimes Related to August 2017 Car Attack at Rally in Charlottesville, Virginia (June 28, 2019), <https://www.justice.gov/opa/pr/ohio-man-sentenced-life-prison-federal-hate-crimes-related-august-2017-car-attack-rally> [<https://perma.cc/29ZQ-DZ53>]; Ramsey Touchberry, *Is Alleged Charlottesville Killer a Terrorist? James Alex Fields Charged with Federal Hate Crimes*, NEWSWEEK (June 28, 2018, 10:02 AM), <https://www.newsweek.com/charlottesville-driver-charged-federal-hate-crimes-998270> [<https://perma.cc/Y28H-FA3B>].

<sup>153</sup> It is possible that 18 U.S.C. § 33 could apply to Fields’s conduct. See *infra* note 167 and accompanying text.

<sup>154</sup> See *supra* note 152 and accompanying text; Wheeler, *supra* note 15.

<sup>155</sup> 18 U.S.C. § 2101 (2012).

<sup>156</sup> See Complaint, *supra* note 1, at 9, 21–22.

<sup>157</sup> Henry Grabar, “Run Them Down”: Driving into Crowds of Protesters Was a Right-Wing Fantasy Long Before the Violence in Charlottesville, SLATE (Aug. 14, 2017, 5:09 PM), <https://slate.com/business/2017/08/driving-into-crowds-of-protesters-was-a-right-wing-fantasy-long-before-charlottesville.html>

definition of terrorism: If a jury agreed that intimidation was the purpose of the violence, RAM's rioting would be use of violence in an effort to intimidate or coerce a civilian population.

The riot statute might be particularly useful as it at least appears to address a favored strategy of RAM. However, it also might present particularly serious dangers. Groups that protest are likely to be among the most disfavored oppositional political groups, and the ongoing disagreements regarding who initiated violence at political rallies<sup>158</sup> seems to suggest this is an area that is easily distorted by bias.

**RICO & VICAR**—The possibility of using RICO (Racketeer Influenced and Corrupt Organizations Act), the organized crime law enforcement powerhouse,<sup>159</sup> to pursue terrorists, has been floated in legal scholarship since at least 1990.<sup>160</sup> Its use, however, has been rare.<sup>161</sup> Both RICO and VICAR (Violent Crimes in Aid of Racketeering)<sup>162</sup> have been successfully used to prosecute gangs on the basis that the gang is an enterprise, defined as a “group of individuals associated in fact.”<sup>163</sup> To qualify, the core organization must have “some structure for the making of decisions and a core of persons who function as a continuing unit,” but if the broader organization has this structure, and affects interstate commerce, satellite (local) subsets of the organization can be prosecuted under the same theory.<sup>164</sup> While RICO requires multiple criminal offenses, VICAR requires only one violent crime committed “for the purpose of gaining entrance to or

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[<https://perma.cc/78CR-K6FB>] (“[A] Massachusetts patrolman commented on Facebook: ‘Hahahaha love this, maybe people shouldn’t block road ways.’”).

<sup>158</sup> See, e.g., Peter Beinart, *The Rise of the Violent Left*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/the-rise-of-the-violent-left/534192>

[<https://perma.cc/3HXB-WFHB>]; David Jackson, *Trump Defends Response to Charlottesville Violence, Says He Put It ‘Perfectly’ with ‘Both Sides’ Remark*, USA TODAY (Apr. 26, 2019, 1:51 PM), <https://www.usatoday.com/story/news/politics/2019/04/26/trump-says-both-sides-charlottesville-remark-said-perfectly/3586024002> [<https://perma.cc/DA87-29DX>]; Cassie Miller, *Accusations in a Mirror: How the Radical Right Blames Rising Political Violence on the Left*, S. POVERTY LAW CTR. (June 11, 2019), <https://www.splcenter.org/hatewatch/2019/06/11/accusations-mirror-how-radical-right-blames-rising-political-violence-left> [<https://perma.cc/V6S2-ZDWL>].

<sup>159</sup> 18 U.S.C. §§ 1961–1968 (2012).

<sup>160</sup> See, e.g., Zvi Joseph, *The Application of RICO to International Terrorism*, 58 FORDHAM L. REV. 1071, 1072 (1990).

<sup>161</sup> Phil Hirschhorn, *Suspect in New York Truck Attack Pleads Not Guilty to Murder and Terrorism Charges*, PBS NEWS HOUR (Nov. 28, 2017, 9:54 PM), <https://www.pbs.org/newshour/nation/suspect-in-new-york-truck-attack-pleads-not-guilty-to-murder-and-terrorism-charges> [<https://perma.cc/TX7A-PFDD>].

<sup>162</sup> 18 U.S.C. § 1959.

<sup>163</sup> Marc Agnifilo et al., *Investigating and Prosecuting Gangs Using the Enterprise Theory*, U.S. ATT’YS’ BULL. at 15–17 (May 2006), <https://www.justice.gov/archive/olp/pdf/gangs.pdf> [<https://perma.cc/X5F8-53ZW>].

<sup>164</sup> *Id.* at 16.; see also *United States v. Turkette*, 452 U.S. 576 (1981).

maintaining or increasing position” in the enterprise.<sup>165</sup> Presumably, crimes committed in order to gain entrance to or gain prestige in a terroristic gang such as RAM, therefore, could be prosecuted under this statute, although crimes committed in order to vaguely support RAM’s ideology could not. Adding these statutes to the list of federal crimes of terrorism would give some additional ability to label and punish these crimes as “terrorism,” but not as broad a reach as would designating domestic organizations as FTOs.

**DESTRUCTION OF MOTOR VEHICLES**—Given the recent spate of van attacks and the urging of terrorist organizations to commit such attacks,<sup>166</sup> it is tempting to suggest that 18 U.S.C. § 33 (“Destruction of motor vehicles or motor vehicle facilities”) be included as a possible federal crime of terrorism. Surely using a Home Depot truck to kill eight tourists and damaging the truck in the process qualifies as damaging a motor vehicle “with a reckless disregard for the safety of human life.”<sup>167</sup> The sister statute respecting destruction of aircraft is already listed in § 2332b(g)(5).<sup>168</sup>

**FIREARMS**—Similarly, given modern terrorism’s turn to firearms and away from explosives,<sup>169</sup> it is confusing that 18 U.S.C. § 924(c)(2018) (criminalizing possession of a firearm in furtherance of a crime of violence) is not included in the list of possible terrorism predicates.

As in the case of hate crimes, adding statutes such as these to § 2332b(g)(5) would not mandate that they be prosecuted as terrorism—it would provide an option and an opportunity to make the argument that a defendant’s intent was terrorism. This nuance, of course, would also open up the same concerns as described in regard to creating a terrorism statute. It is unclear how a jury would make this determination or whether a jury should be trusted to do so. Moreover, hiding the terror intent requirement in a list of predicates, rather than as a primary offense, might hide the question from the jury, enabling the government to avoid having to prove the element. For each of these statutes there is a question as to how much the government would have to prove in order to get a conviction under § 2339A, and if the answer is that the hurdle would not be so high, the question remains whether we really want to give the government that much reach.

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<sup>165</sup> 18 U.S.C. § 1959(a).

<sup>166</sup> Jared Malsin, *Terrorists Have a Long, Grim History of Using Cars as Weapons*, TIME (Nov. 1, 2017), <https://time.com/5005604/new-york-car-truck-attacks-isis> [<https://perma.cc/V4GL-6PNP>].

<sup>167</sup> 18 U.S.C. § 33(a). This statute was charged in the Saipov case, although, obviously, not as a “terrorism charge.” Indictment, *supra* note 3.

<sup>168</sup> Section 32 (relating to destruction of aircraft or aircraft facilities) is the first statute listed under 18 U.S.C. § 2332b(g)(5).

<sup>169</sup> See *supra* note 45 and accompanying text.

### E. Existing Solutions to the Sentencing Enhancement Issue

One of the major discrepancies between the treatment of domestic and international terrorists is that of sentencing. The U.S. Sentencing Guidelines offer an enhancement for people who commit federal crimes of terror, resulting in an extreme change in sentences.<sup>170</sup> The disparity in punishment between domestic terrorists, often convicted of non-terror crimes, and international terrorists, is therefore similarly extreme. On the question of the sentencing enhancement in particular, Professor Jesse Norris has suggested that it might be available even to defendants who had not committed a predicate offense.<sup>171</sup> The language of the enhancement indicates that it is available when a crime is committed in order to *promote* a federal crime of terrorism.<sup>172</sup> Norris suggests that even if a particular crime of terrorism were not intended, certain actions such as trying to start a race war would almost certainly result in classic terrorist activities once such a war had begun.<sup>173</sup> Norris argues that by attempting to start a race war, which presumably would include classic terrorist attacks, domestic extremists should be seen as promoting federal crimes of terrorism.<sup>174</sup> Moreover, at the sentencing level, this requirement need only be proven at a preponderance of the evidence standard.<sup>175</sup> The sentencing judge is also given an option for upward departure if it is proven by a preponderance of the evidence that the defendant had the requisite intent (to intimidate), but not to promote any specific crime.<sup>176</sup> This strategy might broaden the reach of the sentencing enhancement significantly, bringing something closer to parity of punishment between traditional foreign and modern domestic terrorism.

But the repercussions of relying on such a weak standard of proof, and the biases of individual judges, are concerning.

### F. Simply Use Different Language

A more straightforward option is simply to call domestic attacks terrorism. While this would not even out sentences or investigative authority, Assistant Director McGarrity has suggested that the FBI commonly runs terrorism investigations parallel to hate crime investigations, and that at least

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<sup>170</sup> See SENTENCING GUIDELINES MANUAL, *supra* note 43, at § 3A1.4.

<sup>171</sup> Norris, *supra* note 11, at 279–80.

<sup>172</sup> SENTENCING GUIDELINES MANUAL, *supra* note 43, at § 3A1.4. Section 3A1.4 states: “(a) If the offense is a felony that involved, *or was intended to promote*, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.” (emphasis added).

<sup>173</sup> Norris, *supra* note 11, at 280.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 281.

those incidents highlighted in the June hearing had been considered domestic terrorism within the FBI.<sup>177</sup> The Justice Department appears to believe, as do so many critics, that actions such as Roof's mass murder and Fields's vehicle attack fit the definition of terrorism under § 2331.<sup>178</sup> They state that they investigate these incidents as terrorism investigations, and that the sole reason they are not prosecuted under terrorism statutes is that no current terrorism statute fits those crimes.<sup>179</sup> Must there be an official terrorism charge in order to use the word in public?<sup>180</sup> Did we hesitate to call Al Capone a mobster, simply because we could only charge him with tax evasion?

Merely using the word could lessen the social effects that concern many critics, such as reinforcing racial stereotypes and othering.<sup>181</sup> However, the sticking point may, again, be more of a political issue. The label is applied by spokespeople, not prosecutors or FBI agents, and such positions lend themselves to a consideration of political pushback, such as the pushback that resulted in lessening focus on white supremacists in the first place.<sup>182</sup> Additionally, the FBI's decision not to use the label without a charge is not so surprising, given the critical press it received in the early 2000s for labeling defendants "terrorists" and charging them with fraud and false statements.<sup>183</sup>

#### CONCLUSION

For several years now, the nation has wrestled with the fact that right-wing extremist violence is treated noticeably differently from what has traditionally been referred to as foreign terrorism.<sup>184</sup> Part of the debate around this issue has stemmed from the recognition that the label of "foreign" is superficial and misleading.<sup>185</sup> Domestic defendants, who are U.S. citizens, who never traveled abroad, and who completed terrorist attacks without any

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<sup>177</sup> White Supremacy Hearing, *supra* note 5.

<sup>178</sup> In his discussion with Representative Ocasio-Cortez, Assistant Director McGarrity stated that the FBI had considered the two discussed incidents to be terrorism and had conducted terrorism investigations. *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> For an argument that this is the Department of Justice's reluctance, see Sinnar, *supra* note 12, at 1337.

<sup>181</sup> Norris, *supra* note 11; Sinnar, *supra* note 12.

<sup>182</sup> See *supra* note 47 and accompanying text.

<sup>183</sup> See, e.g., David Cole, *Are We Safer?*, N.Y. REV. BOOKS (Mar. 9, 2006), <https://www.nybooks.com/articles/2006/03/09/are-we-safer> [<https://perma.cc/HPN9-CKV8>]; Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST (June 12, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/12/us-campaign-produces-few-convictions-on-terrorism-charges/28d9a061-8f0b-4604-b418-9d4a2f2dfe74> [<https://perma.cc/VL66-P6KJ>].

<sup>184</sup> See *supra* note 8 and accompanying text; Norris, *supra* note 11; Sinnar, *supra* note 12.

<sup>185</sup> See Sinnar, *supra* note 12 at 1337, 1347–57.

direction from a designated FTO, are given the label of “terrorist” and their cases are resolved as international terrorism on the sole basis that they appear to have been sympathetic to the cause of an FTO.<sup>186</sup> Worse, the harm done and the threat posed by domestic extremists seems to have matched or exceeded that done by international terrorists in recent years—certainly the scale of attacks and tactics used have been similar,<sup>187</sup> and domestic extremists have perpetrated attacks more often.<sup>188</sup>

The fact that the FTOs most commonly and publicly pursued by law enforcement are associated with radical Islam and the Middle East has encouraged racially and religiously disparate treatment, as well as reinforced racial and religious biases in the general public.<sup>189</sup> It also points to inadequate protection by law enforcement, as right-wing extremist violence appears to be prevalent, yet not a priority for federal agencies.<sup>190</sup>

Commentary on this issue often suggests that the problem is that no domestic terrorism statute exists.<sup>191</sup> This leads to the natural conclusion that a domestic terrorism statute is needed,<sup>192</sup> and indeed, several have been suggested in Congress.<sup>193</sup> But, as this Essay has shown, al Qaeda and ISIS prosecutions are also rarely pursued through statutes prohibiting terrorist acts.<sup>194</sup> No generalized statute exists to criminalize terrorist acts,<sup>195</sup> and creating a terrorist acts statute (as the congressional drafts currently suggest) would federalize vast swaths of criminal behavior that has traditionally been left to the states, as well as behavior that probably would not be considered terrorism by the general public (and arguably should not be).<sup>196</sup> It is also problematic because the definition of terrorism is highly contested, has not been challenged in courts, and appears to lend itself to bias and prejudice—

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<sup>186</sup> *Id.*

<sup>187</sup> *See, e.g., supra* notes 1–3 and accompanying text; *see also* Soufan, *supra* note 133.

<sup>188</sup> Soufan, *supra* note 133 (citing the Anti-Defamation League).

<sup>189</sup> Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809, 810–17 (2013); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295, 300 (2002); Corbin, *supra* note 15, at 455; Norris, *supra* note 11; Sinnar, *supra* note 12, at 1335–37; Yin, *supra* note 15, at 35.

<sup>190</sup> *See* Norris, *supra* note 11, at 285–87.

<sup>191</sup> *See supra* notes 8–11 and accompanying text.

<sup>192</sup> *See supra* note 11.

<sup>193</sup> *See supra* notes 13–14.

<sup>194</sup> *See supra* Section I.A.

<sup>195</sup> *See supra* Section I.A. Thus far the matter has been avoided in courts because of the nature of the statutes under which terrorists are prosecuted, which do not rely on juries determining whether an act was intended to be terroristic. *Id.*

<sup>196</sup> *See supra* Section II.A.

facts that would almost certainly lead to problems were the issue to come before a jury.<sup>197</sup>

Moreover, a terrorist acts statute would not reach the type of nonviolent activity that is actively pursued in the international context, and therefore would not fully equalize prosecutions of domestic and international extremists.<sup>198</sup> These cases, which make up the majority of terrorism prosecutions, rely on material support statutes.<sup>199</sup> Fully equalizing the pursuit of right-wing terrorists would require designating foreign organizations that these domestic terrorists communicate with, or designating domestic organizations.<sup>200</sup> But designating domestic organizations would be a constitutional sea change with respect to the First Amendment.<sup>201</sup> Designating foreign organizations would be less invasive, but still quite invasive and possibly less effective.<sup>202</sup>

But these two strategies, designation or a generalized statute criminalizing terrorist acts, are not the only options available to law enforcement. This Essay has suggested several alternative options, including adding to the list of crimes enumerated in the “federal crimes of terrorism,”<sup>203</sup> omitting the requirement that “terrorist acts” consist only of certain predicate crimes,<sup>204</sup> writing a domestic terrorism statute that is limited to mass murder attempts,<sup>205</sup> broadening the use of the Terrorism Sentencing Enhancement,<sup>206</sup> or simply referring to more cases as “terrorism cases,” whether or not terrorism charges can be brought.<sup>207</sup>

It is impossible to offer authority to law enforcement without increasing the risk that it be abused, it is unlikely that law enforcement authority in international terrorism cases is going to be limited any time soon, and therefore, it is unlikely that we can create parity between domestic and international terrorism investigations without granting significant increased authority to law enforcement. Each of the suggested possible solutions bring with it the possibility of abuse that is already present in the international context, and the possibility that particularly harsh criminal laws will be applied selectively and in a biased manner. Limiting the reach of any new

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<sup>197</sup> See *supra* Section II.A.

<sup>198</sup> See *supra* Section I.A.

<sup>199</sup> See *supra* Section II.A.

<sup>200</sup> See *supra* Section II.C.

<sup>201</sup> See *supra* Section II.C.

<sup>202</sup> See *supra* Section II.C.

<sup>203</sup> See *supra* Section II.D.

<sup>204</sup> See *supra* Section II.B.

<sup>205</sup> See *supra* Section II.A.

<sup>206</sup> See *supra* Section II.E.

<sup>207</sup> See *supra* Section II.F.

statutes can lessen the breadth of authority given to the Department of Justice, but will leave disparities between domestic and international terrorism. If not domestic organizations, designating foreign organizations like the Azov Battalion as terrorist groups would most likely come closest to closing the gap between the types of terrorism, but would also bring the awesome reach of § 2339B even further into use, risking broad infringement of First Amendment rights. It also may be a losing suggestion, given political considerations.

But if nothing else, it should be clear that a broad terrorism statute is far from the only option to deal with this threat and disparity. This Essay has been an effort to show that other options are available. The arguments for a domestic terrorism statute are compelling, but so are the risks of misuse. Taking action to make domestic terrorism prosecutions more common should be done carefully, with consideration as to how such risks can be minimized, the range of opportunities to change current practice, and the comparative dangers of each.

