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## Our Inner Demons: Prosecuting Domestic Terrorism

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# OUR INNER DEMONS: PROSECUTING DOMESTIC TERRORISM

**Abstract:** The United States does not currently have a uniform framework for how it handles domestic terrorism. Although there is a terrorism section of the criminal code that criminalizes certain actions that are deemed terroristic, these laws are applied disproportionately to those with an Islamic ideology. Political motivations and protectionist interests within the United States tend to prevent similar crimes committed in the name of, for example, right-wing terrorism to be convicted under the terrorism section of the criminal code. In light of the threat posed by domestic terrorism and other trends in the political and cultural ethos, the current state of the law is inadequate to address the problem and unjustly places a stigma on one subsection of the population. In the interest of equality under the eyes of the law, our judicial system should incorporate a uniform domestic terrorism statute that is applied based on the actions of an individual, not based on their belief systems or individual backgrounds.

## INTRODUCTION

In October 2018, Robert D. Bowers entered a Pittsburgh synagogue, the Tree of Life Congregation, with an AR-15 assault rifle.<sup>1</sup> Before surrendering to police, he killed eleven people in what has been described as one of the worst attacks on the Jewish community in this country's history.<sup>2</sup> Following his attack in Pittsburgh, Bowers said he wanted all Jewish people to die for the supposed wrongs they had done.<sup>3</sup> When asked whether or not the attack would be classified as domestic terrorism, U.S. Attorney Scott Brady was noncommittal, stating there would have to be proof that Bowers was trying to promote a spe-

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<sup>1</sup> Christopher Mele et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/W73H-6FQ4>].

<sup>2</sup> *Id.*

<sup>3</sup> Nicole Chavez et al., *Pittsburgh Synagogue Gunman Said He Wanted All Jews to Die, Criminal Complaint Says*, CNN (Oct. 31, 2018), <https://www.cnn.com/2018/10/28/us/pittsburgh-synagogue-shooting/index.html> [<https://perma.cc/JYH5-NDES>] (quoting Bowers as stating to a SWAT officer that he wanted "all Jews to die"). During the shootout, he told police officers, "I just want to kill Jews" because they were "committing genocide against my people." *Id.* Prior to the incident he espoused hate speech online, referring to immigrants as "invaders" and sharing posts that referred to Jews as the "enemy of white people." Julie Turkewitz & Kevin Rose, *Who Is Robert Bowers, the Suspect in the Pittsburgh Synagogue Shooting?*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/robert-bowers-pittsburgh-synagogue-shooter.html> [<https://perma.cc/9HAM-ZYN5>] (describing the beliefs espoused by Robert Bowers). Just before the attack, he posted, "I can't sit by and watch my people get slaughtered. Screw your optics, I'm going in." *Id.*

cific ideology with his attack.<sup>4</sup> In the same month, Cesar Sayoc mailed bombs to the homes of prominent political leaders including former presidents Barack Obama and Bill Clinton.<sup>5</sup> Sayoc, a supporter of President Donald Trump, sent the bombs to political adversaries of the president.<sup>6</sup> Attorney General Jeff Sessions called the attempted bombings “political violence,” but Sayoc was not charged with domestic terrorism.<sup>7</sup>

Throughout the course of the Trump presidency, ideologically motivated attacks have continued to plague the country.<sup>8</sup> In August 2019, Patrick Crusius

<sup>4</sup> Chavez, *supra* note 3 (quoting Scott Brady) (“We continue to see where the line is. But for now, at this point in our investigation, we’re treating it as a hate crime.”).

<sup>5</sup> Devlin Barrett et al., *Man in Florida Arrested, Charged in Connection with Mail Bombs Sent to Public Figures*, WASH. POST (Oct. 26, 2018), <https://www.washingtonpost.com/nation/2018/10/26/suspected-explosive-devices-addressed-cory-booker-james-clapper-probe-expands-packages> [https://perma.cc/XTF3-7YHX].

<sup>6</sup> Scott Calvert et al., *Suspect in Letter Bombs: A History of Arrests and a Prior Bomb Threat*, WALL ST. J. (Oct. 26, 2018), <https://www.wsj.com/articles/suspect-in-letter-bombs-a-history-of-arrests-and-a-prior-bomb-threat-1540572060> [https://perma.cc/5P5J-KLTC] (describing the politics of Cesar Sayoc and his affinity for President Trump).

<sup>7</sup> Kathy Gilsinan, *Why the Mail Bomber Wasn’t Charged with Terrorism*, THE ATLANTIC (Oct. 26, 2018), <https://www.theatlantic.com/international/archive/2018/10/mail-bomb-terrorism-cesar-sayoc/574144/> [https://perma.cc/W6CP-XSSN] (stating that Sayoc was not charged with terrorism because there is no federal crime for domestic terrorism and the most frequently used terrorism charge requires a connection to a foreign terrorism organization). Sayoc pled guilty to sixty-five felonies, sixteen of which were related to the use of a weapon of mass destruction, which is in the terrorism chapter of the criminal code. *Cesar Sayoc Pleads Guilty to 65 Felonies for Mailing 16 Improvised Explosive Devices in Connection with October 2018 Domestic Terrorist Attack*, DEP’T JUST. (Mar. 21, 2019), <https://www.justice.gov/opa/pr/cesar-sayoc-pleads-guilty-65-felonies-mailing-16-improvised-explosive-devices-connection> [https://perma.cc/2YLP-GHL9].

<sup>8</sup> Jim Carlton, *El Paso Shooting Suspect Targeted Mexicans, Officials Say*, WALL ST. J. (Aug. 9, 2019), <https://www.wsj.com/articles/el-paso-shooting-suspect-targeted-mexicans-officials-say-11565383286> [https://perma.cc/7573-NCM5] (describing the 2019 El Paso attack and racist manifesto). The attack in El Paso was not the only mass shooting around that time. See Valerie Bauerlein et al., *Mass Shootings in El Paso, Dayton Leave 31 Dead*, WALL ST. J. (Aug. 5, 2019), <https://www.wsj.com/articles/mass-shootings-in-el-paso-dayton-leave-29-dead-11564962534> [https://perma.cc/6SES-UYE5] (describing shootings in El Paso, Dayton, and Gilroy). The day after the shooting in El Paso, Connor Betts murdered nine people and injured twenty-seven others in Dayton, Ohio. Kris Maher & Melanie Grayce West, *Dayton Police Search for Motive in Mass Shooting*, WALL ST. J. (Aug. 5, 2019), <https://www.wsj.com/articles/dayton-police-search-for-motive-in-mass-shooting-11565025704> [https://perma.cc/6KHG-KX8R] (describing the attack). A week prior, Santino Legan killed three people and wounded thirteen others with an “AK-47 style assault rifle” in Gilroy, California. Evan Sernoffsky, *Gilroy Garlic Festival Shooting: Killer Had More Guns, Survival Gear and a Clown Mask*, S.F. CHRON. (Aug. 8, 2019), <https://www.sfchronicle.com/crime/article/Gilroy-Garlic-Festival-shooting-Killer-had-more-14291480.php> [https://perma.cc/JK58-8YZ3]. Motives for those attacks are not as clear as the El Paso attack. See Jennifer Calfas, *FBI Probes Shooters’ Motives Amid Wider Alarm Over Attacks*, WALL ST. J. (Aug. 6, 2019), <https://www.wsj.com/articles/fbi-probes-two-shooters-motives-amid-wider-alarm-over-attacks-11565136664> [https://perma.cc/N7YM-TZK3] (describing the search for motives in Gilroy and Dayton). The Federal Bureau of Investigation (FBI) launched a domestic terrorism investigation into the Gilroy shooting, exploring “violent ideologies” and a list Legan made “of religious and political targets on both sides of the aisle.” Zusha Ellison, *Gilroy Shooting Prompts Domestic Terrorism Investigation by FBI*, WALL ST. J. (Aug. 6, 2019), <https://www.wsj.com/articles/gilroy-shooting-prompts-domestic-terrorism-investigation-by-fbi-11565120296>

walked into a Walmart with an AK-47 and murdered twenty-two people.<sup>9</sup> Prior to the attack he published a manifesto online that said he wanted to target Hispanics because they posed a threat to the United States.<sup>10</sup> Following the attack, U.S. Attorney John Bash told reporters, “swift and certain justice” will be delivered, because that is “what we do to terrorists in this country.”<sup>11</sup> These attacks have had a profound effect on the nation’s psyche and have forced the government to pay attention to the threat posed by domestic terrorism.<sup>12</sup>

Despite the increased concern, it will be difficult to prosecute these acts as domestic terrorism because there is no such criminal statute in the United States.<sup>13</sup> The threat of domestic terrorism emerged as a national concern following the 1995 bombing of the Alfred P. Murrah Federal Building in Okla-

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[<https://perma.cc/J3N7-5M5C>] (describing the investigation into a possible motive). The FBI is also exploring possible violent ideologies that inspired the shooting in Dayton. See Calfas, *supra* (describing the investigation and Betts’s left-leaning political views).

<sup>9</sup> Carlton, *supra* note 8 (describing the attack and racist manifesto).

<sup>10</sup> *Id.* (referencing Crusius’s Manifesto, which declared that Hispanics were “an ethnic and cultural threat to the U.S. and were taking jobs from native-born Americans”). Most of his victims were Hispanic and seven were Mexican citizens. *Id.*

<sup>11</sup> Matt Ford, *The Danger of a Domestic Terrorism Law*, NEW REPUBLIC (Aug. 15, 2009), <https://newrepublic.com/article/154785/danger-domestic-terrorism-law> [<https://perma.cc/W6UC-L9JX>].

<sup>12</sup> See Caitlin Dickerson et al., *‘It Feels Like Being Hunted’: Latinos Across U.S. in Fear After El Paso Massacre*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/el-paso-shooting-latino-anxiety.html> [<https://perma.cc/ZZK3-FBGR>] (discussing the fear of the Latino community following the shooting in El Paso); Michael Wilson, *There Was No Gunfire in Times Square. But the Panic Was Still Real.*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/nyregion/shootings-panic-anxiety.html> [<https://perma.cc/9HN2-3B6H>] (describing the panic in Times Square, described by one witness as a “war scene,” when a backfiring dirt bike was mistaken for gunfire days after the El Paso and Dayton shootings, resulting in twelve injuries). In response to these attacks, Senator Martha McSally and Representative Adam Schiff both put forward separate, but similar, proposals that would criminalize domestic terrorism. Barbara McQuade, *Proposed Bills Would Help Combat Domestic Terrorism*, LAWFARE (Aug. 20, 2019), <https://www.lawfareblog.com/proposed-bills-would-help-combat-domestic-terrorism> [<https://perma.cc/8K9W-MLPH>].

<sup>13</sup> See Salma Elkhaoudi, *Taylor Michael Wilson Pleads Guilty to Domestic Terrorism, but a Federal Law Is Still Lacking for Far-Right Extremists*, SOUTHERN POVERTY L. CTR. (July 20, 2018), <https://www.splcenter.org/hatewatch/2018/07/20/taylor-michael-wilson-pleads-guilty-domestic-terrorism-federal-law-still-lacking-far-right> [<https://perma.cc/JDD7-9VHM>] (stating that there are specific attacks characterized as terrorism, such as attacking mass transportation systems, but there is no federal law criminalizing politically motivated violence as domestic terrorism); Ford, *supra* note 11 (stating the charges against the El Paso shooter will not contain the words “domestic terrorism” because the law does not use that language); Mary B. McCord, *It’s Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [<https://perma.cc/A2F8-H6UW>] (noting the lack of a federal statute criminalizing domestic terrorism and explaining the need for one); Ryan J. Reilly, *There’s a Good Reason Feds Don’t Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFINGTON POST (Jan. 11, 2018), [https://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists\\_us\\_5a550158e4b003133cecb74](https://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists_us_5a550158e4b003133cecb74) [<https://perma.cc/58Y7-7JQE>] (paraphrasing Thomas Brzozowski, Department of Justice’s counsel for domestic terrorism matters, explaining that there is no federal statute outlawing the definition of domestic terrorism found in the U.S. Code).

homa City.<sup>14</sup> This changed after September 11, 2001 (9/11), when the main focus of law enforcement in the United States shifted to the threat posed by foreign Islamic extremists.<sup>15</sup> In response to 9/11, drastic measures were taken to combat international threats, and the focus moved away from domestic terrorism.<sup>16</sup> During this time, the threat posed by right-wing extremism was large-

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<sup>14</sup> Jane Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/32QK-88DW>] (describing the focus on domestic terrorism following the Oklahoma City bombing). In 1995, Timothy McVeigh, in response to the government siege in Waco, Texas, parked a truck rigged with explosives outside the Alfred P. Murrah Federal Building in Oklahoma City. Jordan Steiker, *Did the Oklahoma City Bombers Succeed?*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 185, 186 (describing the attack). The attack killed 168 people. *Id.* Timothy McVeigh was executed in 2001; it was the first execution by the federal government in thirty-eight years. Christopher S. Wren, *McVeigh Is Executed for Oklahoma City Bombing*, N.Y. TIMES (June 11, 2001), <https://www.nytimes.com/2001/06/11/national/mcveigh-is-executed-for-oklahoma-city-bombing.html> [<https://perma.cc/4U35-WF9W>] (reporting the execution of Timothy McVeigh). Until the September 11 attacks in 2001, the bombing was the deadliest terrorist attack in United States history. *Oklahoma City Bombing Commemorated*, POLITICO (Apr. 19, 2015), <https://www.politico.com/story/2015/04/oklahoma-city-bombing-commemorated-117123> [<https://perma.cc/XE3A-NC49>] (describing commemoration of the Oklahoma attack and noting it was the deadliest attack in United States history prior to 9/11).

<sup>15</sup> Reitman, *supra* note 14 (stating that the FBI and other federal law enforcement agencies focused on international terrorism following 9/11).

<sup>16</sup> See Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1888 (2004) (describing the passage of the Patriot Act in response to 9/11); Daniel L. Byman, *When to Call a Terrorist a Terrorist*, BROOKINGS (Oct. 29, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/10/29/when-to-call-a-terrorist-a-terrorist/> [<https://perma.cc/76JT-BN5U>] (stating that after 9/11 the United States focused on Islamic extremism and less on right-wing violence). The 9/11 attacks had a profound effect on the nation. Steven Brill, *Is America Any Safer?*, THE ATLANTIC (Sept. 2016), <https://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761/> [<https://perma.cc/TP7F-HC3W>] (describing the reaction and response to the 9/11 attacks). The response to 9/11 was drastic and focused on preventing another attack. See *id.* (detailing the response of the United States to 9/11 and the \$1 trillion spent as of September 2016 to combat terrorism). Following 9/11, President Bush announced that the United States was at war with the terrorists who carried out the attacks. Ackerman, *supra*, at 1871 (quoting President Bush at the 2004 State of the Union as saying “terrorists and their supporters declared war on the United States, and war is what they got”). The United States launched Operation Enduring Freedom in Afghanistan with the goal of destroying al-Qaeda—the terrorist group that orchestrated the attack—and the safe haven the Taliban gave them. Andrew Glass, *U.S. Invades Afghanistan, Oct. 7, 2001*, POLITICO (Oct. 7, 2018), <https://www.politico.com/story/2018/10/07/today-in-politics-oct-7-2001-867332> [<https://perma.cc/89NB-QLZE>] (commemorating the United States’ invasion of Afghanistan). The war has become the longest in the history of the United States, and despite recent calls of President Trump to end the war, there are currently 14,000 troops still deployed in Afghanistan. Josh Dawsey & Don Lamothe, *Trump Wanted a Big Cut in Troops in Afghanistan. New U.S. Military Plans Fall Short*, WASH. POST (Jan. 8, 2019), [https://www.washingtonpost.com/world/national-security/new-plans-for-afghanistan-would-have-trump-withdrawing-fewer-troops/2019/01/08/dfd2858e-12a0-11e9-a896-f104373c7ffd\\_story.html](https://www.washingtonpost.com/world/national-security/new-plans-for-afghanistan-would-have-trump-withdrawing-fewer-troops/2019/01/08/dfd2858e-12a0-11e9-a896-f104373c7ffd_story.html) [<https://perma.cc/Z5YF-PE27>] (noting the large presence of United States troops in Afghanistan). The United States engaged in highly controversial practices in the name of protecting the country, including torture. See Jeremy Ashkenas et al., *7 Key Points from the C.I.A. Torture Report*, N.Y. TIMES (Dec. 9, 2014), <https://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html> [<https://perma.cc/D8HZ-42XH>] (detailing the findings of the investigation into the torture practices of the CIA). There were numer-

ly ignored.<sup>17</sup> Despite the focus on international terrorism, however, right-wing extremism continued to pose a great threat.<sup>18</sup>

Right-wing extremism can be defined as violence perpetrated by people who believe their personal or national way of life is being threatened.<sup>19</sup> Right-wing extremists often hold some or all of the beliefs of anti-globalism, racial supremacy, ethnic supremacy, nationalism, wariness of government, desire for personal liberty, and a belief that their way of life is being threatened.<sup>20</sup> The

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ous, drastic changes made to the government to adjust to the post-9/11 world, including assigning more FBI agents to national security, hiring more Border Patrol agents, reconstructing the air-marshals program, upgrading screening at cargo ports, and creating the Department of Homeland Security (DHS). See generally Brill, *supra* (providing an analysis of the steps the government has taken following 9/11 to combat the threat posed by terrorism). The actions taken by the government have been successful, as there has not been another attack carried out by international terrorists close to the scale of 9/11. Lisa Monaco & Ken Wainstein, *We've Declared War on Foreign Terrorism. Why Not Do the Same for Domestic Threats?*, WASH. POST (Nov. 5, 2018), [https://www.washingtonpost.com/opinions/weve-declared-war-on-foreign-terrorism-why-not-do-the-same-for-domestic-threats/2018/11/05/707c3d5c-e13a-11e8-ab2c-b31dcd53ca6b\\_story.html](https://www.washingtonpost.com/opinions/weve-declared-war-on-foreign-terrorism-why-not-do-the-same-for-domestic-threats/2018/11/05/707c3d5c-e13a-11e8-ab2c-b31dcd53ca6b_story.html) [<https://perma.cc/37J3-EPY9>] (noting that although the efforts of the United States following 9/11 have been successful as to foreign terrorism, the modern threat is radicalized individuals on domestic soil).

<sup>17</sup> S. POVERTY LAW CTR., *AGE OF THE WOLF: A STUDY OF THE RISE OF LONE WOLF AND LEADERLESS RESISTANCE TERRORISM* 4–5 (2015) (stating that after 9/11 the government focused on jihadists). A task force on preventing domestic terrorism established after the Oklahoma City bombing was scheduled to meet the morning of 9/11; the meeting did not happen, and the group remained inactive until Attorney General Eric Holder re-launched it in 2014. Devlin Barrett et al., *Federal Government Has Long Ignored White Supremacist Threats, Critics Say*, WASH. POST (Sept. 2, 2017), [https://www.washingtonpost.com/national/federal-government-has-long-ignored-white-supremacist-threats-critics-say/2017/09/02/bf2ed00c-8698-11e7-961d-2f373b3977ee\\_story.html](https://www.washingtonpost.com/national/federal-government-has-long-ignored-white-supremacist-threats-critics-say/2017/09/02/bf2ed00c-8698-11e7-961d-2f373b3977ee_story.html) [<https://perma.cc/F42A-VNNH>] (describing the government's practice of ignoring domestic terrorism). This was reflective of a trend in the Department of Justice to focus on Islamic terrorism and ignore the threats posed by far-right violence. *Id.* (stating that the majority of the government's resources have focused on Islamic extremists). Terrorism expert Bruce Hoffman describes right-wing extremists as the “least consequential of all [the] terrorist group categories” that engage in “sporadic, and uncoordinated, seemingly mindless violence—fueled as much by beer and bravado as by a discernible political agenda.” BRUCE HOFFMAN, *INSIDE TERRORISM* 230 (rev. and expanded ed., 2006) (describing right-wing violence dismissively, but noting they are not completely random nor unthinkingly indiscriminate).

<sup>18</sup> Reitman, *supra* note 14 (describing the “renaissance” of the “militant far right” during the time the government was focused on combatting foreign Islamic groups).

<sup>19</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *IDEOLOGICAL MOTIVATIONS OF TERRORISM IN THE UNITED STATES, 1970–2016*, at 6 (2017) (describing the beliefs of right-wing extremists). White nationalists tend to believe that the white race is “endangered and face[s] extinction” because of immigration and inter-racial marriage. *Id.*; see also *White Nationalist*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist> [<https://perma.cc/9WA5-E8R7>] (stating that white nationalists promote policies to fight against the loss of a white majority and return to the time before the Civil Rights Movement).

<sup>20</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *supra* note 19, at 6. Anti-globalism is a reaction to globalization, “the network of economic interconnection that became the dominant international system after the Cold War.” Liam Stack, *Alt-Right, Alt-Left, Antifa: A Glossary of Extremist Language*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/alt-left-alt-right-glossary.html> [<https://perma.cc/DS6A-SEFC>] (defining words commonly used by extremists). The alt-right's “xenophobic, anti-immigrant and anti-Semitic” disdain for globalism is related to their fear that greater interconnectivity and openness will destroy their own culture.

rise of right-wing extremism was shown in a Homeland Security Intelligence Report that was largely criticized by Republicans when it was released in 2009.<sup>21</sup>

Domestic terrorism, highlighted by a rise in right-wing inspired attacks, poses a great threat to the United States.<sup>22</sup> A spike in recent high-profile incidents has brought concerns about domestic terrorism back into focus.<sup>23</sup> The current laws of the United States are not adequately equipped to deal with this threat.<sup>24</sup> The lack of a statute criminalizing domestic terrorism and the international focus of many terrorism laws enacted in response to 9/11 leave many homegrown, domestic terrorists subject to criminal statutes unrelated to terrorism.<sup>25</sup> The terror statutes in place are disproportionately used against offenders

*Id.* Hoffman describes right-wing terrorists' fight as being against "social welfare policies and tolerance of diverse opinion—alongside its permitting of dark-skinned immigrants in the national labor force and of Jews and other minorities in positions of power or influence" and belief that "only by becoming politically, racially and culturally homogenous can the state recover its strength and again work for its natural citizens rather than the variegated collection of interlopers and parasites who now sap the nation of its strength and greatness." See HOFFMAN, *supra* note 17, at 236.

<sup>21</sup> See OFFICE OF INTELLIGENCE & ANALYSIS, DEP'T OF HOMELAND SEC., RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009) (warning against the rise of right-wing extremism); see also Dean Obeidallah, *Home-Grown, Right-Wing Terrorism: The Hate the GOP Refuses to See*, DAILY BEAST (June 11, 2014), <https://www.thedailybeast.com/home-grown-right-wing-terrorism-the-hate-the-gop-refuses-to-see> [<https://perma.cc/7BZV-QPLD>] (describing Republican outrage to the Homeland Security intelligence assessment).

<sup>22</sup> See Kimberly Kindy et al., *In the United States, Right-Wing Violence Is on the Rise*, WASH. POST (Nov. 25, 2018), [https://www.washingtonpost.com/national/in-the-united-states-right-wing-violence-is-on-the-rise/2018/11/25/61f7f24a-deb4-11e8-85df-7a6b4d25c9bb\\_story.html](https://www.washingtonpost.com/national/in-the-united-states-right-wing-violence-is-on-the-rise/2018/11/25/61f7f24a-deb4-11e8-85df-7a6b4d25c9bb_story.html) [<https://perma.cc/LJF5-YHE7>] (noting the disproportionate amount of right-wing attacks compared to attacks carried out by Islamic extremists and left-wing extremists).

<sup>23</sup> See generally Bruce Hoffman, *Mail Bombs, Hate Crimes, and the Meaning of Terrorism*, COUNCIL ON FOREIGN REL. (Oct. 30, 2018), <https://www.cfr.org/article/mail-bombs-hate-crimes-and-meaning-terrorism> [<https://perma.cc/HE83-ZYAB>] (explaining the meaning of terrorism under current law in light of recent attacks that have "raised the specter of hate and terrorism in the United States" and intensified public debate).

<sup>24</sup> See Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 262 (2017) (explaining that Dylann Roof was not charged with terrorism because there is not currently a statute criminalizing domestic terrorism); Kindy et al., *supra* note 22 (describing the rise of right-wing violence); McCord, *supra* note 13 (describing the problems posed by the lack of a statute criminalizing domestic terrorism); see also S. POVERTY LAW CTR., *supra* note 17, at 4–5 (describing the government's focus on Islamic extremism).

<sup>25</sup> JEROME P. BJELOPERA, CONG. RESEARCH SERV., DOMESTIC TERRORISM: AN OVERVIEW 5–6 (2017) (stating the government often uses statutes relating to arson, firearms, explosives, fraud, threats, and hoaxes to prosecute perpetrators that the federal government considers to be domestic terrorists because no domestic terror statute exists). Christopher Hasson, a self-proclaimed white nationalist described by prosecutors as a domestic terrorist, pled guilty to charges related to "firearms and the firearm silencers," and possession of the drug tramadol after his arrest for planning to kill "journalists, Democratic politicians, professors, Supreme Court justices and those he described as 'leftists in general.'" Christine Hauser, *Coast Guard Officer Called a 'Domestic Terrorist' Pleads Guilty to Gun and Drug Charges*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/christopher-hasson-coast-guard-white-supremacist.html> [<https://perma.cc/86FN-MVLJ>].

who espouse Islamic extremism, as these individuals can be connected to a foreign terrorist organization, even if they had no contact with that organization.<sup>26</sup> Despite this, there are also Islamic extremists who are able to avoid terrorism charges and are subject to general criminal statutes.<sup>27</sup> To ensure terrorists across the ideological spectrum are treated the same way by the laws of the United States, there must be a domestic terror law that criminalizes all domestic terrorism, no matter the ideology espoused.<sup>28</sup>

Part I of this Note looks at how the law currently addresses the topic of terrorism in the United States.<sup>29</sup> Part II explores the gaps in the law and the effect these gaps have had on high profile incidents.<sup>30</sup> Part III proposes a statute criminalizing domestic terrorism that would more appropriately address the current domestic terror threat the United States faces.<sup>31</sup>

## I. HOW THE LAW HANDLES DOMESTIC TERRORISM

Terrorism has had many faces and ideologies throughout the history of the United States.<sup>32</sup> Today, the terrorism in the United States is in large part pepe-

<sup>26</sup> See David Neiwert, *Far-Right Extremists Have Hatched Far More Terror Plots Than Anyone Else in Recent Years*, REVEAL (June 22, 2017), <https://www.revealnews.org/article/home-is-where-the-hate-is/> [<https://perma.cc/B47W-XZ64>] (describing an Investigative Fund database that catalogues incidents of domestic terrorism, data that shows Islamic extremists were disproportionately charged with terrorism crimes). The ability to connect Islamic extremists to a foreign terrorist organization is relevant because of the material support statute, a widely used statute that criminalizes supporting a foreign terrorist organization and can be used to prosecute supporting the “propaganda apparatus in calls for violence.” See MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUSTICE, *WRONG PRIORITIES ON FIGHTING TERRORISM* 4 (2018) (describing the Department of Justice’s practice of classifying American Muslims as international terrorists because they are inspired by foreign terrorist organizations even if their only connection to a foreign group is reading or watching some form of propaganda); Richard C. Daddario & Brian Michael Jenkins, *Think Mass Shootings Are Terrorism? Careful What You Wish for*, POLITICO (Nov. 7, 2017), <https://www.politico.com/magazine/story/2017/11/07/think-mass-shootings-are-terrorism-careful-what-you-wish-for-215797> [<https://perma.cc/U7Y5-RCMN>] (describing the use of material support statutes and their broad application). In 2015, Muhammad Abdulazeez was labeled a terrorist by then FBI director James Comey and described as being motivated by the propaganda of a foreign terrorist organization after killing three Marines and one member of the Navy in Tennessee. GERMAN & ROBINSON, *supra*, at 4. Abdulazeez was characterized in this way despite having worked independent of any foreign group and dying at the scene without leaving behind a reason for his actions. *Id.* The FBI admitted they did not know which group motivated him. *Id.*

<sup>27</sup> See Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism> [<https://perma.cc/ZT49-AQ8C>] (describing the prosecution of Fort Hood shooter—who espoused a radical Islamic agenda—on general murder charges unrelated to terrorism and other similar cases).

<sup>28</sup> See Byman, *supra* note 16 (stating that who a person kills in the name of does not matter; what matters is that the attacker had a political cause).

<sup>29</sup> See *infra* notes 34–163 and accompanying text.

<sup>30</sup> See *infra* notes 164–244 and accompanying text.

<sup>31</sup> See *infra* notes 245–268 and accompanying text.

<sup>32</sup> See KLANWATCH PROJECT, S. POVERTY LAW CTR., *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (6th ed. 2011) (detailing the activity of the Ku Klux Klan (KKK) in the United States



trated by right-wing extremists.<sup>33</sup> Section A of this Part goes over the statutory definition of domestic terrorism in the United States, the terrorism section of the criminal code, and examines how sentencing guidelines use terrorism to heighten penalties.<sup>34</sup> Section B looks at modern threats of domestic terrorism stemming from within the United States, focusing on the large number of attacks perpetrated by people who espouse ideologies other than radical Islam.<sup>35</sup> Section C looks at the growing threat of “lone wolf” terrorists and the use of the Internet to spread extremist ideologies of all kinds.<sup>36</sup> Section D looks at how the current law has been used to prosecute those attacks.<sup>37</sup> Section E addresses how the lack of an objective legal standard has led to the politicization of who can be classified as a terrorist.<sup>38</sup>

### A. Domestic Terrorism Law in the United States

On October 26, 2001, the 107th Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act).<sup>39</sup> The goal of the Patriot Act was to prevent future terrorist attacks from occurring.<sup>40</sup> The Patriot Act added

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since its inception); Peter Chalk, *U.S. Environmental Groups and ‘Leaderless Resistance,’* RAND CORP. (July 1, 2001), [https://www.rand.org/blog/2001/07/u\\_s\\_-environmental-groups-and-leaderless-resistance.html](https://www.rand.org/blog/2001/07/u_s_-environmental-groups-and-leaderless-resistance.html) [<https://perma.cc/A6VX-4WUE>] (analyzing the threat posed by environmental extremists); Kat Eschner, *How President William McKinley’s Assassination Led to the Modern Secret Service,* SMITHSONIAN (Sept. 14, 2017), <https://www.smithsonianmag.com/smart-news/how-president-william-mckinleys-assassination-led-modern-secret-service-180964868/> [<https://perma.cc/73KA-NQ2C>] (noting that President McKinley was assassinated by an anarchist); *Weather Underground Bombings,* FBI, <https://www.fbi.gov/history/famous-cases/weather-underground-bombings> [<https://perma.cc/QY42-KA2M>] (describing bombings carried out by the left-wing militant group the Weather Underground in the 1970s); *supra* note 16 and accompanying text (describing the United States’ efforts to combat foreign Islamic terror groups following 9/11).

<sup>33</sup> See Reitman, *supra* note 14 (noting that the Anti-Defamation League found seventy-one percent of “extremist-related fatalities in the United States between 2008 and 2017 were committed by members of the far right or white-supremacist movements”).

<sup>34</sup> See *infra* notes 39–80 and accompanying text.

<sup>35</sup> See *infra* notes 81–102 and accompanying text.

<sup>36</sup> See *infra* notes 103–118 and accompanying text.

<sup>37</sup> See *infra* notes 119–137 and accompanying text.

<sup>38</sup> See *infra* notes 138–163 and accompanying text.

<sup>39</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act]. Following 9/11, it was believed that the United States needed more powers to properly carry out the “war on terrorism” and the act was quickly passed by Congress to supply them. Ackerman, *supra* note 16, at 1888.

<sup>40</sup> COMM. ON THE JUDICIARY, PROVIDE APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (PATRIOT) ACT OF 2001, H.R. DOC. NO. 107-236, at 41 (1st Sess. 2001) (noting that the “enhanced law enforcement tools and information sharing-provisions will assist in the prevention of future terrorist activities and the preliminary acts and crimes which further such activities”).

a definition for domestic terrorism to the United States Code.<sup>41</sup> Domestic terrorism is defined as activities that pose a danger to human life and violate the laws of the United States that occur primarily within the United States.<sup>42</sup> The activities must be intended to “intimidate or coerce a civilian population,” influence government policy “by intimidation or coercion,” or affect the activities of the government by “mass destruction, assassination, or kidnapping.”<sup>43</sup> The definition of domestic terrorism is largely the same as the definition of international terrorism, except that the act of terrorism occurs primarily within the United States.<sup>44</sup> The intent for both international and domestic terrorism as defined in the statute are exactly the same and neither require a particular ideological motivation for the terrorist activity.<sup>45</sup>

The Patriot Act gave the government expanded powers in combatting terrorism, but it did not criminalize all the acts that fell within its own definition of terrorism.<sup>46</sup> This has left the government without a statute to prosecute individuals fitting the Patriot Act’s definition of domestic terrorism as domestic

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<sup>41</sup> Patriot Act § 802. This definition is codified in section 2331 of the U.S. Code. 18 U.S.C. § 2331 (2012). “International terrorism” is currently defined as:

[A]ctivities that (A) involve acts or acts dangerous to human life that are a violation of the criminal law of the United States or of any State; (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; (iii) or to affect the conduct of a government by mass destruction, assassination or kidnapping; (C) and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1).

<sup>42</sup> 18 U.S.C. § 2331(5). This definition has received criticism due to the potential to classify activist campaigns as domestic terrorists. See *How the Patriot Act Redefines “Domestic Terrorism,”* ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> [<https://perma.cc/B67U-PVBK>] (describing how the activities of legitimate activist groups such as Greenpeace and the Earth Liberation Front that break the law could potentially pose a danger to human life and be classified as domestic terrorism under the Act, and proposing criminalizing acts that “cause serious physical injury or death” rather than all acts that are dangerous to human life). But see BJELOPERA, *supra* note 25, at 11 (listing the Earth Liberation Front as a domestic terror threat).

<sup>43</sup> 18 U.S.C. § 2331(5).

<sup>44</sup> Compare *id.* (requiring that the act “occur primarily within the territorial jurisdiction of the United States”), with *id.* § 2331(1) (requiring that the act “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum”).

<sup>45</sup> *Id.* §§ 2331(1), (5) (defining intent for both international and domestic terrorism).

<sup>46</sup> See Norris, *supra* note 24, at 278 (describing the Patriot Act’s failure to criminalize acts that fall under the Act’s definition of terrorism, particularly the ideologically motivated shooting carried out by Roof). In addition to providing a definition of domestic terrorism, the Patriot Act contained provisions relating to surveillance, terrorism financing, border protection, investigating terrorism, providing relief for victims of terrorism, and improving the intelligence community. See Patriot Act § 1 (listing the sections of the Act).

terrorists unless they commit one of the enumerated offenses in the Terrorism chapter of the criminal code, which does not include a general anti-terrorism law.<sup>47</sup> Despite renewed calls for the criminalization of domestic terrorism by the public and politicians, the United States still does not have a statute that criminalizes all acts fitting within the Patriot Act's definition.<sup>48</sup>

Subsection 1 of this Section will look at the current federal "anti-terrorism laws."<sup>49</sup> Subsection 2 will look at the use of sentencing enhancements to impose greater punishment on people deemed to be terrorists.<sup>50</sup>

## 1. Federal Terrorism Crimes

Although there is no statute criminalizing domestic terrorism in the United States, there are a number of "anti-terrorism laws."<sup>51</sup> These laws are used to supplement other criminal statutes when prosecuting people accused of engaging in terrorism.<sup>52</sup> Many of these laws focus on international, as opposed to domestic, terrorism.<sup>53</sup> Some of the criminal statutes prohibit specific terroristic

<sup>47</sup> See 18 U.S.C. §§ 2331–2339D (criminalizing specific acts, including: using a weapon of mass destruction; bombing a public place, government facility, public transportation system, or infrastructure facility; using a missile system designed to destroy aircraft; using radiological weapons; and using nuclear devices); Norris, *supra* note 24, at 278 (explaining Roof was not charged with domestic terrorism because there is no law criminalizing domestic terrorism).

<sup>48</sup> See Michael Balsamo & Erick Tucker, *Attacks Renew Debate: Should US Have Domestic Terrorism Law?*, FOX NEWS (Oct. 30, 2018), <https://www.foxnews.com/us/attacks-renew-debate-should-us-have-domestic-terrorism-law> [<https://perma.cc/8W85-NPPL>] (acknowledging the recent debate around the lack of a domestic terror statute and describing the current state of the law); Ariel Edwards-Levy et al., *Americans Are Surprised Domestic Terrorism Isn't a Federal Crime. Most Think It Should Be*, HUFFINGTON POST (Apr. 12, 2018), [https://www.huffingtonpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi\\_us\\_5acd1c78e4b09212968c8907](https://www.huffingtonpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi_us_5acd1c78e4b09212968c8907) [<https://perma.cc/Z5GG-T37A>] (citing a survey conducted by the Huffington Post that found sixty-eight percent of Americans think domestic terrorism should be a crime); McQuade, *supra* note 12 (describing the proposed bills put forth by Senator McSally and Representative Schiff to criminalize domestic terrorism). See generally Rafia Zakaria, *The Law Needs to Catch up with the Reality of Domestic Terrorism*, CNN (Oct. 29, 2018), <https://www.cnn.com/2018/10/29/opinions/domestic-terrorism-legal-limitations-rafia-zakaria/index.html> [<https://perma.cc/9G2G-QD56>] (explaining the need for a domestic terrorism statute in light of recent right-wing extremism and citing officials that agree).

<sup>49</sup> See *infra* notes 51–68 and accompanying text.

<sup>50</sup> See *infra* notes 69–80 and accompanying text.

<sup>51</sup> See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 6 (2008) (providing a summary of the current anti-terrorism laws and the other criminal laws used by law enforcement to combat terrorism).

<sup>52</sup> *Id.* (describing the terrorism statutes in the United States and how they are used alongside other criminal statutes). These laws can be found in Chapter 113B of the United States criminal code. See 18 U.S.C. §§ 2331–2339D.

<sup>53</sup> 18 U.S.C. § 2332 (criminalizing murder or conspiracy to murder or cause serious bodily injury of a United States national outside the United States); *id.* § 2332D (criminalizing financial transactions with a country that has been designated as one that supports international terrorism); *id.* § 2333 (providing civil remedies for victims of international terrorism); *id.* § 2334 (providing jurisdiction for § 2333); *id.* § 2335 (providing statute of limitations for actions brought under § 2333); *id.* § 2336

actions such as the use of nuclear weapons and other weapons of mass destruction.<sup>54</sup> In the statutes prohibiting certain actions, the domestic components have caveats relating to interstate commerce in order to establish federal jurisdiction that the international components do not have.<sup>55</sup> The Animal Enterprise Terrorism Act, enacted in 2006, specifically provides for the criminalization of terrorism aimed at an organization that sells or uses animals.<sup>56</sup> The Animal En-

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(providing other limitations to § 2333); *id.* § 2337 (limiting action against the United States or foreign countries under § 2333); *id.* § 2339D (criminalizing the reception of military-type training from or on behalf of a foreign terrorist organization).

<sup>54</sup> *Id.* § 2332A (criminalizing use or attempted use of a weapon of mass destruction); *id.* § 2332B (criminalizing terrorism that transcends national boundaries); *id.* § 2332F (criminalizing the bombing of government facilities, public places, public transportation, and infrastructure); *id.* § 2332G (criminalizing the use, possession, transfer, or production of “missile systems designed to destroy aircraft”); *id.* § 2332H (criminalizing the possession, use, creation, or transfer of weapons that release radiation); *id.* § 2332I (criminalizing the possession, use, or threat to use nuclear weapons); *id.* § 1992 (criminalizing terrorist attacks against railroads or other mass transportation systems).

<sup>55</sup> *Id.* § 2332A (limiting jurisdiction for acts within the United States based on connection to or effect on interstate commerce); *id.* § 2332F (same); *id.* § 2332G (same); *id.* § 2332H (same). Section 2332I does not contain these caveats. *See id.* § 2332I (granting jurisdiction if the specified conduct takes place within the United States). The Supreme Court has said these jurisdictional limitations require a finding that the matter has a substantial impact on interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 567 (1995) (stating that possession of a gun at school does not affect interstate commerce and to hold so would convert authority under the Commerce Clause into general police power). It is not clear how significant of a hurdle these limitations are to terrorist prosecutions, as shown by the conviction of Dzhokhar Tsarnaev under 18 U.S.C. § 2332A. *See Criminal Complaint at 1–3, United States v. Tsarnaev*, 945 F. Supp. 2d 230 (D. Mass. 2013) (13-2106-MBB) (stating the bombing had a “substantial impact on interstate and foreign commerce” because the attack forced the Boston Marathon to end early and forced many businesses in the area to close for multiple days); *see also* John Carney, *Why the Boston Marathon Attack Is a Federal Crime*, CNBC (Apr. 22, 2013), <https://www.cnn.com/id/100662216> [<https://perma.cc/9D6N-RGZE>] (noting the affidavit of the FBI agent in the criminal complaint emphasizes the commercial impact of the bombing because there is no evidence Tsarnaev did any traveling outside Massachusetts to carry out the attack).

<sup>56</sup> Animal Enterprise Terrorism Act, Pub. L. 109-374, 120 Stat. 2652 (2006) (codified as amended at 18 U.S.C. § 43) (expanding the authority of the Department of Justice to combat and prosecute animal enterprise terrorism). The law criminalizes damaging property of an animal enterprise or someone associated with an animal enterprise, or places a person associated with an animal enterprise or their relatives in reasonable fear of death or serious bodily injury with the intent to damage or disrupt the operations of the animal enterprise. 18 U.S.C. § 43(a). The Act provides for different penalties depending on the level of economic damage caused and whether or not a person suffered serious bodily injury or was placed in reasonable fear of suffering seriously bodily injury. *Id.* § 43(b). For jurisdictional purposes, the person must use a facility of interstate or foreign commerce—such as the mail—or travel in interstate or foreign commerce for the purpose of engaging in the conduct covered by the Act. *Id.* § 43(a). This Act has been criticized for criminalizing non-violent acts as terrorism. *See* Ed Pilkington, *Animal Rights ‘Terrorists’? Legality of Industry-Friendly Law to Be Challenged*, THE GUARDIAN (Feb. 19, 2015), <https://www.theguardian.com/us-news/2015/feb/19/animal-rights-activists-challenge-federal-terrorism-charges> [<https://perma.cc/MC26-5VEP>] (describing the charges against Kevin Johnson and Tyler Lang for terrorism under the Act for releasing 2,000 mink from cages, which their lawyers argued was an “inappropriate use of the concept of terrorism that threatens to stop free speech across the animal rights movement”).

terprise Act is the only statute specifically aimed at domestic terrorism.<sup>57</sup>

Sections 2339A and 2339B of Chapter 18 of the U.S. Code are two of the most commonly used terrorism statutes.<sup>58</sup> Section 2339A criminalizes providing or concealing “material support” with the intention that the support be used for a violation of a number of listed statutes.<sup>59</sup> Section 2339B is also a “material support” statute, but prohibits providing such support for any “foreign terrorist organization.”<sup>60</sup> The statutes do not require that the perpetrator have an intent to support terrorism—just the knowledge that those whom they are supporting are engaged in terrorism.<sup>61</sup> “Material support or resources,” as defined by the statutes, is extremely broad and encompasses any property or service with the exception of medicine or religious materials.<sup>62</sup> The acts of support need not be criminal themselves.<sup>63</sup> Section 2339 criminalizes “harboring or concealing terrorists,” but lists certain statutes the person being concealed has to have violated or is about to violate rather than using the definitions of terror-

<sup>57</sup> BJELOPERA, *supra* note 25, at 5 (stating that no existing federal statute criminalizes domestic terrorism, but that the Animal Enterprise Act is aimed at combating animal enterprise terrorism).

<sup>58</sup> Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 5–6 (2005) (stating that the material support statutes have often been used since 9/11); Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SECURITY L. & POL’Y 297, 297 (2008) (describing the laws implemented following the 1993 World Trade Center Bombing and referring to 18 U.S.C. §§ 2339A and 2339B as sections used more often than others).

<sup>59</sup> 18 U.S.C. § 2339A. The statutes listed in § 2339A are “specified crimes of terrorism.” Abrams, *supra* note 58, at 6. These statutes include, but are not limited to, prohibitions on developing chemical weapons (§ 229), damaging property of the United States (§ 1361), obstructing the national defense of the United States (§ 2155), and committing torture (§ 2340A) among others. 18 U.S.C. § 2339A (listing applicable statutes).

<sup>60</sup> 18 U.S.C. § 2339B. The statute defines “terrorist organization” as a group classified as a terrorist organization under section 219 of the Immigration and Nationality Act. *Id.* § 2339B(g)(6).

<sup>61</sup> *Id.* § 2339A (“knowing or intending that they are to be used”); *id.* § 2339B (“whoever knowingly provides material support or resources to a foreign terrorist organization”); Abrams, *supra* note 58, at 6 (describing the mental state required to violate the acts).

<sup>62</sup> 18 U.S.C. § 2339A(b)(1) (defining material support or resources as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”); *id.* § 2339B(g)(4) (stating that the definition of material support is the same as in § 2339A). The statutes cover a wide spectrum of conduct and can be used to prosecute non-violent acts that do not provide any real benefit to a terrorist organization or act. Kelly Berkell, *Off-Ramp Opportunities in Material Support Cases*, 8 HARV. NAT’L SECURITY J. 1, 21–22 (2017) (describing the applicability of material support statutes); *see, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 4, 35–36 (2010) (finding the material support statute did not violate the free speech rights of two U.S. citizens and six domestic organizations that violated the statute by providing support such as monetary contributions, legal training, and political advocacy for the humanitarian and political activities of the PKK and LTTE, two terrorist organizations).

<sup>63</sup> Abrams, *supra* note 58, at 6 (stating that the actions involved may be “minimal and outwardly non-criminal acts”).

ism provided in Section 2331 of the chapter.<sup>64</sup> Section 2332B defines the term “federal crime of terrorism” for the purpose of granting investigative authority of such crimes to the Attorney General, but does not actually establish a federal crime of terrorism.<sup>65</sup> The definition of “federal crime of terrorism” is used in sentencing guidelines and will be looked at in more depth in the next Subsection.<sup>66</sup>

The current terrorism laws in the United States could be drastically changed by two proposed bills that would criminalize domestic terrorism.<sup>67</sup> Both bills propose adding a section to Chapter 113B that criminalizes domestic terrorism, borrowing from the language of Section 2331 which currently defines, but does not criminalize, domestic terrorism.<sup>68</sup>

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<sup>64</sup> 18 U.S.C. § 2339 (criminalizing concealing or harboring an individual who committed or is about to commit one of a number of listed statutes including violence against maritime navigation, arson and bombing of government property, and weapons of mass destruction, among others).

<sup>65</sup> *Id.* § 2332B (defining federal crimes of terrorism and authorizing the Attorney General to investigate such crimes). For the purposes of § 2332B, a federal crime of terrorism is defined as an offense “that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” that is in violation of one of the statutes listed in the section. *Id.* Notably, the section’s definition only includes acts that are intended to have an effect on government; it does not mention civilian populations. *See id.* (defining a federal crime of terrorism as one “calculated to influence or affect the conduct of government”).

<sup>66</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 n.1 (U.S. SENTENCING COMM’N 2018) (stating that for the purpose of the sentencing guidelines the definition of “federal crime of terrorism” in 18 U.S.C. § 2332B applies).

<sup>67</sup> *See* McQuade, *supra* note 12 (describing proposed bills to criminalize domestic terrorism). Senator McCally and Representative Schiff have separately proposed criminalizing domestic terrorism, but their bills are almost identical. *Id.*

<sup>68</sup> *Id.* The Senate bill proposed by Senator McCally would amend the U.S. Code to provide for varying levels of punishment for individuals who commit certain offenses, including:

Whoever, in 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—(1) kills any person . . . (2) kidnaps any person . . . (3) assaults any person with a deadly or dangerous weapon . . . (4) assaults any person in which serious bodily injury results therefrom . . . (5) creates 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 . . .

OLL19717, 116th Cong. 1st Sess. § 1(a) (2019) (discussion draft). The bill would also criminalize attempting or conspiring to commit any of the offenses contained therein. *Id.* For the statute to apply, the offense must occur “against any person or property within the United States” and use or have an effect on interstate commerce; against the United States government; against United States property; or against “property within the United States that is owned, leased, or used by a foreign government.” *Id.* The statute also amends 18 U.S.C. § 2339A to include the crime of domestic terrorism. *Id.* § 1(c). The bill also calls for an annual joint report on domestic terrorism submitted by the Attorney General, the Director of the FBI, and the Secretary of Homeland Security. *Id.* § 2(a). The crime of domestic terrorism in the House Bill proposed by Representative Schiff is almost identical to the Senate Bill. *See* H.R. 4192, 116th Cong. 1st Sess. § 2(a) (2019). The proposed House Bill provides for more protections against abuse. *See id.* It provides a limitation that no person can be prosecuted under the proposed Act without “written certification of the Attorney General or the highest-ranking subordinate of the Attorney General with responsibility for criminal prosecutions of the offenses in this chapter that,

## 2. Sentencing Enhancements

Although there is no statute criminalizing domestic terrorism in the United States, sentencing enhancements have been used to further punish those who engage in it, but are convicted of general criminal statutes.<sup>69</sup> Following the 1995 Oklahoma City Bombing, Congress expanded 18 U.S.C. § 3A1.4 to apply to domestic terrorism.<sup>70</sup> United States sentencing guidelines state that if the defendant is convicted of a felony that included or was meant to support a “federal crime of terrorism,” the sentence given should be more severe.<sup>71</sup> The sentencing guideline uses the definition of “federal crime of terrorism” established in 18 U.S.C. § 2332B.<sup>72</sup> Since the sentencing guidelines use this narrower definition, it is not as broad as the definition of domestic terrorism found in Section 2331.<sup>73</sup> The Patriot Act expanded the enhancement to include other offenses such as concealing a terrorist and obstructing an investigation into terrorism.<sup>74</sup> These notes allow for an upward departure from the guidelines in certain circumstances, allowing for its application to crimes not enumerated in the definition of “federal crime of terrorism” and attacks intended to influence

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in the judgement of the certifying official,” the offense was intended to further an ideological goal. *See id.* While Senator McCally’s proposal calls for an annual report on domestic terrorism in the country, Representative Schiff’s proposed bill calls for a report on civil liberties. *See id.* § 2(e)(1). It states that within four years of the Act’s enactment, the Privacy and Civil Liberties Oversight Board established by the Intelligence Reform and Terrorism Prevention Act of 2004 must publish a public report “on any civil liberties issues arising from the implementation” of the Act. *Id.*

<sup>69</sup> Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1526 (2017) (stating that defendants convicted for “terrorism-related conduct” have been given very long sentences due to section 3A1.4 of the sentencing guidelines).

<sup>70</sup> *Id.* at 1527 (stating that the enhancement was expanded to cover domestic terrorism in 1996); James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 LAW & INEQ. 51, 60 (2010) (describing the changes to the sentencing enhancement after the Oklahoma City Bombing).

<sup>71</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a). The enhancement can have a very large effect on the suggested sentence. *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 480 (2014) (stating that if the offense is found to be a federal crime of terrorism it triggers a “greatly enhanced punishment”).

<sup>72</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 n.1 (providing for increased offense levels for an offense that “involved, or was intended to promote, a federal crime of terrorism”).

<sup>73</sup> *See* Norris, *supra* note 24, at 279 (describing the differences between the definition of domestic terrorism found in 18 U.S.C. § 2331 and the definition of “federal crime of terrorism” found in § 2332B). “Federal crime of terrorism” does not include offenses where the intent is to influence the civilian population, only the government. 18 U.S.C. § 2332B. In addition to this limitation, one of the offenses enumerated in the statute must have been committed. *Id.*

<sup>74</sup> Ahmed, *supra* note 69, at 1527–28 (stating the Patriot Act made the enhancement applicable to terrorism-related offenses including “(1) crimes involving terrorism but not falling within the statutory definition of ‘federal crime of terrorism’; (2) obstructing an investigation of a federal crime of terrorism; (3) harboring or concealing a terrorist; and (4) intending to influence the government’s conduct by intimidation or coercion, retaliate against government conduct, or influence a civilian population by intimidation or coercion”); McLoughlin, *supra* note 70, at 61 (describing the changes the Patriot Act made to the guidelines).

a civilian population.<sup>75</sup> Section 3A1.4 does not consider the harm the individual defendant was responsible for; the crime at issue may be a rudimentary step in the planning process.<sup>76</sup>

There is also an aggravating factor concerning terrorism when juries consider whether or not to sentence the defendant to death.<sup>77</sup> When the offense at issue is homicide, an aggravating factor is whether the defendant planned and premeditated an act of terrorism.<sup>78</sup> Non-statutory aggravating factors are also considered by the capital jury.<sup>79</sup> Non-statutory factors relating to the defendant's purported terrorist activities have been used when considering the imposition of the death penalty.<sup>80</sup>

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<sup>75</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 n.4 (stating that there can be an upward departure from the guidelines if the act was intended to influence the government, but was not covered by one of the enumerated statutes, and if the act was covered by one of the enumerated statutes, but was intended to influence a civilian population rather than the government); Norris, *supra* note 24, at 281–82 (describing the circumstances in which an upward departure from the guidelines is allowed).

<sup>76</sup> Ahmed, *supra* note 69, at 1530 (stating that the terrorism enhancements do not account for whether or not the defendant's actions caused harm); George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517, 539 (2014) (describing the broad applicability of the sentencing enhancement and its applicability to “inchoate steps along the way to acts of terrorism”).

<sup>77</sup> Norris, *supra* note 24, at 282–83 (describing the aggravating factor for the death penalty).

<sup>78</sup> 18 U.S.C. § 3592(c)(9). This section of the law does not say a federal crime of terrorism, and no definition of terrorism is given. *See id.* (omitting a definition of terrorism).

<sup>79</sup> CHARLES DOYLE, CONG. RESEARCH SERV., FEDERAL CAPITAL OFFENSES: AN OVERVIEW OF SUBSTANTIVE AND PROCEDURAL LAW 16 (2011) (stating that the Federal Death Penalty Act allows non-statutory aggregating factors to be considered, although the jury must agree on at least one statutory aggravating factor to sentence the defendant to death). Non-statutory aggravating factors are “approved by an individual court in a specific case but not listed in the jurisdiction's death penalty statute.” Jeffrey L. Kircheier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 375 (1998). Courts are allowed to “consider a wide range of non-statutory factors.” *Id.* at 376. There is a limitless amount of potential non-statutory aggravating factors. *Id.* at 379. There are fears that the limitless potential of non-statutory aggravating factors may lead to “unfettered jury discretion.” *Id.* at 381.

<sup>80</sup> *See* Penalty Phase Jury Verdict at 12–13, *United States v. Tsarnaev*, 53 F. Supp. 3d 450 (D. Mass. June 27, 2013) (13–10200–GAO) (listing aggravating factors including two related to terrorism, whether “in conjunction with committing acts of violent terrorism, Dzhokhar Tsarnaev made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States” and whether “Dzhokhar Tsarnaev targeted the Boston Marathon, an iconic event that draws large crowds of men, women, and children to its final stretch, making it especially susceptible to the act and effects of terrorism”). The jury had to unanimously find that each factor was proven “beyond a reasonable doubt with regard to all the applicable counts.” *Id.* The jury found such regarding the targeting of the Boston Marathon, but did not regarding the statements encouraging additional acts. *Id.*



### B. Terrorism in the United States Since 9/11

It is difficult to definitively determine the number of domestic terror incidents in the United States.<sup>81</sup> The United States government does not publish an official and public list of domestic terrorist organizations.<sup>82</sup> Additionally, since many individuals, who would be considered domestic terrorists by federal agencies, are often charged with crimes unrelated to terrorism, it is difficult to determine how many terrorist incidents there are.<sup>83</sup> The Federal Bureau of Investigation's (FBI) Most Wanted list of domestic terrorists contains twelve individuals, only one of whom, an alleged member of the Earth Liberation Front, is wanted for an action that took place after 9/11.<sup>84</sup> While there is no official list of organizations or individuals considered domestic terrorists, the Department of Justice has published a list of domestic terrorism threats in a white paper from 2006.<sup>85</sup> The threats listed are animal rights extremists, eco-terrorists, anarchists, anti-government extremists, black separatists, white supremacists, and anti-abortion extremists.<sup>86</sup> As noted in a Congressional Re-

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<sup>81</sup> See BJELOPERA, *supra* note 25, at 5 (describing the difficulty of assessing domestic terrorism trends in the United States).

<sup>82</sup> *Id.* at 9. This is not true of foreign organizations which can be officially designated as foreign terrorist organizations by the Secretary of State pursuant to Section 219 of the Immigration and Nationality Act. *Id.* at 9–10. There are currently sixty-eight organizations designated as foreign terrorist organizations by the Secretary of State. *Foreign Terrorist Organizations*, U.S. DEP'T STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/LM4G-N79M>] (listing foreign terrorist organizations, including the recently designated Islamic Revolutionary Guard Corps).

<sup>83</sup> See BJELOPERA, *supra* note 25, at 5 (describing the difficulty of counting terrorism cases without a federal statute criminalizing domestic terrorism). There are times when individuals the FBI considers domestic terrorists do not violate federal crimes, resulting in a state handling the case which makes it more difficult to fully grasp the scope of domestic terrorism in the United States. *Id.* at 5–6.

<sup>84</sup> *FBI Most Wanted, Domestic Terrorism*, FBI, <https://www.fbi.gov/wanted/dt> [<https://perma.cc/MM8V-QRDC>]. The list includes Donna Joan Borup for a violent anti-apartheid demonstration in 1981, George Edward Wright for the 1972 hijacking of a plane, Josephine Sunshine Overaker who was indicted in 2006 for her activity with the Earth Liberation Front dating back to 1996, Cheri Laverne Dalton for her role in a 1981 bank robbery, Catherine Marie Kerkow for her role in the 1972 hijacking of a plane, Elizabeth Anna Duke for her involvement with a communist organization in the 1970s and 1980s, Leo Frederick Burt for his involvement with a bombing in 1970, William Morales for his involvement with an extremist Puerto Rican independence organization in the 1970s and 1980s, Ishmail Muslim Ali for the hijacking of a plane in 1984, Jose Espinosa Caballero for his involvement in the hijacking of a plane in 1980, Eduardo Guerra Jimenez for his role in the hijacking of a plane in 1979, and Ambrose Henry Montfort for his role in the 1983 hijacking of a plane. *Id.*

<sup>85</sup> BJELOPERA, *supra* note 25, at 10.

<sup>86</sup> DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 59 (2006) (listing domestic terror threats). Islamic extremism is not listed as a domestic terrorism threat because the FBI only classifies groups with American inspired ideology as domestic terrorists. See BJELOPERA, *supra* note 25, at 4 (describing the FBI's definition and stating the FBI's shorthand definition of domestic terrorism is "Americans attacking Americans based on U.S.-based extremist ideologies"). Despite this, when noting the importance of fighting domestic terrorism, the Department of Justice's white paper references the attack on the British subway system as an example of "individuals disaffected from mainstream society who are turning to terrorism." See DEP'T OF JUSTICE, *supra*, at 59. The attackers espoused an Islamic extremist ideology. See *Seven Years Since 7/7*, THE ECONOMIST (July 6, 2012), <https://www>.

search Service report from 2017, one of the only public sources where the FBI lists and describes domestic terrorism ideologies is a website for teenagers titled “Don’t Be a Puppet.”<sup>87</sup>

Although the federal government does not provide a list of domestic terrorism organizations or incidents, there are a number of private organizations that have documented domestic terrorism in the United States.<sup>88</sup> The National Consortium for the Study of Terrorism and Responses to Terrorism (START) publishes the Global Terrorism Database, which contains information on terrorist attacks that have occurred around the world.<sup>89</sup> START research has

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economist.com/blightly/2012/07/06/seven-years-since-7/7 [https://perma.cc/DM6J-X93M] (describing the London underground bombings on July 7, 2005, known as the 7/7 attacks). This indicates that they would not fall under the Department of Justice’s own definition of domestic terrorism, even though they are discussed in the white paper’s section on domestic terrorism. See DEP’T OF JUSTICE, *supra*, at 59 (“As with the British homegrown terrorists who bombed the London subway system, an increasing number of investigations indicate that we share this problem of individuals disaffected from mainstream society who are turning to terrorism.”); BJELOPERA, *supra* note 25, at 4 (describing the FBI’s definition of domestic terrorism). There are ideologies that have inspired attacks not included in the list of threats, including incel extremists. See DEP’T OF JUSTICE, *supra*, at 59 (listing examples of threats of domestic terrorism); Hailey Branson-Potts & Richard Winton, *How Elliot Rodger Went from Misfit Mass Murderer to ‘Saint’ for Group of Misogynists—and Suspected Toronto Killer*, L.A. TIMES (Apr. 26, 2018), <https://www.latimes.com/local/lanow/la-me-ln-elliott-rodger-incel-20180426-story.html> [https://perma.cc/TT9W-YA9E] (detailing the attack of Elliot Rodger in California and describing the incel belief that women who deny them sex are committing a crime).

<sup>87</sup> BJELOPERA, *supra* note 25, at 10 n.55 (describing the Don’t Be a Puppet website); see also *Don’t Be a Puppet*, FBI, <https://cve.fbi.gov/whatare/?state=domestic> [https://perma.cc/L2KG-DKTD] (listing sovereign citizen extremists, animal rights extremists, environmental extremists, anarchist extremists, abortion extremists, militia extremists and white supremacy extremists). The Don’t Be a Puppet page does not list black separatists as a domestic extremist ideology, and lists abortion extremists from various ideologies instead of just anti-abortion extremists. See *Don’t Be a Puppet*, *supra*. The website does not list any particular groups that commit crimes to advance those ideologies. See *id.*

<sup>88</sup> See Richard E. Berkebile, *What Is Domestic Terrorism? A Method for Classifying Events from the Global Terrorism Database*, 29 TERRORISM & POL. VIOLENCE 1, 2 (2017) (listing Extremist Crime Database and American Terrorism Study as two databases on domestic terrorism in America); *About the GTD*, GLOBAL TERRORISM DATABASE, <https://www.start.umd.edu/gtd/about/> [https://perma.cc/S3SM-LLLN] (describing the database as a collection of terrorist attacks around the world and claiming to be “the most comprehensive unclassified database” relating to terrorist attacks in the world); *Terrorism in America After 9/11*, NEW AM., <https://www.newamerica.org/in-depth/terrorism-in-america/> [https://perma.cc/E25R-WLK4] (describing itself as “a comprehensive, up-to-date source of online information about terrorist activity in the United States and by Americans overseas since 9/11).

<sup>89</sup> *About the GTD*, *supra* note 88. From 2012 to 2017, the Global Terrorism Database was funded by DHS and the U.S. State Department. GLOBAL TERRORISM DATABASE, [https://www.start.umd.edu/gtd/?\\_sm\\_au\\_=iVVWLZqH8Wrk5Hq](https://www.start.umd.edu/gtd/?_sm_au_=iVVWLZqH8Wrk5Hq) [https://perma.cc/D4H6-HC5L]. The State Department recently took away the Database’s funding. Erin Miller, *Message from the Global Terrorism Database Manager*, START (Aug. 15, 2018), <https://www.start.umd.edu/news/message-global-terrorism-database-manager> [https://perma.cc/3UG3-C7PX] (informing users of the loss of funding despite only positive feedback from the Bureau of Counterterrorism). The Database does not explicitly differentiate between domestic and international terrorism, but one can manipulate the dataset to view domestic ter-

shown that the attacks from the past two decades have been consistent with the pattern in the United States since the 1970s of many non-lethal attacks that are highlighted by a few mass casualty incidents.<sup>90</sup> According to START, 3,187 Americans died from terrorism in the United States, the vast majority on 9/11 when 913 Americans lost their lives.<sup>91</sup> Between 2002 and 2009, twenty-one Americans died from terrorist attacks on U.S. soil.<sup>92</sup> During this time, according to START's Global Terrorism Database there were a total of 140 terrorist incidents, 108 of which were considered successful.<sup>93</sup> From 2010 to 2017 that number drastically increased to 253 deaths.<sup>94</sup> According to the Global Terror-

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ror. See Berkebile, *supra* note 88, at 4 (explaining the Global Terrorism Database and the ability of researchers to refine the data).

<sup>90</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *supra* note 19, at 5 (describing the pattern of lethality in attacks). Ninety-one percent of the attacks in the United States between 1970 and 2016 have been non-lethal. *Id.*

<sup>91</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, AMERICAN DEATHS IN TERRORIST ATTACKS, 1995-2017 (2018) (listing American deaths by year). The data set does not differentiate between international and domestic terror incidents. See *id.* (stating the numbers represent total number of terrorist attacks).

<sup>92</sup> *Id.*

<sup>93</sup> See *Search Results for Attacks 2002-2009*, GLOBAL TERRORISM DATABASE, <https://bit.ly/31bz31L> [<https://perma.cc/6DKS-LMBA>] (searching for all attacks between 2002 and 2009 that took place in the United States); *Search Results for Successful Attacks 2002-2009*, GLOBAL TERRORISM DATABASE, <https://bit.ly/2O6Llms> [<https://perma.cc/4XFE-5D4G>] (searching for successful attacks between 2002 and 2009 that took place in the United States). The database does not list the nationality of the perpetrator of incidents and sometimes cannot identify the perpetrator, so it is not clear from the data how many of these incidents were domestic. Berkebile, *supra* note 88, at 13.

<sup>94</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, *supra* note 91. Two high-casualty incidents inflate the number of deaths in this time: the killing of fifty-four Americans in Las Vegas by Stephen Paddock and the killing of fifty people at Pulse Night Club in Orlando—though it is not clear how many victims of these incidents were American citizens. See David Agren, *Orlando Shooting: At Least Four Mexicans Among the Dead*, THE GUARDIAN (June 14, 2016), <https://www.theguardian.com/us-news/2016/jun/14/orlando-shooting-pulse-attack-four-mexicans-among-the-dead> [<https://perma.cc/2LQN-8QGH>] (stating there were at least four victims from Mexico); Fiona Ortiz & Letitia Stein, *Hispanics Shaken by Heavy Toll at Orlando Club Massacre*, REUTERS (June 13, 2016), <https://www.reuters.com/article/us-florida-shooting-latinos/hispanics-shaken-by-heavy-toll-at-orlando-club-massacre-idUSKCN0YZ22GH> [<https://perma.cc/V8MJ-J439>] (stating the Dominican foreign relations ministry confirmed one victim was from the Dominican Republic); *Coroner Releases Names of All 58 Las Vegas Shooting Victims*, LAS VEGAS SUN (Oct. 6, 2017), <https://lasvegassun.com/news/2017/oct/05/coroner-releases-names-all-58-las-vegas-shooting/> [<https://perma.cc/5EZ4-96XG>] (listing the fifty-eight people who died in the massacre and noting four of them were Canadian). This number may be an overestimate; no clear motive has been found in the Las Vegas attack, but the Global Terrorism Database classifies it as terrorism. See *GTD ID: 201710010018*, GLOBAL TERRORISM DATABASE, <https://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=201710010018> [<https://perma.cc/JH2J-EJ2P>] (describing the attack and classifying it as unambiguously terrorism); see also Jason Wilson, *New Documents Suggest Las Vegas Shooter Was Conspiracy Theorist—What We Know*, THE GUARDIAN (May 19, 2018), <https://www.theguardian.com/us-news/2018/may/19/stephen-paddock-las-vegas-shooter-conspiracy-theories-documents-explained> [<https://perma.cc/5MU3-6Q56>] (stating Paddock held anti-government beliefs). But see JOSEPH LOMBARDO, SHERIFF, LVMPD PRELIMINARY INVESTIGATIVE REPORT 1 OCTOBER / MASS CASUALTY SHOOTING 52 (2018) (stating that there is no evidence that Paddock carried out the attack in the name of a specific

ism Database, there were 267 terrorist incidents during this time, 233 of which were successful.<sup>95</sup> According to a Washington Post analysis of the Global Terrorism Database, ninety-two of these incidents were committed by right-wing extremists, thirty-eight were carried out by Islamic extremists, thirty-four were committed by left-wing extremists, and the remaining were carried out by attackers whose motives were unknown or unclear.<sup>96</sup> According to START's analysis of their Extremist Crime Database, since 9/11 through 2016, there were thirty-one events of Islamic extremism resulting in 119 deaths compared to eighty-nine events of far-right extremism resulting in 158 deaths.<sup>97</sup>

The Investigative Fund at the Nation Institute, together with Reveal at the Center for Investigative Reporting, published a study collecting data on domestic terrorism over a span of nine years, from 2008 to 2016.<sup>98</sup> The Center states there were sixty-three incidents of Islamic extremism inspired domestic terrorism, 66% of which were unsuccessful.<sup>99</sup> Over the same period of time, the Center documented 115 incidents of right-wing inspired domestic terrorism, 35% of which were unsuccessful.<sup>100</sup> The right-wing inspired incidents during this time resulted in death 33% of the time, compared to 13% of the

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ideology or terrorist organization, and he left no manifesto or rationale for the attack); Jennifer Medina & Julie Turkewitz, *Las Vegas Police Release Final Report on Massacre, With Still No Idea of Motive*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/us/las-vegas-shooting-final-report.html> [<https://perma.cc/W5GZ-F82E>] (describing the final report and the lack of any signs for a motive for the attack).

<sup>95</sup> See *Search Results for Attacks 2010-2017*, GLOBAL TERRORISM DATABASE, <https://bit.ly/2uELbvM> [<https://perma.cc/EEW3-7T5W>] (searching for all attacks between 2010 and 2017 in the United States); *Search Results for Successful Attacks 2010-2017*, GLOBAL TERRORISM DATABASE, <https://bit.ly/36Ewc2t> [<https://perma.cc/VP7N-FSM3>] (searching for all successful attacks between 2010 and 2017 in the United States).

<sup>96</sup> Kindy, *supra* note 22.

<sup>97</sup> NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM & RESPONSES TO TERRORISM, ISLAMIST AND FAR-RIGHT HOMICIDES IN THE UNITED STATES (2017) (listing deaths from Islamist and far-right attacks).

<sup>98</sup> Darren Ankrom et al., *Homegrown Terror*, REVEAL (June 22, 2017), <https://apps.revealnews.org/homegrown-terror> [<https://perma.cc/34BD-X3H2>] (describing the study). The Center for Investigative Reporting was founded in 1977 and claims to be one of the most credible media organizations in the country. *About Us*, REVEAL, <https://www.revealnews.org/about-us/> [<https://perma.cc/MTL5-CLR6>]. The Center publishes their reporting on the "Reveal" website. *Id.* The Investigative Fund at the Nation Institute has been renamed Type Investigations. *Mission*, TYPE INVESTIGATIONS, <https://www.typeinvestigations.org/about/mission/> [<https://perma.cc/X4VD-T9W9>]. Type Investigations is an organization that works with independent reporters. *Id.* David Neiwert has provided the sources used in the study and the methodology of deciding whether an incident qualified as terrorism. See generally David Neiwert, *How We Analyzed Domestic Terror Incidents*, REVEAL (June 22, 2017), <https://www.revealnews.org/blog/how-we-analyzed-domestic-terror-incidents/> [<https://perma.cc/M5QL-6Q9B>] (describing the methodology of the study).

<sup>99</sup> Neiwert, *supra* note 26.

<sup>100</sup> *Id.*

Islamic extremist inspired incidents.<sup>101</sup> The study noted that there were only nineteen left-wing inspired events that resulted in seven deaths.<sup>102</sup>

### C. Wolves on the Internet

One trend in terrorist attacks is the rise of “lone wolf terrorism.”<sup>103</sup> In 2011, President Obama stated that lone wolf terrorists pose a greater threat to the United States than a large-scale attack by a group.<sup>104</sup> Similar to the term terrorism, “lone wolf terrorism” lacks a precise definition.<sup>105</sup> Despite this, many definitions embrace the notion that a “lone wolf terrorist” is one that acts entirely on his or her own to further an ideology, even if that ideology is held by a larger group.<sup>106</sup> There have been a number of high profile attacks where the attackers were motivated by Islamic extremism espoused by groups like ISIS and al-Qaeda, but unlike 9/11, many of the perpetrators have been American nationals with no actual connection to the groups.<sup>107</sup> Lone wolves also play

<sup>101</sup> *Id.* The study notes that Islamist inspired incidents resulted in more deaths in large part due to the mass shooting at Fort Hood. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 187, 193 (2018) (stating that there has been a 143% increase in lone wolf terrorist attacks from 1970 to the 2000s); Daniel L. Byman, *How to Hunt a Lone Wolf: Countering Terrorists Who Act on Their Own*, BROOKINGS (Feb. 14, 2017), <https://www.brookings.edu/opinions/how-to-hunt-a-lone-wolf-countering-terrorists-who-act-on-their-own/> [https://perma.cc/JVM7-LHWV].

<sup>104</sup> Laura MacInnis, *Obama Says “Lone Wolf Terrorist” Biggest U.S. Threat*, REUTERS (Aug. 16, 2011), <https://www.reuters.com/article/us-usa-obama-security/obama-says-lone-wolf-terrorist-biggest-u-s-threat-idUSTRE77F6XI20110816> [https://perma.cc/XEU4-2W5V] (quoting President Obama as saying, “the most likely scenario we have to guard against right now ends up being more of a lone wolf operation than a large, well-coordinated terrorist attack”).

<sup>105</sup> Beydoun, *supra* note 103, at 192.

<sup>106</sup> See MARK S. HAMM & RAMON SPAAJJ, *THE AGE OF LONE WOLF TERRORISM* 5 (2017) (stating “lone wolf terrorism refers to terrorist actions carried out by lone individuals, as opposed to those carried out on the part of terrorist organizations or state bodies” and that such an individual “is solitary in nature and prefers to act totally alone, although his or her radicalization to action may be spurred by violent media images, incendiary books, manifestos, and fatwas”); S. POVERTY LAW CTR., *supra* note 17, at 7 (stating that a lone wolf terrorist is “a person who carries out a terrorist attack entirely on his own”); Beydoun, *supra* note 103, at 193–94 (quoting the Georgetown University Security Studies Program that defines lone wolf terrorism as “the deliberate creation and exploitation of fear through violence or threat of violence committed by a single actor, who pursues political change linked to a formulated ideology, whether his own or that of a larger organization, and who does not receive orders, direction, or material support from outside sources” and proposing a new definition of lone wolf terrorism that is “premeditated violence unleashed by an individual actor driven by discretely held views or a cogent ideology espoused by an organization”).

<sup>107</sup> See Gilsinan, *supra* note 7 (stating that modern terrorism is largely homegrown and even Islamic extremists are often U.S. citizens or permanent residents). There are numerous examples of this in recent high-profile attacks. See Greg Miller & Scott Wilson, *No Links Seen Between Boston Suspects and Foreign Terrorist Groups, Officials Say*, WASH. POST (Apr. 23, 2013), [https://www.washingtonpost.com/world/national-security/no-links-seen-between-boston-suspects-and-foreign-terrorist-groups-officials-say/2013/04/23/f08c9b7e-ac4b-11e2-b6fd-ba6f5f26d70e\\_story.html](https://www.washingtonpost.com/world/national-security/no-links-seen-between-boston-suspects-and-foreign-terrorist-groups-officials-say/2013/04/23/f08c9b7e-ac4b-11e2-b6fd-ba6f5f26d70e_story.html) [https://perma.cc/ZP7A-BAAF] (stating that while Dzhokhar Tsarnaev admitted to being influenced by extremist Islamist

a prominent role in white supremacist violence.<sup>108</sup> Despite the prevalence of lone wolves of all ideologies, Muslims tend to be branded as lone wolf terrorists while white perpetrators are labeled lone wolf killers.<sup>109</sup>

The ability of an ideology or group to attract followers who carry out lone wolf attacks has been helped by the growth of the Internet, which provides a platform for individuals to spread their message.<sup>110</sup> Both Islamic extremist groups and domestic ideologies have used the Internet and social media to spread their ideology and recruit new followers.<sup>111</sup> United States citizens inspired by Islamic extremism are considered international terrorists by the Department of Justice.<sup>112</sup> These individuals may have no contact with a foreign organization outside of visiting certain websites.<sup>113</sup> Similarly, white supremacists have used the Internet to spread their ideology and influence others who may carry out an attack on their own.<sup>114</sup> White supremacists' activities online

ideology there was no connection to any foreign terrorist groups); Emily Palmer & Benjamin Weiser, *Akayed Ullah Guilty of ISIS-Inspired Bombing Near Times Square*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/nyregion/port-authority-bombing-verdict.html> [<https://perma.cc/9ZN7-BMF3>] (describing how the man who detonated a pipe bomb in Times Square stated that he did not carry out the attack for ISIS and said the government was “trying to put [him] in a group, which [he] d[idn’t] support”); Richard Perez-Pena & Michael S. Schmidt, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html> [<https://perma.cc/PV3F-Q9XJ>] (stating that despite ISIS claiming their supporters carried out the San Bernardino attack there is no indication the attackers were part of a network).

<sup>108</sup> BJELOPERA, *supra* note 25, at 53.

<sup>109</sup> See Beydoun, *supra* note 103, at 190 (referencing the characterizations of Stephen Paddock, a white man classified as a lone wolf killer, after the 2017 Las Vegas shooting and Omar Mateen, a middle eastern man classified as a lone wolf terrorist, after the 2016 Pulse Nightclub shooting).

<sup>110</sup> BJELOPERA, *supra* note 25, at 49 (stating that “the internet allows individuals and groups to connect with each other and disseminate ideology”); Daniel L. Byman, *Can Lone Wolves Be Stopped?*, BROOKINGS (Mar. 15, 2017), <https://www.brookings.edu/blog/markaz/2017/03/15/can-lone-wolves-be-stopped> [<https://perma.cc/LK4P-GV22>] (stating that a small group can reach a wide audience with the Internet).

<sup>111</sup> BJELOPERA, *supra* note 25, at 48 (describing the online presence of Islamic extremists and domestic terrorists); Emily B. Tate, Note, “*Maybe Someone Dies*”: *The Dilemma of Domestic Terrorism and Internet Edge Provider Liability*, 60 B.C. L. REV. 1731, 1747 (2019) (describing the rise of domestic terrorism and partially attributing the rise to the use of the Internet and social media).

<sup>112</sup> GERMAN & ROBINSON, *supra* note 26, at 4 (describing the treatment of individuals inspired by Islamic extremist ideology). This extends to a perception that Islamic terrorism is perpetrated by foreign terrorists while domestic attacks are committed by “dysfunctional young white guys from suburbia” and that “there is no Osama Bin Laden to hunt down on this front, only our sons and brothers.” Kevin D. Williamson, *White-Boy al-Qaeda*, NAT’L REV. (Aug. 7, 2019), <https://www.nationalreview.com/corner/el-paso-dayton-shootings-domestic-terrorism/> [<https://perma.cc/63MK-URV2>] (arguing that while recent attacks such as El Paso should be considered terrorism, the threat is fundamentally different than Islamic terror).

<sup>113</sup> See GERMAN & ROBINSON, *supra* note 26, at 4 (describing the actions needed to be classified as a foreign terrorist, such as watching an online video or going to certain websites).

<sup>114</sup> See BJELOPERA, *supra* note 25, at 48–49 (describing white supremacist use of the Internet to create “free spaces” to discuss their views); The Editors, *Crush This Evil*, NAT’L REV. (Aug. 4, 2019), <https://www.nationalreview.com/2019/08/el-paso-shooting-white-supremacy-evil-ideology/> [<https://>

form a community similar to Islamic extremist movements.<sup>115</sup> According to a George Washington University study, white nationalist movements are much more active on Twitter than ISIS supporters.<sup>116</sup> The difficulty in combating the use of the Internet to espouse white supremacist ideology and recruit new followers is that the websites and accounts often claim they are not violent and there are laws that protect the sites from facing liability for what their users post.<sup>117</sup> Despite this, there have been a number of documented cases where websites used by white nationalists were frequented by and inspired individu-

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perma.cc/QFB2-L7JQ] (stating, “the patterns on display over the last few years have revealed that we are contending here not with another ‘lone wolf,’ but with the fruit of a murderous and resurgent ideology—white supremacy—that deserves to be treated by the authorities in the same manner as has been the threat posed by militant Islam”).

<sup>115</sup> Rita Katz, *ISIS Hunter: Time to Wake Up to the White Nationalist Terror Threat*, DAILY BEAST (Mar. 9, 2017), <https://www.thedailybeast.com/isis-hunter-time-to-wake-up-to-the-white-nationalist-terror-threat> [https://perma.cc/48HH-R68E] (stating that the white supremacist community recruits online and furthers its message through propaganda, similar to jihadist sites). The website Daily Stormer, an online forum for white nationalists, has over 240,000 members. *Id.*

<sup>116</sup> J.M. BERGER, GEO. WASH. PROGRAM ON EXTREMISM, NAZIS VS. ISIS ON TWITTER: A COMPARATIVE STUDY OF WHITE NATIONALISTS AND ISIS ONLINE SOCIAL MEDIA NETWORKS 3 (2016) (stating that white nationalists outperform ISIS in almost every metric on Twitter including followers and number of tweets per day).

<sup>117</sup> BJELOPERA, *supra* note 25, at 49; Drew Harwell, *Three Mass Shootings This Year Began with a Hateful Screed on 8chan. Its Founder Calls It a Terrorist Refuge in Plain Sight.*, WASH. POST (Aug. 4, 2019), <https://www.washingtonpost.com/technology/2019/08/04/three-mass-shootings-this-year-began-with-hateful-screed-chan-its-founder-calls-it-terrorist-refuge-plain-sight/> [https://perma.cc/YFV8-H7W8]. According to current law, “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c) (2012). Moderators on the white-nationalist website Stormfront, where Norwegian terrorist Anders Breivik first posted his manifesto, constantly delete threads debating the righteousness of Breivik’s attacks because the site has a policy against posts that promote violence or illegal acts. J.M. Berger, *The Dangerous Spread of Extremist Manifestos*, THE ATLANTIC (Feb. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/christopher-hasson-was-inspired-breivik-manifesto/583567/> [https://perma.cc/UK2S-D2XG] (describing the ease with which online manifestos are spread). Andrew Anglin, the founder of Daily Stormer, provides instructions for those who read the site on how to harass targets. See Luke O’Brien, *The Making of an American Nazi*, THE ATLANTIC (Dec. 2017), <https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/> [https://perma.cc/J6RS-EJDG] (detailing the tactics of Anglin and his targets, including John Goldberg and David French, two prominent conservative writers, as well as the author of the article cited). In these instructions, he explicitly tells his followers not to use or threaten violence to protect themselves from legal liability. *Id.* Despite the activities of Anglin being limited to trolling, numerous people who visited the website have acted violently to further the ideologies being espoused, including Roof, Thomas Mair (who stabbed a member of Parliament in the United Kingdom), James Harris Jackson (who stabbed an African American in New York City), and Devon Arthurs (who was a former Neo-Nazi and killed two of his roommates who were still Neo-Nazis). *Id.* The owner of 8chan, a site that has gained notoriety for its involvement with right-wing terrorism, has called the site “a refuge for free speech online” and called the Christchurch shooter a “criminal alien.” Harwell, *supra*. The now disassociated founder of 8chan stated the message board “is a receptive audience for domestic terrorists.” *Id.* In light of mounting criticism, the site placed the message “Embrace Infamy” on its homepage. *Id.*

als who carried out attacks in the name of that ideology, including recent attacks in El Paso, Texas; Christchurch, New Zealand; and Baerum, Norway.<sup>118</sup>

*D. How the Legal System Has Dealt with Domestic Terror  
Attacks in the United States Post-9/11*

Similar to the difficulty in analyzing the level of domestic terror activity in the United States, it is difficult to fully analyze the federal government's efforts in fighting domestic terrorism.<sup>119</sup> There is not a uniform way in which activities that could be considered domestic terrorism are prosecuted in the United States.<sup>120</sup> The attacks that have been perpetrated since 9/11 have been prosecuted using a mixture of general criminal statutes, and where the government thinks appropriate, one of the terroristic crimes of the criminal code.<sup>121</sup> Law enforcement agencies and prosecutors will often label people as "extremists," allowing them to avoid labeling and prosecuting them as terrorists.<sup>122</sup> Due to this practice of using the terrorism chapter of the criminal code

<sup>118</sup> BERGER, *supra* note 116, at 4 (noting Roof and Breivik as two examples of white nationalist terrorists who were active online). Prior to attacking the Walmart in El Paso, Patrick Crusius published a manifesto on 8chan, an online messaging board frequented by extremists. Gianluca Mezzofiore & Donie O'Sullivan, *El Paso Mass Shooting Is at Least the Third Atrocity Linked to 8chan This Year*, CNN (Aug. 5, 2019), <https://www.cnn.com/2019/08/04/business/el-paso-shooting-8chan-biz/index.html> [<https://perma.cc/CL3E-QYRC>]. Similarly, Brenton Tarrant posted a manifesto to 8chan before he carried out an attack in Christchurch, New Zealand, killing fifty-one people. *Id.* Tarrant wrote in his manifesto he was inspired by Roof and Breivik. Jelani Cobb, *The New Zealand Shooting and the Great-Man Theory of Misery*, NEW YORKER (Mar. 20, 2019), <https://www.newyorker.com/news/daily-comment/the-new-zealand-shooting-and-the-great-man-theory-of-misery> [<https://perma.cc/HK87-L6J2>]. Patrick Crusius cited the Christchurch massacre as inspiration. Mezzofiore & O'Sullivan, *supra*. A few days after the El Paso shooting, Philip Manshaus published a manifesto announcing his attack to "increase the racial war" on Endchan, an online forum. *Terrorangrepet i Baerum*, VG (Aug. 10, 2019), <https://www.vg.no/spesial/2019/angrepet-paa-al-noor-moskeen-i-baerum/> [<https://perma.cc/28KD-4N6K>]. He attempted to enter a mosque with multiple weapons before he was stopped by worshippers Mohammed Rafique and Mohammed Iqbal Javel who managed to subdue Manshaus, saving numerous lives. *Id.* Prior to the attack, Manshaus made posts on Endchan praising the El Paso shooter, a man charged with killing one person at a California synagogue, and stating he was "chosen" by the Christchurch shooter. Emma Anderson, *Norway Attack 'Inspired' By Christchurch, El Paso Shootings: Report*, POLITICO (Aug. 12, 2019), <https://www.politico.eu/article/norway-attack-suspect-inspired-by-christchurch-el-paso-shootings-report/> [<https://perma.cc/264W-YWET>].

<sup>119</sup> See BJELOPERA, *supra* note 25, at 8 (discussing the inconsistencies in terror prosecutions).

<sup>120</sup> *Id.* at 5–6 (describing how domestic terrorism is currently prosecuted with general criminal statutes).

<sup>121</sup> 18 U.S.C. §§ 2331–2339D (2012); Hennessey, *supra* note 27 (describing the prosecution of terrorists using general criminal statutes); ZABEL & BENJAMIN, JR., *supra* note 51, at 6 (describing the laws used to prosecute terrorism).

<sup>122</sup> BJELOPERA, *supra* note 25, at 8 (describing the use of extremism instead of terrorism and the flexibility that it provides federal officials). After Roof carried out his attack, the government did not unambiguously state it was terrorism. Norris, *supra* note 24, at 265–66 (describing the Department of Justice's labeling of the attack). After the attack, a group of senators sent a letter to Senator Chuck Grassley, chairman of the Senate Judiciary Committee, calling for a hearing on domestic terrorism and



to prosecute certain individuals as terrorists, while labeling others as extremists and charging them with crimes completely unrelated to terrorism, it is difficult to analyze how the United States has prosecuted terrorism.<sup>123</sup> Further complicating the task of analyzing how the legal system has handled domestic terrorism in the United States, a report published in 2009 highlighted great discrepancies in how the federal courts, the National Security Division of the Department of Justice, and federal prosecutors classified terrorists.<sup>124</sup>

According to the database released by the Investigative Fund at the Nation Institute and Reveal from the Center of Investigative Reporting, Islamist inspired incidents have been subject to more terrorist and federal charges than non-Islamist inspired incidents.<sup>125</sup> The study found 48.6% of the Islamist inspired events they documented were the result of sting operations, compared to 12% of far-right inspired incidents and 10.5% of far-left inspired incidents.<sup>126</sup> Eighty-four percent of the Islamist inspired events that led to arrests, which made up 31% of all documented incidents, included terrorist charges.<sup>127</sup> This is compared to only 9% of far-right inspired incidents that resulted in arrests.<sup>128</sup> Of the incidents resulting in arrest, 91% of the Islamist inspired incidents resulted in federal charges, compared to 60% of far-right inspired incidents.<sup>129</sup> The study also found that perpetrators of Islamist inspired attacks were punished much more severely than those who were inspired by right-wing ideologies.<sup>130</sup> The average sentence for Islamist inspired perpetrators was twenty-one years, which does not include the 8% who received life sentences and the 2% who received death sentences.<sup>131</sup> In the case of right-wing inspired incidents, the average sentence was twelve years, not counting the 12% who received life

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noting that if Roof had espoused an Islamic extremist ideology, it would immediately have been labeled terrorism. *Id.* at 268.

<sup>123</sup> BJELOPERA, *supra* note 25, at 8 (describing the difficulty of gauging the extent of terrorism due to the different labels and crimes used). This practice gives flexibility to prosecutors, allowing them to get convictions without having to convince a jury the defendant is a terrorist. *Id.* Despite this, the different labels used make it hard to determine the full extent of terrorism. *Id.*

<sup>124</sup> See generally TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, WHO IS A TERRORIST? GOVERNMENT FAILURE TO DEFINE TERRORISM UNDERMINES ENFORCEMENT, PUTS CIVIL LIBERTIES AT RISK (2009), <https://trac.syr.edu/tracreports/terrorism/215/> [<https://perma.cc/D6M2-NKNM>] (detailing the discrepancies in how prosecutors, the courts, and the Department of Justice label perpetrators as terrorists). Transactional Records Access Clearinghouse (TRAC) is a data research organization at Syracuse University. *About Us*, TRAC, <https://trac.syr.edu/aboutTRACgeneral.html> [<https://perma.cc/CY8E-YLR9>].

<sup>125</sup> Neiwert, *supra* note 26.

<sup>126</sup> *Id.*

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

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

sentences and the 5% who received the death sentence.<sup>132</sup> A 2016 study by Reuters has shown similar trends.<sup>133</sup> The study showed that over a two-year period twenty-seven individuals were charged for planning or carrying out attacks in the name of the Islamic State.<sup>134</sup> Those twenty-seven individuals were charged with crimes carrying a median sentence of fifty-three years.<sup>135</sup> Over the same span of time, twenty-seven individuals were charged with similar actions, but inspired by U.S.-based ideologies.<sup>136</sup> The charges faced by those individuals carried a median sentence of twenty years.<sup>137</sup>

### E. Politicization of Terrorism

The most accepted definitions of terrorism do not differentiate Islamic extremists inspired by foreign groups, on the one hand, and those who espouse what the FBI and DHS consider to be a homegrown ideology, on the other.<sup>138</sup> Despite this, in the United States, politics and public opinion of who a terrorist is make such a differentiation.<sup>139</sup> Even with the rise in right-wing terrorism in the United States, the focus is largely still on foreign Islamic extremism.<sup>140</sup> The federal government does not publicly list domestic terrorists or domestic terror organizations in the United States.<sup>141</sup> Due to the lack of uniformity in how domestic terrorism is prosecuted, the debate of what is or is not terrorism is often politicized.<sup>142</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> See Julia Edwards et al., *U.S. Eyes Ways to Toughen Fight Against Domestic Extremists*, REUTERS (Feb. 4, 2016), <https://www.reuters.com/article/us-usa-militants-domestic-insight-idUSKCN0VD0FG> [<https://perma.cc/AXT2-EA3H>] (stating that the study shows “domestic terrorism suspects collectively have faced less severe charges than those accused of acting on behalf of the Islamic State since prosecutors began targeting the group in early 2014”).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See Byman, *supra* note 16 (stating that most definitions of terrorism do not differentiate between foreign and domestic ideologies).

<sup>139</sup> See J.M. Berger, *The Difference Between a Killer and a Terrorist*, THE ATLANTIC (Apr. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/04/the-difference-between-killer-and-terrorist/558998/> [<https://perma.cc/GKC8-YVX4>] (describing the use of the term terrorism in the United States and its use to describe Islamic extremists); Byman, *supra* note 16 (describing the “skewed perception” of who a terrorist is following 9/11).

<sup>140</sup> Berkebile, *supra* note 88, at 1 (stating that despite the fact that domestic terrorism makes up eighty to ninety percent of attacks in the world, it is the least studied because research is concentrated on transnational terrorism); Reitman, *supra* note 14 (describing the Trump administration’s resistance to addressing domestic terrorism).

<sup>141</sup> BJELOPERA, *supra* note 25, at 5.

<sup>142</sup> See Daniel L. Byman, *Should We Treat Domestic Terrorists the Same Way We Treat ISIS?*, BROOKINGS (Oct. 3, 2017), <https://www.brookings.edu/articles/should-we-treat-domestic-terrorists-the-way-we-treat-isis-what-works-and-what-doesnt/> [<https://perma.cc/W3RW-NBZG>] (stating that political baggage associated with terrorism in the United States makes it harder to use the label when

Studies have shown that public perception, as well as media portrayals, have led Americans to associate terrorism with Islamic extremism, increasing negative attitudes towards Muslims.<sup>143</sup> Some conservative news outlets are opposed to casting right-wing extremism in the same light as Islamic extremism and have voiced opposition to classifying those cases as domestic terrorism.<sup>144</sup> The practice of casting Islamic extremist attacks and attacks inspired by other ideologies differently is not limited to conservative news outlets, as me-

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talking about domestic groups); Daryl Johnson, *I Warned of Right-Wing Violence in 2009. Republicans Objected. I Was Right.*, WASH. POST (Aug. 21, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/i-warned-of-right-wing-violence-in-2009-it-caused-an-uproar-i-was-right> [<https://perma.cc/TG4D-SHM7>] (describing the practice of side-stepping or rationalizing right-wing terrorism to avoid political backlash); Obeidallah, *supra* note 21 (claiming Republicans do not want to address right-wing extremism for fear of angering their base).

<sup>143</sup> Beydoun, *supra* note 103, at 190 (stating that Afghan and Muslim identities are tied to terrorism in the United States); Yolanda Rondon, *Treatment of Domestic Terrorism Cases: Class and Mental Health in the Criminal System*, 26 AM. U. J. GENDER SOC. POL'Y & L. 741, 742 (2018) (stating that public portrayals and perceptions have fueled Islamophobia and xenophobia). Although mass shootings are portrayed by the media, many smaller attacks do not generate the same attention. David French, *It's Time to Declare War on White Nationalist Terrorism*, NAT'L REV. (Aug. 5, 2019), <https://www.nationalreview.com/2019/08/declare-war-on-white-nationalist-terrorism/> [<https://perma.cc/ASP6-X6UD>] (stating that “[m]ost Americans remember the Tree of Life synagogue massacre in Pittsburgh,” but “do you remember the white supremacist who killed a black man in New York with a sword,” or “the attempted church massacre in Kentucky,” or when “a member of an ‘alt-Reich’ Facebook group stabbed a black Maryland college student to death without provocation,” “or that a white man in Kansas shouted ethnic slurs before shooting two Indian engineers in a bar,” and stating “substitute ‘jihadist’ for ‘white supremacist’ or ‘white nationalist’ and then imagine how we’d act”).

<sup>144</sup> See David Harsanyi, *The Washington Post Claims There's a 'Surge' in Right-Wing Violence. There Isn't*, THE FEDERALIST (Nov. 26, 2018), <http://thefederalist.com/2018/11/26/washington-post-claims-theres-surge-right-wing-violence-isnt/> [<https://perma.cc/FNJ7-XY9S>] (taking issue with the classification of certain right-wing actions as domestic terrorism); Michael Edison Hayden, *Tucker Carlson Claims That 'Terrorism Is a Largely Immigrant Phenomena'; That's Highly Misleading*, NEWSWEEK (Apr. 25, 2018), <https://www.newsweek.com/tucker-carlson-claim-immigrants-cause-terrorism-misleading-900908> [<https://perma.cc/2WBC-2A8P>] (describing a segment Tucker Carlson did on Fox News stating that terrorism is largely a problem in the immigrant community); John R. Lott Jr., *The Media Misses the Motive*, WASH. TIMES (Nov. 7, 2018), <https://www.washingtontimes.com/news/2018/nov/7/ascribing-recent-violent-attacks-to-a-political-or/> [<https://perma.cc/R42F-E6AG>] (criticizing the media for seeing political rhetoric as influencing a large number of attacks and claiming right-wing individuals do not carry out a large number of terror attacks). *But see* Max Boot, *Why Won't Trump Use the 'T' Word to Describe Charlottesville?*, WKLY. STANDARD (Aug. 15, 2017), <https://www.weeklystandard.com/max-boot/why-wont-trump-use-the-t-word-to-describe-charlottesville> [<https://perma.cc/AA5E-DQN9>] (noting the threat of Islamic extremist terror is the greatest terror threat in the world but that does not mean one can ignore the rising threat of right-wing terror in the United States); French, *supra* note 143 (“Every wave of terrorism is dangerous, but waves of racist terror are particularly dangerous in a nation that once tore itself to bloody shreds in large part due to its repugnant white supremacism.”); Andrew C. McCarthy, *Let Virginia Prosecute the Charlottesville Terrorism*, NAT'L REV. (Aug. 14, 2017), <https://www.nationalreview.com/2017/08/charlottesville-terrorist-attack-virginia-should-prosecute-not-feds/> [<https://perma.cc/452T-DXTM>] (stating that asking whether the Charlottesville right-wing car attack is terrorism is “akin to asking whether the sky is blue,” but arguing it should be left to the state to prosecute).

dia outlets across the political spectrum have provided more coverage to Islamic extremist attacks.<sup>145</sup>

A reluctance to classify right-wing attacks as terrorism is shared by some politicians on the right who fear right-wing ideology being criminalized.<sup>146</sup> Right-wing extremists also invoke political tensions because they often support causes many Americans believe in, even though the vast majority of Americans who share the ideology would never resort to violence.<sup>147</sup> This lack of objectivity can be shown at the highest levels of government, as shown by the disproportionate reactions of President Trump when the perpetrator carries out an attack in the name of Islamic extremism rather than right-wing ideolo-

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<sup>145</sup> See Murtaza Hussain, *Muslims Accused of Plotting Violence Get Seven Times More Media Attention and Four Times Longer Sentences*, INTERCEPT (Apr. 5, 2018), <https://theintercept.com/2018/04/05/muslims-violence-media-attention-prosecution/> [<https://perma.cc/995F-7HS4>] (describing the results of a study conducted by the Institute for Social Policy and Understanding). A study by the Institute for Social Policy and Understanding looked at coverage by the *New York Times* and *Washington Post* between 2002 and 2015 of ideologically motivated violence, revealing unsuccessful attacks by Muslims received an average of 770% more coverage than unsuccessful ideologically motivated attacks by non-Muslims. *Id.* Successful ideologically motivated attacks by Muslims received double the coverage of ideologically motivated attacks by non-Muslims. *Id.* The study also found that the Department of Justice was six times more likely to put out a press release about unsuccessful ideologically motivated attacks by Muslims than by non-Muslims. *Id.* Another study, conducted by researchers at the University of Alabama and Georgia State University, showed that the religion of the attacker is the best predictor of media coverage of terrorist attacks and Muslim attackers received an average of 357% more coverage than non-Muslim attackers. See Erin M. Kearns et al., *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, JUST. Q. 1, 8–14 (2019) (describing the methodology and the results of the study).

<sup>146</sup> See DHS' *Domestic Terror Warning Angers GOP*, CBS NEWS (Apr. 16, 2009), <https://www.cbsnews.com/news/dhs-domestic-terror-warning-angers-gop/> [<https://perma.cc/PS45-45L5>] (describing Republican outrage at a Homeland Security intelligence assessment that warned against right-wing extremism, especially in the veteran community). Not everyone on the right shares this reluctance to classify right-wing attacks as domestic terrorism. See BOB WOODWARD, FEAR 239 (2018) (describing Republican responses to the Charlottesville attack). Following the Charlottesville attack, Republican senator Cory Gardner tweeted “Mr. President – we must call evil by its name. These were white supremacists and this was domestic terrorism.” *Id.* Republican senator Marco Rubio tweeted “Very important for the nation to hear @potus describe events in #Charlottesville for what they are, a terror attack by #whitesupremacists.” *Id.* Republican Speaker of the House Paul Ryan tweeted “White supremacy is a scourge. This hate and its terrorism must be confronted and defeated.” *Id.* After the El Paso shooting, George P. Bush, Republican Texas Land Commissioner and son of notable Republican Jeb Bush, wrote an op-ed in *The Atlantic*, where he wrote “terrorism by white supremacists is indeed a real and present danger” and “Conservatives have not been afraid to confront extremism in our world, and we must not be afraid to confront terrorism here at home: anywhere, anytime, and in any form.” George P. Bush, *White-Nationalist Terrorism Must Be Stopped*, THE ATLANTIC (Aug. 5, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/white-terrorism-must-be-stopped/595471/> [<https://perma.cc/T76B-M94N>]. Conservative writer David French stated addressing right-wing extremism does not require “surrendering a single rational, good-faith argument about proper levels of immigration” and “fighting for your political values does not ever require you to abandon decency and respect.” French, *supra* note 143.

<sup>147</sup> Byman, *supra* note 142. Fifteen percent of Americans support the idea that abortion should be illegal no matter the circumstance, but the overwhelming majority would not resort to the violence others have to support that cause. *Id.*

gies.<sup>148</sup> The Trump administration has found political support in many individuals and groups with right-wing extremist views.<sup>149</sup> President Trump has been accused of not condemning right-wing terrorist attacks as harshly as Islamic extremist attacks to appease these supporters.<sup>150</sup> The failure to recognize do-

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<sup>148</sup> See Maggie Haberman & Michael D. Shear, *Trump Defends Initial Remarks on Charlottesville; Again Blames 'Both Sides'*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [<https://perma.cc/4992-RL8A>] (summarizing President Trump's response to the Charlottesville protest and attack, where he stated there was "blame on both sides" for the violence); Alex Wagner, *Trump's Selective Responses to Terror*, THE ATLANTIC (Jun. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/06/trumps-selective-responses-to-terror/529218/> [<https://perma.cc/LDL5-M2JC>] (comparing the quick and powerful responses of President Trump to Islamist inspired attacks, and his silence, delay, and reluctance following attacks carried out in the name of right-wing ideologies).

<sup>149</sup> See J.M. Berger, *How White Nationalists Learned to Love Donald Trump*, POLITICO (Oct. 25, 2016), <https://www.politico.com/magazine/story/2016/10/donald-trump-2016-white-nationalists-alt-right-214388> [<https://perma.cc/YW74-HA9K>] (describing Neo-Nazi and KKK support for President Trump's 2016 campaign); French, *supra* note 143 ("Alt-right support for Trump wasn't random. It wasn't arbitrary. It was directly related to his rhetoric, and it was cultivated by his allies, and it was cultivated in part because it was a new way to fight, to punch back against the hated Left."); Kevin Roose & Ali Winston, *Far-Right Internet Groups Listen for Trump's Approval, and Often Hear It*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/politics/far-right-internet-trump.html> [<https://perma.cc/R63T-HCFF>] (describing right-wing online forums supporting President Trump's rhetoric). A commenter on the white nationalist site Stormfront called President Trump's avoidance of the question of whether he would repudiate the endorsement from David Duke, head of the KKK, as "the best political thing I have seen in my life." Berger, *supra*. These groups saw many of President Trump's actions during the campaign, such as retweeting a tweet from an account with the username @whitegenocideTM, as nods to their ideologies, even as he would publicly apologize for them later. *Id.*

<sup>150</sup> See J.M. Berger, *A Dangerous New Americanism?*, WAR ON THE ROCKS (Apr. 24, 2017), <https://warontherocks.com/2017/04/a-dangerous-new-americanism/> [<https://perma.cc/LS8D-JFDS>] (claiming President Trump and his "movement" are "steering America into the death spiral that leads to true violent extremism" as he works against "out-groups" such as Muslims). Steve Bannon, who leads Breitbart news and claimed he wanted it to become the "platform for the alt-right," worked as a chief strategist in the Trump White House. See Joseph Bernstein, *Alt-White: How the Breitbart Machine Laundered Racist Hate*, BUZZFEED NEWS (Oct. 5, 2017), <https://www.buzzfeednews.com/article/josephbernstein/heres-how-breitbart-and-milo-smuggled-white-nationalism#.inq1rVA0D> [<https://perma.cc/57AG-VGTM>] (publishing documents and emails that detail the inner workings of Breitbart and Steve Bannon). Prior to the 2016 election, Breitbart adopted a "no enemies on the right policy." See Tina Nguyen, *Steve Bannon Has a Nazi Problem*, VANITY FAIR (Sept. 12, 2016), <https://www.vanityfair.com/news/2017/09/steve-bannon-has-a-nazi-problem> [<https://perma.cc/FE4S-UX3N>] (describing the relationship between Steve Bannon and the far right). Bannon was ousted from the White House soon after Charlottesville. *Id.* Associates of Bannon state that he believes open association with racists is a threat to his desire for "populist nationalism," but the issue is removing them from the movement. See *id.* (quoting Steve Bannon as angrily asking "What the fuck do we do about the Nazis?"). There are members of the Trump Administration who have taken issue with the President's response to right-wing attacks, including former economic advisor Gary Cohen, who attempted to resign following the President's response to Charlottesville. See WOODWARD, *supra* note 146, at 249 (describing the attempted resignation of Cohen and President Trump's hostility to his concerns). Attorney General Jeff Sessions referred to the Charlottesville attack as an evil act of domestic terrorism. See Rebecca R. Ruiz & Charlie Savage, *Sessions Emerges as Forceful Figure in Condemning Charlottesville Violence*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/>

mestic terrorism for what it is, however, is not a problem unique to the Trump administration, as the Obama administration did not characterize Dylann Roof as a domestic terrorist when he attacked a church in South Carolina in order to start a race war.<sup>151</sup>

This lack of an objective standard has real world consequences, as shown by conservative outrage at a 2009 Department of Homeland Security Report that warned of a rise in right-wing extremism.<sup>152</sup> John Boehner, then-Minority Leader of the House, criticized the Department for using the same words used to describe al-Qaeda to describe Americans who have different opinions than the government.<sup>153</sup> Despite the accuracy of the report, there was enough outrage for the Department of Homeland Security Secretary to renounce the report's findings.<sup>154</sup> The unit that wrote the report was dissolved, and by 2010, there were no analysts at the Department of Homeland Security working on threats posed by domestic terrorism.<sup>155</sup> In 2011, the House Homeland Security Committee held hearings on domestic terrorism that focused solely on threats relating to al-Qaeda.<sup>156</sup> The Trump administration has made cuts to programs aimed at combating right-wing extremism.<sup>157</sup> There have also been accusations

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politics/domestic-terrorism-sessions.html [https://perma.cc/F4EP-X9UX] (describing Jeff Sessions's response to the Charlottesville attack).

<sup>151</sup> See Norris, *supra* note 24, at 265–68 (describing the responses of members of the Obama administration to the Charleston shooting). FBI Director James Comey did not shut down the idea of calling it terrorism but hesitated; a month after the attack he replied he did not yet know if it was terrorism. *Id.* at 265. Attorney General Loretta Lynch did not immediately label the act as terrorism either. *Id.* at 266.

<sup>152</sup> S. POVERTY LAW CTR., *supra* note 17, at 12, 14–15 (describing the outrage following the release of a DHS report titled “Right-Wing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment”). The Report warned of a possible rise in right-wing extremism due to the economic downturn at the time and the recent election of President Obama. OFFICE OF INTELLIGENCE & ANALYSIS, *supra* note 21, at 3–4 (describing the factors that could lead to a rise in right-wing extremism). The Report singled out “disgruntled military veterans” as a group that could be exceptionally dangerous, though it noted the trend from the 1990s that was present when the report was released only involved a small percentage of veterans who were willing to join extremist groups. *Id.* at 7.

<sup>153</sup> S. POVERTY LAW CTR., *supra* note 17, at 14–15 (quoting House Minority Leader John Boehner as stating the same words used to describe al-Qaeda should not be used to describe “American citizens who disagree with the direction Washington Democrats are taking our nation”).

<sup>154</sup> *Id.* at 12–13 (describing DHS's response to the outrage over the report).

<sup>155</sup> Johnson, *supra* note 142.

<sup>156</sup> Neiwert, *supra* note 26 (quoting Representative Peter King, who was the chairman of the House Homeland Security Committee, as saying, “[t]his committee cannot live in denial, which is what some would have us do when they suggest that this hearing dilute its focus by investigating threats unrelated to Al Qaeda”).

<sup>157</sup> Peter Beinart, *Trump Shut Programs to Counter Violent Extremism*, THE ATLANTIC (Oct. 29, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/trump-shut-countering-violent-extremism-program/574237/> [https://perma.cc/T4VR-4U4M] (detailing the cancellation of grants to groups focused on combating right-wing extremism and the gutting of the Office of Community Partnerships). One of the grants went to the group Life After Hate, a group that helped people leave white supremacy groups. *Id.* The other grant went to University of North Carolina researchers who were helping

that the Trump administration defunded the Global Terrorism Database because the data showed a rise in right-wing attacks.<sup>158</sup> The National Strategy for Counterterrorism almost exclusively focuses on the threats posed by “radical Islamist terrorist groups,” and dedicates more time discussing the threat posed by European separatist movements than it does domestic terrorism.<sup>159</sup> Programs intended to counter extremism have largely focused on Muslims despite the rise in right-wing extremism.<sup>160</sup> The politicization of who is considered a terrorist has extended to the Trump Administration’s attempt to vilify people on the left who embrace violence, while ignoring those on the right.<sup>161</sup> A major problem

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young people create media campaigns to discourage other young people from adhering to white supremacy and other radical ideologies. *Id.* The grants were administered by the Office of Community Partnerships, which aimed to work with communities to prevent people from embracing Islamic extremism and white supremacist ideologies. *Id.* The administration cut the Office’s budget by more than \$18 million, cut the number of its full-time employees in half, and renamed it the Office of Terrorism Prevention Partnerships. *Id.*

<sup>158</sup> Emily Atkin, *A Database Showed Right-Wing Terror on the Rise. Then Trump Defunded It.*, NEW REPUBLIC (Jan. 3, 2019), <https://newrepublic.com/article/152675/database-showed-far-right-terror-rise-trump-defunded-it> [<https://perma.cc/VPF4-CENP>] (describing the Global Terrorism Database and the data it showed and raising the possibility that it was defunded because of the administration’s hostility to its findings).

<sup>159</sup> See DONALD J. TRUMP, NATIONAL STRATEGY FOR COUNTERTERRORISM, at I (2018) (stating the main terroristic threat faced by the nation today is radical Islamic terrorist groups and groups affiliated with Iran). In a section of the *National Strategy for Counterterrorism* titled “The Terrorist Adversary,” the focus is mostly on “radical Islamist terrorists.” *Id.* at 7–9. Ten paragraphs are dedicated to the threat posed by “radical Islamist” groups such as al-Qaeda and ISIL, one paragraph is dedicated to overseas separatist movements, and the last paragraph recognizes the threat from domestic terrorists motivated by extremism that is not radical Islamist. *Id.* at 7–10.

<sup>160</sup> Ahmed, *supra* note 69, at 1561.

<sup>161</sup> Mike Baker & Nicholas Bogel-Burroughs, *Antifa and Far-Right Groups Face off in Portland as Trump Weighs in*, N.Y. TIMES (Aug. 17, 2019), <https://www.nytimes.com/2019/08/17/us/portland-oregon-protests.html> [<https://perma.cc/LTF9-HJAQ>] (showing the response of President Trump to 2019 clashes between anti-fascist group “Antifa” and far-right group “the Proud Boys” in Oregon). President Trump has publicly considered labeling Antifa an “organization of terror.” See Donald Trump (@realDonaldTrump), TWITTER (Aug. 17, 2019, 7:04 AM), <https://twitter.com/realDonaldTrump/status/1162726857231544320> [<https://perma.cc/X8H4-RJTN>] (“Major consideration is being given to naming ANTIFA an “ORGANIZATION OF TERROR.” Portland is being watched very closely. Hopefully the Mayor will be able to properly do his job!”). President Trump did not mention the right-wing groups present at the time in Portland. Baker & Bogel-Burroughs, *supra*. Republican Senators Bill Cassidy of Louisiana and Ted Cruz of Texas have introduced a resolution to designate Antifa a domestic terrorist organization. *Id.* The resolution states that the Senate:

(1) calls for the groups across the country who act under the banner of Antifa to be designated as domestic terrorist organizations; (2) unequivocally condemns the violent actions of Antifa groups as unacceptable acts for anyone in the United States; (3) expresses the need for the peaceful communication of varied ideas in the United States; (4) urges any group or organizations in the United States to voice its opinions without using violence or threatening the health, safety, or well-being of any other persons, groups, or law enforcement officers in the United States; [and] (5) calls upon the Federal Government to redouble its efforts, using all available and appropriate tools, to combat the spread of all forms of domestic terrorism, including White supremacist terrorism.

with prosecuting domestic terrorists as terrorists is the inability of federal prosecutors to persuade juries that an individual with no affiliation to a foreign terrorist organization is a terrorist.<sup>162</sup> Additionally, prosecutors may refrain from labeling a defendant a terrorist when charging him with general criminal statutes because the defendant may claim the term is not supported by the charges he is facing and is unfairly prejudicial.<sup>163</sup>

## II. SIMILAR ACTS, BUT DIFFERENT CRIMES

Part II of this Note shows why a federal statute criminalizing domestic terrorism is needed to capture all individuals who fit within the definition provided in the terrorism chapter of the criminal code.<sup>164</sup> Section A looks at the gaps in the current law and why people who fit the Patriot Act's definition of domestic terrorism are not prosecuted as terrorists.<sup>165</sup> Sections B through D look at high-profile cases of attacks that fit within the Patriot Act's definition of domestic terrorism, and how they were prosecuted.<sup>166</sup> Section B examines the attack carried out by Dzhokhar Tsarnaev at the 2013 Boston Marathon, the response to it, and his prosecution under the applicable statutes in the terrorist chapter of the criminal code.<sup>167</sup> Section C looks at Michael Taylor Wilson and his attempted attack on an Amtrak Train in 2017, the reaction to it, and why he was charged as a terrorist.<sup>168</sup> Section D looks at the 2015 attack carried out by Dylann Roof in Charleston, South Carolina, the response to it, and the government's inability to charge him as a terrorist.<sup>169</sup> Section E compares the similarities between these attacks despite their different treatment by the government.<sup>170</sup>

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*Cassidy, Cruz: Antifa Is a Domestic Terrorism Organization*, BILL CASSIDY, M.D. (July 18, 2019), <https://www.cassidy.senate.gov/newsroom/press-releases/cassidy-cruz-antifa-is-a-domestic-terrorist-organization> [https://perma.cc/JWA8-QWPE]. Antifa has engaged in violent acts but are responsible for zero deaths. Garrett Epps, *The Proud Boys' Real Target*, THE ATLANTIC (Aug. 23, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/meaning-street-protests-portland/596686/> [https://perma.cc/FNJ9-2DFB] (describing Antifa actions including beating up a conservative journalist, throwing milkshakes, threatening violence, and fighting at right-wing rallies).

<sup>162</sup> Daryl Johnson, *Congressional Report Highlights Gaps in U.S. Domestic Terrorism Policy*, SOUTHERN POVERTY L. CTR. (Jan. 2, 2018), <https://www.splcenter.org/hatewatch/2018/01/02/congressional-report-highlights-gaps-us-domestic-terrorism-policy> [https://perma.cc/Q2RK-GE6W] (quoting "current and formal federal prosecutors" stating it is hard to "convince a jury that someone who is not affiliated with a foreign group can be guilty of terrorism").

<sup>163</sup> McCord, *supra* note 13 (describing the risks prosecutors would take in labeling a defendant a terrorist but not charging terroristic crimes).

<sup>164</sup> See *infra* notes 164–244 and accompanying text.

<sup>165</sup> See *infra* notes 171–192 and accompanying text.

<sup>166</sup> See *infra* notes 193–225 and accompanying text.

<sup>167</sup> See *infra* notes 193–207 and accompanying text.

<sup>168</sup> See *infra* notes 208–218 and accompanying text.

<sup>169</sup> See *infra* notes 219–225 and accompanying text.

<sup>170</sup> See *infra* notes 226–244 and accompanying text.



### A. Gaps in the Law

As discussed in Part I, there are numerous laws that address terrorism in the United States.<sup>171</sup> Despite this, there are acts that fit within the Patriot Act's definition of domestic terrorism that cannot be prosecuted as terrorism.<sup>172</sup> The lack of applicable statutes to non-Islamic extremists may be one reason for the disproportionate treatment of Muslims as terrorists.<sup>173</sup> Section 2339B, criminalizing support to a foreign terrorist organization, has been interpreted very broadly to cover individuals in the United States who support foreign terrorist organizations.<sup>174</sup> Attacks inspired by Islamic extremist ideology are considered international because they are inspired by the ideology of foreign terrorist organizations.<sup>175</sup> Many of the Islamic inspired attacks in the United States are prosecuted using the provision outlawing "material support" for a "foreign terrorist" organization.<sup>176</sup> For an individual inspired by a domestic ideology to be prosecuted with a material support statute, one of the enumerated crimes must have been committed.<sup>177</sup> Only two incidents that were not inspired by Islamic ideology have been prosecuted under Section 2339A since its enactment.<sup>178</sup>

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<sup>171</sup> 18 U.S.C. §§ 2331–2339D (2012).

<sup>172</sup> See Norris, *supra* note 24, at 278 (explaining why Roof was not charged with terrorism following his ideologically motivated attack in South Carolina).

<sup>173</sup> See BJELOPERA, *supra* note 25, at 1 (stating that a large number of individuals who are considered domestic terrorists do not engage in the typical tactics that are covered in the terrorism chapter of the criminal code).

<sup>174</sup> 18 U.S.C. § 2339B; see GERMAN & ROBINSON, *supra* note 26, at 4 (noting the treatment of Islamists as international terrorists if they consume propaganda of a foreign terrorist organization); Daddario & Jenkins, *supra* note 26 (noting the broad use of the material support statutes). In 2018, Alexander Ciccolo of Adams, Massachusetts was charged and pled guilty to § 2339B, in addition to other charges. See *Massachusetts Man Pleads Guilty to Terrorism Charges*, DEP'T JUST. (May 21, 2018), <https://www.justice.gov/opa/pr/massachusetts-man-pleads-guilty-terrorism-charges> [<https://perma.cc/EZ8X-Q62P>] (describing the actions and plea of Alexander Ciccolo). Ciccolo pledged allegiance to ISIS and had a plan to carry out an attack in the United States in their name. *Id.* Ciccolo had conversations with a cooperating witness about the plan and the influence ISIS ideology had on him, but there was no mention of any contact with the organization. See Government's Memorandum in Support of Its Motion to Detain Alexander Ciccolo at 2–7, *United States v. Ciccolo*, 2015 WL 9294206 (D. Mass. Dec. 21, 2015) (Crim. No. 15-mj-3054-KAR) (detailing the contacts Ciccolo had with the FBI's cooperating witnesses). The FBI Special Agent in Charge said, "Alexander Ciccolo was a committed solidier of ISIS." Sasha Ingber, *Boston Police Captain's Son Sentenced to 20 Years for Terrorist Plot*, NPR (Sep. 5, 2018), <https://www.npr.org/2018/09/05/644957277/boston-police-captains-son-sentenced-to-20-years-for-terror-plot> [<https://perma.cc/UW9U-8LP3>].

<sup>175</sup> Daddario & Jenkins, *supra* note 26 (noting the use of the material support statute to prosecute those inspired by foreign terrorist organizations).

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

<sup>177</sup> See 18 U.S.C. § 2339A (listing the crimes that constitute terrorism for purposes of the statute); Ahmed, *supra* note 69, at 1560 (stating that a Muslim accused of violating § 2339B for providing support to a group like ISIS can be prosecuted for actions that would not violate federal law if they were done to support a domestic group such as the KKK).

<sup>178</sup> 18 U.S.C. § 2339A; Edwards et al., *supra* note 133 (noting the lack of prosecutions under the material support statute for individuals espousing domestic ideologies). In 1996 a militia gathered explosives as part of a plot to attack the FBI building. GERMAN & ROBINSON, *supra* note 26, at 8

There is no material support statute for domestic terror organizations like there is for foreign terror organizations.<sup>179</sup> Furthermore, there is no list of domestic terror organizations like there is for foreign terrorist organizations, and many of the domestic groups that inspire domestic terror attacks engage in Constitutionally protected free speech.<sup>180</sup> Similar to the material support statutes, Section 2339, which criminalizes harboring terrorists, only applies to individuals that harbor or conceal someone who has or is about to commit one of the acts covered by the enumerated statutes listed.<sup>181</sup>

The treatment of individuals inspired by Islamic extremism as supporting foreign organizations is consistent with the FBI and Department of Homeland Security view that domestic terrorists do not get inspiration from foreign groups.<sup>182</sup> The effect of this policy is to define domestic terrorism as only being events inspired by certain ideologies, without considering the nationality of the perpetrator.<sup>183</sup> That said, many of the ideologies considered to be domestic,

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(describing the instances where individuals espousing domestic ideologies were charged with material support). Two of the men involved were charged with violating § 2339A, one of whom pled guilty to the charge. *Id.* at 8–9. In 2012, a KKK member built and tested a radiation device to use against Muslims with the assistance of another individual. *Id.* at 9. Both were charged with violating § 2339A. *Id.* One of the men was found guilty of other charges while the other pled guilty to § 2339A. *Id.*

<sup>179</sup> Edwards et al., *supra* note 133.

<sup>180</sup> See Margaret K. Lewis, *When Foreign Is Criminal*, 55 VA. J. INT'L L. 625, 671 (2015) (stating that the lack of a clear definition of domestic terrorist organization makes it harder to define what a foreign terrorist organization is for the purposes of the material support statutes); Byman, *supra* note 142 (describing the free speech issue with treating domestic terrorists the same as international terrorists). The United States Constitution protects the exercise of free speech and the right of assembly. See U.S. CONST. amend I. This protection extends to the ideologies that inspire terrorist attacks, including that of the Charlottesville protests. See *ACLU Statement on Charlottesville Violence and Demonstrations*, ACLU (Aug. 12, 2017), <https://www.aclu.org/news/aclu-statement-charlottesville-violence-and-demonstrations> [<https://perma.cc/S5S6-5WD3>] (explaining that the First Amendment protects “vile, hateful, and ignorant speech,” and justifying the decision of the American Civil Liberty Union (ACLU) to defend the Unite the Right protesters’ right to march prior to the protests). Due to these protections, the United States does not have the same tools as other countries, such as Germany, to combat ideologies. See Claire G. Gastañaga, *Why We Can’t Support HB 1601, Domestic Terrorism Legislation*, ACLU VA. (Jan. 24, 2018), <https://acluva.org/en/news/why-we-cant-support-hb-1601-domestic-terrorism-legislation> [<https://perma.cc/YTT3-G9CY>] (stating that the ACLU cannot support a bill criminalizing domestic terrorism in Virginia due to free speech concerns); *Germany Is Silencing “Hate Speech,” but Cannot Define It*, THE ECONOMIST (Jan. 13, 2018), <https://www.economist.com/europe/2018/01/13/germany-is-silencing-hate-speech-but-cannot-define-it> [<https://perma.cc/A52A-636K>] (discussing anti-hate speech laws in Germany including bans on the Swastika and Mein Kempf in unannotated form, as well as the criticism of the policies and troubles the government has faced in accurately defining what constitutes “hate speech”).

<sup>181</sup> 18 U.S.C. § 2339.

<sup>182</sup> See BJELOPERA, *supra* note 25, at 4 (stating the definition of domestic terrorism used by the FBI and DHS).

<sup>183</sup> See GERMAN & ROBINSON, *supra* note 26, at 3 (describing the effect of the government’s classification of domestic terrorism).

such as white supremacy, have international inspirations or affiliations.<sup>184</sup> Many international groups with shared ideologies as “U.S. based ideologies,” however, are not designated as international terrorist organizations by the United States government, making the material support statute used in the fight against Islamic extremism inapplicable.<sup>185</sup>

The remaining crimes in Chapter 113B relate to specific actions.<sup>186</sup> This leaves individuals who would be considered terrorists under the Patriot Act’s definition of domestic terrorism as outside the reach of the terrorism section of the criminal code.<sup>187</sup> Additionally, the statutes relating to specific actions do not have a requirement that the perpetrator intended to influence the govern-

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<sup>184</sup> See *id.* (describing the international influences of domestic ideologies); Lewis, *supra* note 180, at 672 (questioning whether American groups that get inspiration from foreign group would be considered foreign or domestic for the purposes of the material support statute). An example of international inspiration is the fact that the Neo-Nazi movement has drawn from the Nazi movement in Germany. GERMAN & ROBINSON, *supra* note 26, at 3. Similarly, the Earth Liberation Front was founded in the United Kingdom in 1992. Bruce Barcott, *From Tree-Hugger to Terrorist*, N.Y. TIMES (Apr. 7, 2002), <https://www.nytimes.com/2002/04/07/magazine/from-tree-hugger-to-terrorist.html> [<https://perma.cc/2YSC-TZWT>] (describing the origins of the Earth Liberation Front). More recently, domestic white supremacists have been heavily influenced by Breivik, who published an almost 1,600-page manifesto titled “2083: A European Declaration of Independence” prior to setting off a truck bomb in Oslo and attacking a youth political camp, killing seventy-seven people. Berger, *supra* note 117. Christopher Hasson, a member of the U.S. Coast Guard arrested for plotting an attack on public liberal figures, closely followed instructions in Breivik’s manifesto, including his use of human growth hormones. See Motion for Detention Pending Trial at 6–13, *United States v. Hasson*, 2019 WL 4573424 (D. Md. Sept. 20, 2019) (No. GLS-19-63) (detailing Breivik’s influence on Hasson). Hasson is just the most recent American to be inspired by Breivik; J.M. Berger, a fellow at the International Center for Counterterrorism at the Hague, has stated that Breivik has “acquired iconic status on the far right.” See Berger, *supra* note 117. Alex Linder, American Neo-Nazi and owner of the far-right forum VNN, has said Breivik is a model to follow, stating “I believe the time for violence is here: Anders Breivik fired the starting gun for the Age of Killing the Enemy.” *Id.* On right-wing forums, Anders Breivik is usually mentioned alongside Dylann Roof as a role-model. *Id.*

<sup>185</sup> See GERMAN & ROBINSON, *supra* note 26, at 3–4 (stating that many of the international groups that share ideologies considered by the Department of Justice to be domestic are not listed as foreign terrorist organizations). An example of this influence is Blood and Honour, a racist skinhead group based in the United Kingdom that advocates a race war and has American affiliates. *Blood & Honour*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/blood-honour> [<https://perma.cc/VXA5-VA78>] (describing Blood and Honour in the United States). The group is not designated as a foreign terrorist organization by the State Department. See *Foreign Terrorist Organizations*, *supra* note 82.

<sup>186</sup> See *supra* note 54 and accompanying text (detailing terrorism statutes punishing specific actions such as using nuclear weapons, weapons of mass destruction, and the bombing of government buildings).

<sup>187</sup> See Norris, *supra* note 24, at 278 (noting that Roof falls under the Patriot Act’s definition of terrorism but it cannot be prosecuted as such); Greg Myre, *Why the Government Can’t Bring Terrorism Charges in Charlottesville*, NPR (Aug. 14, 2017), <https://www.npr.org/2017/08/14/543462676/why-the-govt-cant-bring-terrorism-charges-in-charlottesville> [<https://perma.cc/7876-AC5R>] (quoting Attorney General Jeff Sessions as stating that the actions of James Alex Fields Jr. in Charlottesville meet the statutory definition of domestic terrorism and pointing out he cannot be charged with domestic terrorism).

ment or a civilian population.<sup>188</sup> Unlike these statutes, the definition of domestic terrorism in the Patriot Act requires that the action is intended to influence the population or government.<sup>189</sup> This allows for situations where an individual is convicted under the terrorism chapter of the criminal code for an action that does not fit the government's own definition of terrorism.<sup>190</sup>

The sentencing enhancements for terrorism have been criticized because Muslims have faced tougher sentences when charged with terrorism.<sup>191</sup> The terrorism enhancement does not differentiate between religion, race, ethnicity, or ideology, but Muslims are disproportionately affected.<sup>192</sup>

### B. Dzhokhar Tsarnaev

In April 2013, two bombs were set off at the finish line of the Boston Marathon.<sup>193</sup> The explosives were placed there by Dzhokhar Tsarnaev and Tamerlan Tsarnaev, two brothers who legally immigrated from Chechnya to Cambridge, Massachusetts.<sup>194</sup> Dzhokhar was the only brother to survive the manhunt that ensued.<sup>195</sup> Before he was apprehended while hiding under a boat in Watertown, Massachusetts, he wrote a message on the wall of the boat that denounced U.S. policy towards the Middle East.<sup>196</sup> In addition to this, the brothers learned how to make the bombs from the online magazine of al-Qaeda.<sup>197</sup>

Tsarnaev was charged under two statutes from the terrorism chapter of the criminal code: Use of a Weapon of Mass Destruction and Bombing of a Place

<sup>188</sup> 18 U.S.C. § 1992 (omitting such an intent requirement); *id.* § 2332A (same); *id.* § 2332F (same); *id.* § 2332G (2012) (same); *id.* § 2332H (2012) (same); *id.* § 2332I (same).

<sup>189</sup> See *id.* § 2331(5) (defining the intent requirement for domestic terrorism).

<sup>190</sup> See *United States v. Reynolds*, 381 F.3d 404, 404 (5th Cir. 2004) (convicting defendant of 18 U.S.C. § 2332A after he told a customer service representative that he put anthrax in the company's air conditioning because he was angry with the company).

<sup>191</sup> Rondon, *supra* note 143, at 784 (stating that there are worries Muslims and Muslim Arabs face tougher sentences for terror related crimes).

<sup>192</sup> See Ahmed, *supra* note 69, at 1534 (stating that Muslims are disproportionately affected by the terrorism enhancement much like African Americans are disproportionately affected by the sentencing laws promulgated in the war on drugs).

<sup>193</sup> Michael Cooper & John Eligon, *Blasts at Boston Marathon Kill 3 and Injure 100*, N.Y. TIMES (Apr. 15, 2013), <https://www.nytimes.com/2013/04/16/us/explosions-reported-at-site-of-boston-marathon.html> [<https://perma.cc/2SL9-ZZ85>].

<sup>194</sup> *Boston Marathon Terror Attack Fast Facts*, CNN (Mar. 25, 2018), <https://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/index.html> [<https://perma.cc/455V-382R>].

<sup>195</sup> *Id.* Tamerlan Tsarnaev was killed in a shootout with police. *Id.*

<sup>196</sup> *Indictment at 4*, *United States v. Tsarnaev*, 53 F. Supp. 3d 450 (D. Mass. June 27, 2013) (13-10200-GAO). The messages on the inside of the boat were: "The U.S. government is killing our innocent civilians"; "I can't stand to see so much evil go unpunished"; "We Muslims are one body, you hurt one you hurt us all"; "Now I don't like killing innocent people it is forbidden in Islam but due to said [unintelligible] it is allowed"; and "Stop killing our innocent people and we will stop." *Id.*

<sup>197</sup> Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 686 (2017).

of Public Use.<sup>198</sup> In the indictment, the government wrote that Tsarnaev had various items of Islamic extremist propaganda on his computer, in furtherance of the conspiracy to use a weapon of mass destruction.<sup>199</sup> There were two non-statutory aggravating factors related to terrorism for the jury to consider when weighing whether or not to sentence him to death.<sup>200</sup> The jury had to determine whether he (1) made statements that promoted terrorism against the United States, and (2) targeted a large, “iconic event” that was vulnerable to terrorist attacks.<sup>201</sup> Tsarnaev is the first terrorist to receive a death sentence from a federal jury since 9/11.<sup>202</sup>

The actions of the Tsarnaev brothers fit within the Patriot Act’s definition of domestic terrorism because the actions were dangerous to human life and can be considered intended to influence government policy or affect the conduct of the government through mass destruction.<sup>203</sup> Despite fitting into the definition of domestic terrorism in the Patriot Act and being an American citizen, Tsarnaev would not qualify as a domestic terrorist under FBI and Homeland Security definitions because he was acting on behalf of a foreign ideology.<sup>204</sup> Tsarnaev was prosecuted as a terrorist because his acts fit with those covered by the terrorism chapter of the criminal code.<sup>205</sup> Tsarnaev was not charged with material support to a foreign terrorist organization, despite the al-

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<sup>198</sup> See Indictment, *supra* note 196, at 1 (listing the charges); see also 18 U.S.C. §§ 2332A, F. He was also charged with Malicious Destruction of Property, Use of a Firearm During and in Relation to a Crime of Violence, Use of a Firearm During and in Relation to a Crime of Violence Causing Death, Carjacking Resulting in Serious Bodily Injury, Interference with Commerce by Threats or Violence, Aiding and Abetting, and Forfeiture. Indictment, *supra* note 196, at 1.

<sup>199</sup> See Indictment, *supra* note 196, at 6–7 (listing the propaganda downloaded to his computer). According to the indictment, Tsarnaev downloaded a copy of “The Slicing Sword, Against the One Who Forms Allegiances with Disbelievers and Takes Them as Supporters Instead of Allah, His Messenger and the Believers,” which counsels Muslims not to support governments that invade Muslim lands, “Defense of the Muslim Lands, the First Obligation and Imam,” which promotes violence against supposed enemies of Islam, “Jihad and the Effects and Intention Upon It,” which calls for martyrdom in support of violent jihad, and volume one of “Inspire,” which contains instructions on how to build an IED. *Id.*

<sup>200</sup> Penalty Phase Jury Verdict, *supra* note 80, at 12–13 (listing the non-statutory aggravated factors).

<sup>201</sup> *Id.*

<sup>202</sup> Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html> [<https://perma.cc/JW6L-ZTX2>].

<sup>203</sup> See Richard Valdmanis, *Boston Bomb Suspect Influenced by Al-Qaeda: Expert Witness*, REUTERS (Mar. 23, 2015), <https://www.reuters.com/article/us-boston-bombings-trial/boston-bomb-suspect-influenced-by-al-qaeda-expert-witness-idUSKBN0MJ0Z620150323> [<https://perma.cc/BE7H-2Q33>] (describing the testimony of a counterterrorism expert at Tsarnaev’s trial that Tsarnaev was influenced by al-Qaeda).

<sup>204</sup> See BJELOPERA, *supra* note 25 at 4 (describing the FBI and DHS definitions of terrorism).

<sup>205</sup> See Indictment, *supra* note 196, at 1–3 (stating that Tsarnaev detonated an explosive at the Boston Marathon and was charged with bombing of a public place and use of a weapon of mass destruction).

Qaeda literature he possessed and the willingness of prosecutors to apply the statute to individuals who had no direct contact with the foreign organizations that influenced them.<sup>206</sup> Had Tsarnaev used a different method of attack other than a bomb, it is not clear if he would have been charged as a terrorist.<sup>207</sup>

### C. Taylor Michael Wilson

In October 2017, Taylor Michael Wilson pulled the emergency brakes on an Amtrak train in Nebraska.<sup>208</sup> Wilson broke into the engine room with a gun, where he cut the lights and disabled the train.<sup>209</sup> He was subsequently overpowered by the train conductors.<sup>210</sup> During the struggle he said that he was “trying to save the train from black people.”<sup>211</sup> Wilson is a member of the National Socialist Movement, a Neo-Nazi organization, and upon searching his apartment authorities found a copy of *Mein Kampf* and a play Wilson had written about overthrowing the American government.<sup>212</sup> He also attended a 2017 “Unite the Right” rally in Charlottesville.<sup>213</sup> According to his roommate, Wilson had recently joined an extremist group by looking at online forums.<sup>214</sup>

Wilson pled guilty to one terroristic crime, though not in the terrorist chapter of the criminal code, for carrying out a terroristic attack against railroad carriers.<sup>215</sup> The act of taking over a train is dangerous to human life and his active affiliations with white supremacy groups and comments on the train evidenced a political motivation, so Wilson’s actions seemingly fall under the Patriot Act’s

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<sup>206</sup> See *id.* at 1 (listing the charges, which did not include material support to a foreign terrorist organization); Daddario & Jenkins, *supra* note 26 (describing the broad application of the material support statute).

<sup>207</sup> See Indictment, *supra* note 196, at 1 (listing the only two terrorist charges against Tsarnaev as ones that include explosives).

<sup>208</sup> *Missouri Man Sentenced for Disabling an Amtrak Train in Nebraska*, DEP’T JUST. (Oct. 5, 2018), <https://www.justice.gov/usao-ne/pr/missouri-man-sentenced-disabling-amtrak-train-nebraska> [<https://perma.cc/49AZ-WD9K>].

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Eric Levenson, *Neo-Nazi Charged with Terrorism in Attempt to Wreck Amtrak Train, Complaint Says*, CNN (Jan. 9, 2018), <https://www.cnn.com/2018/01/09/us/nazi-white-supremacist-amtrak-terrorism-arrest-trnd/index.html> [<https://perma.cc/K4A7-8LDK>] (noting Wilson’s attendance at the rally).

<sup>214</sup> Bill Chappell, *Alleged White Supremacist Is Charged with Terrorism After Stopping Amtrak Train*, NPR (Jan. 5, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/05/575960858/alleged-white-supremacist-is-charged-with-terrorism-after-stopping-amtrak-train> [<https://perma.cc/KDK5-7D22>] (noting the online activity of Wilson).

<sup>215</sup> See Elkhaoudi, *supra* note 13 (describing the guilty plea and explaining that, despite the plea, there is still no domestic terror statute that is wildly applicable).

definition of domestic terrorism.<sup>216</sup> Despite this connection to white supremacy, the statute he was charged under did not require any intent to influence a population or government.<sup>217</sup> Had Wilson not attacked a train or other mass transportation system, his actions would not be considered terrorism unless he committed one of the other acts of the terrorism chapter of the criminal code.<sup>218</sup>

#### D. Dylann Roof

In June of 2015, Dylann Roof entered Emanuel African Methodist Episcopal Church in Charleston, South Carolina and killed nine African-American churchgoers.<sup>219</sup> Roof had posted a white supremacist manifesto online and told authorities he carried out the attack to provoke a race war.<sup>220</sup> Roof adopted his radical ideology by consuming online materials.<sup>221</sup>

This attack fits the definition of terrorism in the Patriot Act, as it was intended to coerce a civil population by starting a race war, and involved acts dangerous to human life.<sup>222</sup> Roof was not charged with terrorism due to a lack of statutes that applied to his method of carrying out the attack.<sup>223</sup> Roof's crimes could have led to the application of terrorism sentencing enhancements or aggravating factors for terrorism supporting the death penalty.<sup>224</sup> Despite

<sup>216</sup> See 18 U.S.C. § 2331 (stating the definition of domestic terrorism); *Missouri Man Sentenced for Disabling an Amtrak Train in Nebraska*, *supra* note 208 (describing the incident and connection to white supremacist groups).

<sup>217</sup> See 18 U.S.C. § 1992 (omitting such an intent requirement). Wilson denies his actions were terrorism, claiming he took a hallucinogenic drug before the attack and telling the judge that the attack was not related to the ideologies he believed. Ryan J. Reilly, *Neo-Nazi Sentenced to 14 Years on Federal Terrorism Charges for Amtrak Attack*, HUFFINGTON POST (Oct. 5, 2018), [https://www.huffingtonpost.com/entry/neo-nazi-domestic-terrorism-taylor-michael-wilson\\_us\\_5bb7931be4b01470d051338a](https://www.huffingtonpost.com/entry/neo-nazi-domestic-terrorism-taylor-michael-wilson_us_5bb7931be4b01470d051338a) [<https://perma.cc/P3TT-KYVV>] (noting Wilson's defense).

<sup>218</sup> See Elkhaoudi, *supra* note 13 (explaining Wilson was charged with terrorism because he attacked a railroad, violating a specific statute, and noting the absence of a general domestic terrorism statute); see also *supra* note 54 and accompanying text.

<sup>219</sup> Norris, *supra* note 24, at 260–61.

<sup>220</sup> *Id.* Before the attack Roof declared he was there “to shoot black people,” and during the shooting he stated “Y’all are raping our women and taking over the country. This must be done.” *Id.* at 260.

<sup>221</sup> Mark Berman, *Prosecutors Say Dylann Roof ‘Self-Radicalized’ Online, Wrote Another Manifesto in Jail*, WASH. POST (Aug. 22, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online> [<https://perma.cc/R7GP-93CS>] (describing the radicalization of Roof).

<sup>222</sup> See generally Norris, *supra* note 24, at 273–78 (providing a detailed analysis of why Roof's actions qualified as terrorism under the definition in the Patriot Act).

<sup>223</sup> See *id.* at 278 (explaining why Roof was not charged with terrorism). Roof was charged with thirty-three federal counts of hate crimes, obstruction of religious exercise, and firearms charges. *Federal Jury Sentences Dylann Storm Roof to Death*, DEP'T JUST. (Jan. 10, 2017), <https://www.justice.gov/usao-sc/pr/federal-jury-sentences-dylann-storm-roof-death> [<https://perma.cc/4XCW-7BLC>] (reporting Roof received the death sentence and noting the charges).

<sup>224</sup> See generally Norris, *supra* note 24, at 278–83 (explaining why the actions of Roof should lead to the imposition of the terrorism sentencing enhancements and aggravating factors for the death penalty).

this, when Roof was sentenced to death, neither the statutory aggravating factor for terrorism nor any non-statutory aggravating factors for terrorism were considered by the jury.<sup>225</sup>

### *E. Different Treatments for Similar Crimes*

Dylann Roof and Dzhokhar Tsarnaev both carried out acts of violence against innocent people to further an ideology they believed in; one in the name of white supremacy and one in the name of Islamic extremism.<sup>226</sup> Tsarnaev downloaded Islamic extremist propaganda from the Internet and Roof became radicalized by consuming white supremacy propaganda on the Internet.<sup>227</sup> Both were sentenced to death.<sup>228</sup> Tsarnaev was charged as a terrorist and Roof was not because Tsarnaev used a more traditional attack: a weapon of mass destruction in a public place.<sup>229</sup> Despite the similarity of their crimes—mass violence to further their own ideology—only Tsarnaev faced aggravating factors for terrorism when facing the death penalty.<sup>230</sup>

Taylor Michael Wilson was charged with a terrorism statute, while Roof was not, because he targeted a train rather than a church.<sup>231</sup> Wilson and Roof

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<sup>225</sup> Sentencing Phase Verdict Form at 7–13, *United States v. Roof*, 225 F. Supp. 3d 419 (D.S.C. 2016) (2:15–472–RMG) (listing the aggravating factors to be considered and not listing any for terrorism).

<sup>226</sup> See Indictment, *supra* note 196, at 6–7 (describing motivation of Tsarnaev); *Federal Jury Sentences Dylann Storm Roof to Death*, *supra* note 223 (describing the acts and motivation of Roof); *Judge Imposes Death Sentence for Boston Marathon Bomber*, DEP’T JUST. (June 26, 2015), <https://www.justice.gov/opa/pr/judge-imposes-death-sentence-boston-marathon-bomber> [<https://perma.cc/P2LD-K3NS>] (describing the acts of Tsarnaev).

<sup>227</sup> See Indictment, *supra* note 196, at 6–7 (describing the propaganda Tsarnaev downloaded to his computer); Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/5XNN-AWJU>] (describing the radicalization of Roof on the Internet).

<sup>228</sup> See *Federal Jury Sentences Dylann Storm Roof to Death*, *supra* note 223 (stating Roof was sentenced to death); *Judge Imposes Death Sentence for Boston Marathon Bomber*, *supra* note 226 (stating Tsarnaev was sentenced to death).

<sup>229</sup> See *Federal Jury Sentences Dylann Storm Roof to Death*, *supra* note 223 (describing the attack carried out by Roof); *Judge Imposes Death Sentence for Boston Marathon Bomber*, *supra* note 226 (stating the charges against Tsarnaev, including using a weapon of mass destruction and bombing a place of public use).

<sup>230</sup> Compare Penalty Phase Jury Verdict, *supra* note 80, at 12–13 (listing aggravating factors and listing two non-statutory aggravating factors for terrorism), with Sentencing Phase Verdict Form, *supra* note 225, at 7–13 (listing aggravating factors, including ones related to hatred for African Americans and societal impact of the attack but omitting any related to terrorism).

<sup>231</sup> See 18 U.S.C. § 1992 (criminalizing terrorist attacks against railroads and other mass transportation); Elkhaoudi, *supra* note 13 (explaining that Wilson was charged with terrorism because he attacked a railroad, violating a specific statute, and noting the absence of a general domestic terrorism statute); *Federal Jury Sentences Dylann Roof to Death*, *supra* note 223 (noting that Roof attacked a church).



both espoused white supremacist ideologies.<sup>232</sup> They both carried out their attacks with guns.<sup>233</sup> Despite these similarities, only Wilson was charged with a terrorism crime because he happened to fall under one of the enumerated statutes criminalizing a specific action, in his case attacking a railroad.<sup>234</sup>

As shown by the case of Dylann Roof, there are a number of federal statutes that individuals who fit the Patriot Act's definition of domestic terrorist can be charged under, even if one of the limited chapters of the terrorism code does not apply.<sup>235</sup> Although this use of other crimes allows people fitting the Patriot Act's definition of domestic terrorism to be prosecuted, it creates other issues.<sup>236</sup> Terrorism has been used to refer to "the other side," and "the bad guy."<sup>237</sup> The United States has fought a "war on terror."<sup>238</sup> Today, the criminal justice system of the United States disproportionately applies the label of terrorism to individuals that espouse Islamic extremism.<sup>239</sup> This discrepancy can be partially explained by the difficulty of prosecuting domestic terrorists as terrorists due to the requirement they commit certain acts, rather than just domestic terrorism more broadly.<sup>240</sup> This treatment has led to an increase in prejudice against Muslims, including a significant rise in anti-Muslim hate crimes since 9/11.<sup>241</sup> The disproportionate coverage of Islamic extremist terror in the media as well as the harsher treatment in the court system has helped separate

<sup>232</sup> See Norris, *supra* note 24, at 260–61 (describing Roof's white supremacist motivation for the attack); *Missouri Man Sentenced for Disabling an Amtrak Train in Nebraska*, *supra* note 208 (describing Wilson's membership in the National Socialist Party).

<sup>233</sup> Norris, *supra* note 24, at 260 (describing Roof's use of a firearm); *Missouri Man Sentenced for Disabling an Amtrak Train in Nebraska*, *supra* note 208 (describing Wilson's use of a firearm).

<sup>234</sup> See 18 U.S.C. § 1992 (only criminalizing terrorist attacks on public transportation); Elkhaoudi, *supra* note 13 (explaining Wilson was charged with terrorism because he attacked a railroad, violating a specific statute, and noting the absence of a general domestic terrorism statute).

<sup>235</sup> See BJELOPERA, *supra* note 25, at 5 (describing the use of statutes other than terrorism to prosecute domestic terror).

<sup>236</sup> See *id.* at 8 (describing the problems with tracking domestic terrorism due to the mixed use of criminal statutes in prosecuting terrorism).

<sup>237</sup> See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23 (2006) (describing the use of the term terrorism to demonize and to refer to the "other side"); see also Berger, *supra* note 139 (stating terrorism has been used as a way to "demonize society's villains du jour"); Byman, *supra* note 142 (quoting Bryan Jenkins as stating, "terrorism is what the bad guys do").

<sup>238</sup> See Ahmed, *supra* note 69, at 1523 (stating the United States has launched a "War on Terror" to combat groups in Muslim-majority countries).

<sup>239</sup> See Neiwert, *supra* note 26 (describing the results of the study that found a vast discrepancy in the number of Muslims charged with terrorism crimes and right-wing extremists charged with terrorism crimes).

<sup>240</sup> See Norris, *supra* note 24, at 278 (noting the lack of a general domestic terror statute). Only specific acts will lead to prosecution as a terrorist; *supra* note 54 and accompanying text.

<sup>241</sup> See Ahmed, *supra* note 69, at 1562 (describing the effect of the treatment of terrorism as uniquely Muslim on Muslims in the United States). "According to the FBI, anti-Muslim hate crimes in the United States rose by 67 percent from 2015 to 2014." Byman, *supra* note 103.

them as a distinct class of perpetrators.<sup>242</sup> The increase of lone wolves across the ideological spectrum have made terrorists increasingly similar, and both Islamic extremists and individuals adhering to other ideologies are often radicalized on the Internet.<sup>243</sup> It is important for the federal government to prosecute individuals who only differ on ideology the same way, and not place a stigma on one segment of the population.<sup>244</sup>

### III. WHAT SHOULD A DOMESTIC TERROR STATUTE LOOK LIKE?

A United States statute criminalizing domestic terrorism should make it illegal for any lawful resident of the United States to carry out an act that violates the criminal laws of the United States, or any state, with the intent to cause serious physical injury or death in order to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and to carry out such crime primarily within the territorial jurisdiction of the United States.<sup>245</sup>

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<sup>242</sup> See Ahmed, *supra* note 69, at 1535 (stating that policymakers have justified the disproportionate use of sentencing enhancements against Muslims by stating they are dangerous and “uniquely incapable of being rehabilitated”); Rondon, *supra* note 143, at 785 (describing how disproportionate portrayals of Islamic extremist attacks in the media and harsher treatment of Muslim defendants in the court system has led to the institutionalization of Arabs and Muslims “as a distinct class in the criminal legal system”).

<sup>243</sup> See Indictment, *supra* note 196, at 6–7 (noting that Dzhokhar A. Tsarnaev downloaded Islamic extremist propaganda to his computer); S. POVERTY LAW CTR., *supra* note 17, at 23, 28, 30, 31 (noting that Kevin William Harpham posted over 1,000 messages to a Neo-Nazi site prior to attempting to detonate a bomb at a MLK Day parade; Christopher Lacy downloaded anti-government literature to his computer before shooting a police officer; Robert James Taylor Jr. ran a Facebook group dedicated to anti-government, anti-Muslim, and anti-LGBTQ propaganda before being arrested for a plot to recruit others in various terror plots; and Elliot Rodgers had posted to a misogynistic website prior to going on a murderous rampage); Byman, *supra* note 103 (noting that the San Bernardino assailants acted alone, with no direct contact with a foreign organization, but were inspired by al-Qaeda member Anwar al-Awlaki and pledged allegiance to ISIS); Norris, *supra* note 24, at 261 (noting that Roof admitted he developed white supremacist beliefs by visiting white supremacist websites).

<sup>244</sup> See Brian Resnick, *All Muslims Are Often Blamed for Single Acts of Terror. Psychology Explains How to Stop It.*, VOX (Nov. 30, 2017), <https://www.vox.com/science-and-health/2017/11/30/16645024/collective-blame-psychology-muslim> [<https://perma.cc/A3KA-RP6J>] (describing the collective blame of Muslims for acts of terrorism).

<sup>245</sup> See 18 U.S.C. § 2331 (2012) (providing the current definition of domestic terrorism and not differentiating against ideologies espoused); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (requiring a substantial effect on interstate commerce); *BJELOPERA*, *supra* note 25, at 4 (stating that the FBI and DHS require domestic terrorism to lack foreign direction but pointing out the international influence of many ideologies considered to be domestic); Berger, *supra* note 139 (stating that terrorism is “public violence to advance a political, social, or religious cause or ideology”); Beydoun, *supra* note 103, at 190 (stating that Afghan and Muslim identities are tied to terrorism in the United States); *How the Patriot Act Redefines “Domestic Terrorism,” supra* note 42 (expressing concern with the requirement of the current definition of domestic terrorism that the act causes harm).

The United States criminal code has a definition for domestic terrorism, and although it does not criminalize domestic terrorism, it is a good starting point for a potential domestic terrorism crime statute.<sup>246</sup> The definition covers violations of the law that pose a risk to human life and have an intent to influence a population or government.<sup>247</sup> Though the exact definition of terrorism is debated, this definition fits with the expert perception that terrorism is public violence intended to advance a certain ideology, whether it be social, religious, or political.<sup>248</sup>

The current definition of domestic terrorism requires an action that violates a federal or state law and poses a danger to human life.<sup>249</sup> There are a broad range of acts that are covered by the definition, and not all of them would fit a traditional understanding of terrorism.<sup>250</sup> On the other hand, a statute criminalizing domestic terrorism should not be limited to certain actions covered in other enumerated statutes, as is the standard for Federal Crime of Terrorism used in 18 U.S.C. § 2332B and sentencing enhancements.<sup>251</sup> The American Civil Liberties Union (ACLU) has proposed a requirement that the acts actually result in serious harm or death instead of the broader definition of all acts that pose a danger to human life.<sup>252</sup> Given the severity of the charge, a statute criminalizing terrorism should ensure the perpetrator intends to actually cause harm or death.<sup>253</sup> An effective act criminalizing domestic terrorism should require that the perpetrator carries out an act that violates the criminal laws of the United States, or any state, with the intent to cause serious physical injury or death.<sup>254</sup>

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<sup>246</sup> See 18 U.S.C. § 2331 (defining domestic terrorism). This has served as the starting point for both Senator McSally's and Representative Schiff's proposed bills. See McQuade, *supra* note 12.

<sup>247</sup> See 18 U.S.C. § 2331 (defining domestic terrorism as "activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States").

<sup>248</sup> See Berger, *supra* note 139 (stating that for the people who deal with terrorism every day, it is thought to be "public violence to advance a political, social, or religious cause or ideology," though there are some differences in the details of the definition including who the target is and whether the attacker must be a non-state actor).

<sup>249</sup> See 18 U.S.C. § 2331.

<sup>250</sup> See *How the Patriot Act Redefines "Domestic Terrorism," supra* note 42 (describing the applicability of the statute to protesters participating in civil disobedience on a military base because the protesters violate the law by trespassing on the base and it can be argued their attempts to stop bombing exercises could be dangerous to human life).

<sup>251</sup> See 18 U.S.C. § 2332B (defining Federal Crime of Terrorism).

<sup>252</sup> See *How the Patriot Act Redefines "Domestic Terrorism," supra* note 42 (describing an alternative to the current requirement of the Patriot Act).

<sup>253</sup> See *id.* (describing the seriousness of being considered a domestic terrorist).

<sup>254</sup> See *id.* (stating the ACLU's proposed statute requires harm be caused).

Terrorism is ideologically motivated, so a statute criminalizing it must include such a *mens rea* requirement.<sup>255</sup> The perpetrator cannot be prosecuted for simply holding such an ideology; the act must have been carried out to advance that ideology.<sup>256</sup> The current definition of domestic terrorism requires such an intent.<sup>257</sup> The current intent requirement is important because it does not differentiate between ideologies; as long as the act is carried out with the stated purpose of influencing a government or civilian population, the requirement is satisfied.<sup>258</sup> This is different than the FBI and DHS requirement that domestic terrorism be influenced by “domestic ideologies.”<sup>259</sup> This will ensure Americans radicalized on the Internet, with no direct connection to a terrorist organization, will be prosecuted the same way, no matter the ideology they adhere to.<sup>260</sup> This will also help make the idea of terrorism more objective, and break down preconceived ideas that exist in the United States that only Muslims are terrorists.<sup>261</sup>

Police power in the United States is held by the states, not the federal government.<sup>262</sup> Under the Commerce Clause of the United States Constitution, Congress has the power to regulate activity that has a substantial effect on in-

<sup>255</sup> See Berger, *supra* note 139 (stating that terrorism is an act done to “advance a political, social, or religious cause or ideology”).

<sup>256</sup> See *id.* (stating that terrorism must be an act, but must also advance an ideology). For example, there have been reports that Stephen Paddock, the Las Vegas shooter, harbored anti-government beliefs. Wilson, *supra* note 94. Despite this, no motive has been found for the shooting. See LOMBARDO, *supra* note 94, at 52 (stating that there is no evidence that Paddock carried out the attack in the name of a specific ideology or terrorist organization, and he left no manifesto or rationale for the attack). Absent a finding that Paddock intended to advance an ideology with his attack, he would not be found guilty under the statute. See Berger, *supra* note 139 (stating that for a crime to be considered there must be evidence it was done to advance an ideology).

<sup>257</sup> See 18 U.S.C. § 2331 (defining domestic terrorism as requiring an intent “(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; (iii) or to affect the conduct of a government by mass destruction, assassination, or kidnapping”). It is unconstitutional to criminalize the expression of an ideology, but by prosecuting individuals who act out violently in the name of an ideology, the statute is not criminalizing the ideology itself, but rather, the violent act carried out in its name. See Gastañaga, *supra* note 180 (stating that the ACLU cannot support a bill criminalizing domestic terrorism in Virginia due to free speech concerns because it creates a category of domestic terrorism organizations and does nothing to criminalize violent conduct, which the ACLU believes should be the focus). The ACLU noted there is “nothing legally wrong with having radical or ‘extreme’ ideas,” as long as those who hold such beliefs do not engage in violence. *Id.*

<sup>258</sup> See 18 U.S.C. § 2331 (defining the intent requirement and not excluding certain ideologies from the definition of domestic terrorism); Rondon, *supra* note 143, at 743 (stating that the current federal definition of terrorism is meant to include a variety of ideologies including “antigovernment anarchists, white supremacists, and animal-rights activists”).

<sup>259</sup> See BJELOPERA, *supra* note 25, at 4 (stating the FBI and DHS definition of domestic terrorists as lacking foreign direction and carrying out attacks in the name of a U.S.-based ideology).

<sup>260</sup> See 18 U.S.C. § 2331 (refraining from differentiating between different ideologies).

<sup>261</sup> See Beydoun, *supra* note 103, at 190 (stating that Afghan and Muslim identities are tied to terrorism in the United States).

<sup>262</sup> Lopez, 514 U.S. at 566.

terstate commerce.<sup>263</sup> There must be a requirement in the statute that the act of terrorism affects interstate or foreign commerce.<sup>264</sup> Establishing an effect on commerce should not be a difficult burden to overcome, as attacks intended to influence the government and the population have an effect on the entire nation.<sup>265</sup>

To differentiate international terrorists from foreign terrorists, there must be a requirement that the attack was carried out in the United States by a lawful resident of the United States.<sup>266</sup> The United States criminal code currently provides tools to prosecute individuals directly affiliated with the foreign organizations.<sup>267</sup> This statute would be intended to prosecute only those individuals acting domestically, which the current federal criminal code does not adequately provide for.<sup>268</sup>

### CONCLUSION

The United States currently lacks a statute criminalizing domestic terrorism. Instead, federal prosecutors use an assortment of statutes under the terrorism chapter of the criminal code targeting specific acts or those working with foreign groups. This leaves many individuals who fit in the definition of domestic terrorism provided in the Patriot Act to be prosecuted using other statutes. The effect has been that a disproportionate number of individuals inspired by Islamic extremism are prosecuted as terrorists, while people inspired by other ideologies such as white supremacy are not. With the rise in right-wing extremist violence, the politicization of who is considered a terrorist, and the similarities in how people inspired by Islamic extremism and “domestic” ideologies are radicalized, the United States needs to criminalize domestic terrorism and treat all who fit the definition the same way. The label of terrorism is impactful, and only giving it to people who espouse a certain ideology is wrong. It is important for

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<sup>263</sup> *Id.* at 559.

<sup>264</sup> *Id.*

<sup>265</sup> See McCord, *supra* note 13 (stating that when crimes with terroristic intent are carried out, they “unquestionably transcend state boundaries”). An example of meeting this jurisdictional requirement can be seen in the case of Tsarnaev. See Criminal Complaint, *supra* note 55, at 1–3 (alleging that the attack had a substantial effect on interstate commerce because the marathon is a large event attracting many people and was disrupted by the attack, and businesses in the area were forced to close).

<sup>266</sup> See BJELOPERA, *supra* note 25, at 4 (noting the FBI and DHS definition requires the lack of foreign direction but pointing out the international influence of many ideologies considered to be domestic).

<sup>267</sup> See 18 U.S.C. § 2332 (criminalizing murder or conspiracy to murder or cause serious bodily injury of a United States national outside the United States); *id.* § 2332D (criminalizing financial transactions with a country that has been designated by the U.S. Code as one that supports international terrorism); *id.* § 2333 (providing civil remedies for victims of international terrorism); *id.* § 2339D (criminalizing the reception of military-type training from or on behalf of a foreign terrorist organization).

<sup>268</sup> See *id.* § 2331 (defining, but not criminalizing domestic terrorism).

the United States to adopt a law criminalizing domestic terrorism that treats all those who attack the United States and its citizens in the name of a certain ideology the same, no matter what ideology they espouse.

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