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Separate and Unequal: The Law of "Domestic" and "International" Terrorism

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SEPARATE AND UNEQUAL: THE LAW OF "DOMESTIC" AND "INTERNATIONAL" TERRORISM

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U.S. law differentiates between two categories of terrorism. "International terrorism" covers threats with a putative international nexus, even when they stem from U.S. citizens or residents acting only within the United States. "Domestic terrorism" applies to political violence thought to be purely domestic in its origin and intended impact. The law permits broader surveillance, wider criminal charges, and more punitive treatment for crimes labeled international terrorism. Law enforcement agencies frequently consider U.S. Muslims "international" threats even when they have scant foreign ties. As a result, they police and punish them more intensely than white nationalists and other "domestic" threats. This legal divide not only harms individuals and communities but also reinforces distorted public perceptions of terrorism that fuel anti-immigrant and discriminatory policies.

This Article is the first to challenge the domestic–international divide in U.S. terrorism law. It maps the divergence in the investigation, prosecution, and punishment of terrorism. It then refutes the three leading rationales for the divide: (1) civil liberties; (2) federalism; and (3) the magnitude of the threats. It further argues that, once the law divides threats into the "domestic" and "international," the latter category will predictably expand to cover U.S. individuals perceived as "foreign," even if they are citizens with negligible relationships abroad. Policymakers should reject the legal divide as both incoherent and invidious. But rather than "ratchet up" the criminalization of domestic terrorism in the name of equality, they should make the law's approach to "international" terrorism more accountable and just.

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TABLE OF CONTENTS

INTRODUCTION

In the four years since a twenty-one-year-old white supremacist shot dead nine African American men and women at a Charleston church, a public debate has emerged on the law's response to political violence.[1] Initially,

1. For a sample of the debate that followed the Charleston church shooting, see Jelani Cobb, *Terrorism in Charleston*, NEW YORKER (June 29, 2015), https://www.newyorker.com/

the public conversation centered largely on labeling acts of violence. Critics often charged that the race, religion, or ideology of suspects affected whether government officials and the media conceptualized such acts as "terrorism."[2] But the conversation has increasingly moved from labeling to law, as commentators and policymakers observe that, even where authorities recognize violence as terrorism, the policing and prosecution of terrorism differs across ideologies and communities.[3]

The differences are even more stark than is generally recognized. The government intensively surveils and polices U.S. Muslim communities to root out potential terrorist threats. Law enforcement officials intercept phone conversations and obtain internet records with secret warrants from the Foreign Intelligence Surveillance Court (FISA Court).[4] Through a vast network of confidential informants, the FBI identifies individuals deemed prone to "radicalization" and offers them ostensible opportunities to engage in violence.[5] If individuals take the bait—sometimes after intense prodding from informants—federal prosecutors indict them for federal offenses including material support to terrorism.[6] Human rights advocates charge that these prosecutions target vulnerable individuals and induce them to commit

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magazine/2015/06/29/terrorism-in-charleston [https://perma.cc/4KGS-G2BM]; Julia Craven, *Dylann Roof Wasn't Charged with Terrorism Because He's White*, HUFFPOST (July 23, 2015, 8:10 PM), https://www.huffingtonpost.com/entry/dylann-roof-terrorism_us_55b107c9e4b07af29d57a5fc [https://perma.cc/8T5C-M2K5]; Rick Gladstone, *Many Ask, Why Not Call Church Shooting Terrorism?*, N.Y. TIMES (June 18, 2015), https://www.nytimes.com/2015/06/19/us/charleston-shooting-terrorism-or-hate-crime.html [https://perma.cc/EC6F-7UJ3]; and Ryan J. Reilly, *FBI Director James Comey Still Unsure if White Supremacist's Attack in Charleston Was Terrorism*, HUFFPOST (July 9, 2015, 5:45 PM) (updated July 10, 2015), https://www.huffingtonpost.com/2015/07/09/james-comey-charleston-terrorism-_n_7764614.html [https://perma.cc/U4L8-Q38V].

2. For a more recent example, see Samantha Schmidt, *Austin Bomber: 'Challenged Young Man' or 'Terrorist'?*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/22/austin-bomber-challenged-young-man-or-terrorist/ [https://perma.cc/T7L6-FLTM].

3. *See, e.g.*, INST. FOR SOC. POLICY & UNDERSTANDING, EQUAL TREATMENT? MEASURING THE LEGAL AND MEDIA RESPONSES TO IDEOLOGICALLY MOTIVATED VIOLENCE IN THE UNITED STATES (2018), https://www.imv-report.org/ [https://perma.cc/PWM3-A46M] (arguing that Muslim perpetrators of ideological violence received harsher charges, longer sentences, and more media coverage than non-Muslim perpetrators); Daniel Byman, *Should We Treat Domestic Terrorists the Way We Treat ISIS?: What Works—and What Doesn't*, FOREIGN AFF. (Oct. 3, 2017), https://www.foreignaffairs.com/articles/united-states/2017-10-03/should-we-treat-domestic-terrorists-way-we-treat-isis [https://perma.cc/9UZN-GXP8] (describing differences in treatment of ISIS sympathizers and domestic terrorists).

4. *See infra* Sections I.A.1–2.

5. *See* HUMAN RIGHTS WATCH, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 21–26 (2014); WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS (2015); Amna Akbar, *Policing "Radicalization*," 3 U.C. IRVINE L. REV. 809, 845–68 (2013); *see also* TREVOR AARONSON, THE TERROR FACTORY: INSIDE THE FBI'S MANUFACTURED WAR ON TERRORISM 44 (2013).

6. *See infra* Section I.A.4.

crimes they would never have undertaken on their own.[7] Sentences are steep—as high as life without parole for a twenty-three-year-old high school dropout who accepted an inert bomb from FBI operatives who stoked the young man's ISIS sympathies.[8]

The federal government takes a different approach to non-Muslim terrorist threats. White supremacists, anti-government militias, sovereign citizens, and other groups present a significant terrorist threat.[9] The FBI investigates these individuals and groups using conventional warrants rather than secret foreign intelligence surveillance orders or other national security tools.[10] While prosecutors pervasively use material support charges to "preemptively" target Islamic extremists, they rarely charge white nationalists or anti-government extremists with material support.[11] Studies suggest that the FBI does not use informants and undercover operations against right-wing threats as extensively or aggressively as it does with Muslims.[12] And local law enforcement officials prosecute many cases under state law, thereby precluding the application of a federal terrorism sentencing enhancement and other potential consequences of federal prosecution.[13]

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7. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 5, at 27–54 (describing targeting of vulnerable individuals and informants' active roles in generating plots).

8. Judgment in a Criminal Case, United States v. Suarez, No. 15-10009 (S.D. Fla. Apr. 19, 2017), ECF. No. 171; Office of Pub. Affairs, *Florida Resident Sentenced to Life in Prison for Attempting to Possess a Weapon of Mass Destruction and Provide Material Support to a Terrorist Organization*, U.S. DEP'T JUSTICE (Apr. 18, 2017), https://www.justice.gov/opa/pr/florida-resident-sentenced-life-prison-attempting-possess-weapon-mass-destruction-and-provi-1 [https://perma.cc/A2LS-UFAN]; Lisa Rose, *The Massive FBI Sting to Bring Down an ISIS-Supporting Weightlifter in Key West*, CNN (Jan. 24, 2018, 3:37 PM), https://www.cnn.com/2018/01/24/politics/harlem-suarez-isis/index.html [https://perma.cc/XH7T-GA9X].

9. JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW 23–25 (2017). Among groups classified as "domestic" extremist movements, white supremacists are reportedly the most lethal. DEP'T OF HOMELAND SEC. & FED. BUREAU OF INVESTIGATION, JOINT INTELLIGENCE BULLETIN: WHITE SUPREMACIST EXTREMISM POSES PERSISTENT THREAT OF LETHAL VIOLENCE 4 (2017), https://cpb-us-e1.wpmucdn.com/blogs.uoregon.edu/dist/9/13250/files/2017/11/White-Supremacist-Extremism-Joint-Intelligence-Bulletin-1y5quxs.pdf [https://perma.cc/3NKQ-DK9W]. Terrorism also emanates from left-wing organizations and causes, although studies show far fewer fatalities. *See infra* note 309 (reporting results from comparative studies).

10. *See infra* Sections I.A.1–2.

11. *See infra* Section I.A.4 (describing unavailability of some material support charges and nonuse of others against domestic terrorists).

12. *See* Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 655 (2015) (finding, based on an original dataset, that "jihadi" and "left-wing" terrorism cases featured more indicators of government "entrapment" or "borderline entrapment" than right-wing cases); David Neiwert, *Home Is Where the Hate Is*, INVESTIGATIVE FUND (June 22, 2017), https://www.theinvestigativefund.org/investigation/2017/06/22/home-hate/ [https://perma.cc/JHD6-XQF8] (stating that a much higher proportion of preempted plots among Islamist incidents, compared to far-right incidents, suggests allocation of fewer resources—such as informants and undercover operations—to far-right violence).

13. *See infra* Section I.A.5.

This divergence in the treatment of terrorist threats stems in part from a formal division in the law of terrorism. U.S. law differentiates between two categories of terrorism in the investigation and prosecution of individuals. The "international" category covers terrorism with a putative international nexus—even when the threat stems from U.S. citizens or residents on American soil contemplating acts only within the United States. The "domestic" category covers terrorism thought to be purely domestic in its origin and intended impact. These categories thus do not coincide with the common understanding of "domestic" terrorism as occurring within the United States and "international" terrorism as committed abroad. Moreover, in practice, this categorization has a blunt impact because government officials largely consider threats of terrorism by Muslims to be international and threats by others to be domestic, even where there is little difference in their actual geography. For instance, the FBI characterizes U.S. citizens inspired by ISIS or al Qaeda propaganda as international terrorists even if they have no actual international ties, while it often views white supremacists and neo-Nazis as domestic terrorists despite the movements' global dimensions.[14]

The consequences of the legal divide between domestic and international terrorism—and its frequent application along ideological lines—are troubling. The legal divide subjects U.S. Muslim communities to greater surveillance, with less oversight, than other groups. It exposes some offenders to criminal punishment—and harsh sentences—for conduct that would not be criminal with respect to others. The discrepancy in consequences is greatest for individuals suspected of tenuous and uncertain connections to violence.

Beyond these direct effects, the legal divide contributes to a flawed—and racialized—public understanding of the terrorist threat, with further repercussions for public policy and communities. Federal officials say they hesitate to describe white nationalist or anti-government cases as terrorism because federal terrorism charges are less available in domestic cases.[15] In addition, the Justice Department only publishes statistics on international terrorism convictions, which reinforces perceptions that terrorists are primarily Muslim and foreign.[16] These skewed representations—facilitated by the binary legal regime—fuel exclusionary and discriminatory policies, like President Trump's travel bans, that target Muslims and immigrants while minimizing attention to racial violence afflicting communities of color.[17]

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14. *See infra* Sections I.A.1–4.

15. Ryan J. Reilly, *There's a Good Reason Feds Don't Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFPOST (Jan. 11, 2018, 9:32 AM), https://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists_us_5a550158e4b003133ecceb74 [https://perma.cc/S8VP-9H9K] (quoting Justice Department domestic terrorism counsel stating that federal prosecutors do not describe cases as domestic terrorism where they do not deploy terrorism charges).

16. *See infra* Section I.B.

17. *See infra* Section I.B.

Despite the significance of the domestic–international terrorism divide and its increasing relevance in policy debates, legal scholarship has scarcely touched the subject. A handful of law review articles point out racial discrepancies in the use of the terrorism label,[18] advocate treating racist violence as terrorism,[19] or address the legal distinction in particular contexts.[20] Some legal blog posts defend the distinction.[21] But none of these pieces systematically addresses the scope, impact, or legitimacy of the terrorism divide.

This Article illuminates and challenges the legal divide in the treatment of domestic and international terrorism within the United States. It shows that the investigation, prosecution, and sentencing of terrorism diverges according to the "domestic" or "international" classification of the threat. At the investigative stage, government officials use Foreign Intelligence Surveillance Act (FISA) orders, National Security Letters, and other tools for international terrorism that involve lower substantive standards and less oversight.[22] At the prosecution stage, federal officials routinely charge international terrorism defendants with material support charges that are una-

18. *See* Khaled A. Beydoun, Online Essay, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213 (2018) (arguing that the "lone wolf" label presumptively disconnects white and non-Muslim perpetrators from terrorism but connects Muslims to terrorism); Caroline Mala Corbin, Essay, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017) (describing how false narratives about the race and religion of terrorists interact with propaganda); Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 ALA. C.R. & C.L. L. REV. 33 (2013) (arguing that crimes by non-Arabs and non-Muslims are typically not viewed as terrorism for complex reasons).

19. *See* Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 299 (2017) (arguing that government officials should have sought a terrorism sentencing enhancement for Charleston shooter Dylann Roof and calling for new terrorism statutes to cover such incidents); Dawinder S. Sidhu, *Lessons on Terrorism and "Mistaken Identity" from Oak Creek, with a Coda on the Boston Marathon Bombings*, 113 COLUM. L. REV. SIDEBAR 76, 77–83 (2013) (noting debate over whether 2012 shooting at Sikh temple should be labeled terrorism and arguing for a broader definition of the term in U.S. criminal law).

20. The best of these is a student comment: Nick Harper, Comment, *FISA's Fuzzy Line Between Domestic and International Terrorism*, 81 U. CHI. L. REV. 1123 (2014). *See also* Margaret K. Lewis, *When Foreign Is Criminal*, 55 VA. J. INT'L L. 625, 669–70 (2015) (discussing material support ban).

21. *See, e.g.*, Jane Chong, *White Hate but Islamic Terror? Charleston, Hate Crimes and Terrorism Per Quod*, LAWFARE (June 21, 2015, 10:00 PM), https://www.lawfareblog.com/white-hate-islamic-terror-charleston-hate-crimes-and-terrorism-quod [https://perma.cc/X7B7-WNJA] (arguing that the Obama Administration has differentiated terrorism from other kinds of crime carefully and for justifiable legal reasons); Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015, 11:34 AM), https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism [https://perma.cc/SV28-L2NM] (arguing that federalism and civil liberties explain the differentiation across categories of ideologically motivated violence); *see also* Byman, *supra* note 3 (identifying potential benefits and complications from treating domestic terrorists similarly to Americans tied to foreign terrorism).

22. *See infra* Sections I.A.1–2.

vailable in domestic cases.[23] In addition, due in part to the uneven federalization of terrorism, federal prosecutors handle most international terrorism cases while local prosecutors frequently charge domestic terrorism under state law.[24] This disproportionate federal treatment of international terrorism unequally exposes defendants to a severe federal terrorism sentencing enhancement that treats even first-time offenders charged with nonviolent offenses like defendants with the most serious criminal histories.[25]

These legal differences do not account for all observed disparities between the treatment of Muslim suspects and those of other identities and ideologies. Even where certain laws apply to both domestic and international terrorism, law enforcement officials sometimes apply them differentially to Muslim individuals.[26] Thus, formal legal divisions by no means furnish the whole explanation for differential treatment. That larger explanation involves some combination of factors related to the influence of race and identity, contingent historical developments, security perceptions, and domestic politics. Still, the divide between domestic and international terrorism in significant areas of the law likely contributes to differential conceptualization of the threat and differential enforcement across the board. Because the legal distinction appears facially plausible, it allows government officials and society to excuse observed disparities as the incidental consequences of a neutral and rational scheme.

In undercutting the legitimacy of the domestic–international terrorism divide, this Article forces a confrontation with inequality. Although the historical origins of the legal divide are complex, none of the three primary rationales articulated in its defense—civil liberties, federalism, and the magnitude of threats—provides a good reason to maintain it.

First, some argue that civil liberties interests justify the greater protection of domestic terrorism because it presents heightened speech or privacy concerns. But I use the material support and foreign intelligence surveillance contexts to show that domestic and international terrorism equally implicate the civil liberties of U.S. communities.[27] In each case, overbroad measures threaten speech and privacy and invite the suppression of dissent for improper political reasons. Moreover, claims of heightened government interests with respect to international terrorism rest on simplistic distinctions between the government's capacity to act within and beyond its borders. Given that the United States exercises substantial power over counterterrorism abroad, the government-interest side of the constitutional balance is not necessarily weightier with respect to international terrorism.[28]

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23. *See infra* Section I.A.4.

24. *See infra* Section I.A.3.

25. *See infra* Section I.A.5.

26. *See infra* Section I.A.4 (discussing evidence of differential application of 18 U.S.C. § 2339A (2012), a statute that could be applied to both domestic and international terrorism).

27. *See infra* Sections II.A.1–2.

28. *See infra* Sections II.A.1–2.

Second, some contend that a respect for federalism explains why federal law unequally criminalizes domestic and international terrorism.[29] Constitutional doctrine, however, does not require the more limited federal approach to domestic terrorism.[30] Whether the federal government *should* criminalize and prosecute more domestic terrorism is more complicated. Federal treatment of domestic terrorism could provide greater resources, enable a centralized approach, and compensate for any inadequate state responses. Yet expanded federalization could also undermine local oversight of policing and expose more defendants to punitive consequences.[31] While there are tradeoffs, the key point is that the benefits and burdens of a federal approach to domestic terrorism do not markedly differ from those applicable to terrorism with an international nexus. Thus, rather than justify dichotomous treatment, federalism concerns should trigger renewed attention to fairness and accountability with respect to international terrorism.

Third, some justify the differential approach on the grounds that international terrorism presents a far greater threat.[32] Limited public information and other challenges of terrorism risk assessment make this claim difficult either to prove or refute. But some evidence related to the scale of recent incidents, the potential for mass casualties, and the organized nature of the threats calls into question assumptions of incommensurate threats.[33] Furthermore, even if the international terrorist threat is greater in the aggregate, that does not justify a different approach to individuals in the United States associated with each threat. For one thing, nothing in the international terrorism category limits the distinctive legal treatment to significant threats.[34] FISA and material support provisions, for instance, reach groups that pose a marginal threat to the United States—and less of a threat than domestic organizations specifically targeting Americans.[35] Moreover, if the legal divide turns on the fear of sophisticated international plots resulting in mass casualties, many individual defendants targeted in "international" cases appear ex ante to lack the connections or capabilities to engage in such plots.[36] Rather, little may separate the young man following ISIS online from his white supremacist neighbor posting on the *Daily Stormer*.[37]

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29. *See infra* Section II.B.

30. *See infra* Section II.B.1.

31. *See infra* Section II.B.2.

32. *See infra* Section II.C.

33. *See infra* Section II.C.1.

34. *See infra* Section II.C.2.

35. *See infra* Section II.C.2.

36. *See infra* Section II.C.2.

37. The Daily Stormer is a neo-Nazi and white nationalist website that is "arguably the leading hate site on the internet." Luke O'Brien, *The Making of an American Nazi*, ATLANTIC (Dec. 2017), https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/ [https://perma.cc/B6EZ-HTYH]. It encourages followers to meet locally to undertake paramilitary training, and its readers have included Charleston shooter Dylann

Thus, none of the three rationales offers a convincing justification for the domestic–international divide. But even if some grounds for the legal divide were plausible, there is another reason to reject the division. Processes of "othering" immigrant and nonwhite communities—endemic in U.S. history—suggest that the "international" category will almost inexorably expand to cover racial, ethnic, or religious communities perceived as a threat, even if they have scant connections abroad.[38] National security and public safety threats sharpen in-group identities against perceived outsiders, leading the government and the public to cast out some groups from the national community.[39] These deep tendencies to separate in-groups from out-groups help explain both why the terrorism legal divide is problematic and why it persists.

Some recent public conversation acknowledges the asymmetric approach to domestic and international terrorism, but then proposes to address it by "ratcheting up" the treatment of domestic terrorism through enacting new terrorism charges or conferring new coercive powers on law enforcement.[40] Such an intervention could corrode individual rights without protecting communities or achieving equality. Terrorism and security

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Roof and others who killed out of racial motives. *Id.* The name of the website is an allusion to *Der Stürmer*, the anti-Semitic weekly prized by Adolf Hitler. *Id.*

38. *See infra* Section III.A.

39. *See infra* Section III.A (invidious nature of legal divide).

40. *See, e.g.*, Reema Amin, *Price, Attorney General Propose Law Aimed at Domestic Terrorism*, DAILY PRESS (Jan. 22, 2018, 3:40 PM) (updated Jan. 24, 8:30 PM), https://www.dailypress.com/news/newport-news/dp-nws-politics-domestic-terrorism-20180122-story.html [https://perma.cc/3V2H-ATCF] (describing a Virginia legislative proposal to criminalize association with domestic terrorist groups); Monique Garcia, *Illinois Senate Approves Resolution Asking Police to Recognize Neo-Nazi Groups as Terrorist Organizations*, CHI. TRIB. (Aug. 13, 2017, 7:24 PM), https://www.chicagotribune.com/news/local/politics/ct-illinois-senate-neo-nazi-terrorist-organization-story.html [https://perma.cc/D6LY-3V2R] (describing an Illinois resolution urging recognition of white nationalist groups as terrorist organizations); Norris, *supra* note 19, at 292–95 (calling for a new federal terrorism statute); Ryan J. Reilly, *Domestic Terrorism Isn't a Federal Crime. DOJ May Try to Change That*, HUFFPOST (Aug. 16, 2017, 8:08 PM), https://www.huffingtonpost.com/entry/charlottesville-attack-domestic-terrorism-doj_us_5991eaa2e4b09071f69bb648 [https://perma.cc/ZP7P-USWP] (describing Justice Department consideration of a new domestic terrorism statute); Ryan J. Reilly et al., *Americans Are Surprised Domestic Terrorism Isn't a Federal Crime. Most Think It Should Be.*, HUFFPOST (Apr. 12, 2018, 4:54 PM), https://www.huffingtonpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi_us_5acd1c78e4b09212968c8907 [https://perma.cc/TU7F-72JS] (reporting strong bipartisan support for new federal terrorism statute); Jazmine Ulloa, *Violence from White Supremacist Groups Should Be Treated as Terrorist Acts, Committee Says*, L.A. TIMES (Aug. 29, 2017, 3:57 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-state-senate-committee-calls-1504046997-htmlstory.html [https://perma.cc/5LFF-2ADK] (describing California lawmakers' resolutions to treat white nationalist violence as terrorism). Some recent federal bills primarily call for increased data-gathering, training, and assessment of domestic terrorism, *see* Domestic Terrorism Prevention Act of 2018, H.R. 4918, 115th Cong. (2018); Domestic Terrorism Prevention Act of 2017, S. 2148, 115th Cong. (2017), while other proposals would require financial institutions to freeze the assets of those merely suspected of domestic terrorism, *see* FASTER Act of 2017, H.R. 3747, 115th Cong. (2017).

threats have long challenged civil liberties and democratic governance. Subjecting more people to policies that compromise rights and diminish accountability only magnifies the harm. Moreover, given that race pervades criminal justice decisions, new domestic terrorism laws risk threatening African Americans protesting police brutality, indigenous rights activists, and other historically targeted groups.[41]

Instead of ratcheting up the legal treatment of domestic terrorism, policymakers should restore civil liberties and oversight to the international terrorism legal regime. To begin, Congress or the Court should revisit the ban on material support to foreign terrorist organizations, which applies even to speech.[42] Furthermore, the Justice Department should oversee investigations of domestic and international terrorism with equal rigor and rein in the aggressive uses of informants in the latter context.[43] The federal government should collect and publicize consistent information on terrorism across the divide, allowing law enforcement and the public to better understand the domestic terrorism threat—and to devote more law enforcement resources where existing attention has fallen short.[44] In addition, so long as the distinction survives, institutions like the FISA Court should be required to find a substantial connection between individuals and foreign terrorist threats before treating suspects as "international."[45] Such measures would be a first step toward leveling the treatment of political violence across ideologies and communities.[46]

The Article develops as follows. Part I systematically maps the operation, origins, and effects of the legal divide between domestic and international terrorism. Part II critiques the primary rationales articulated in defense of the distinction: civil liberties, federalism, and the scale of domestic and international terrorism targeting the United States. Part III explains how racialized patterns of "othering" help explain the persistence of the legal divide and points the way toward a more equal and less punitive approach.

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41. *See infra* Section III.C.

42. *See infra* Section III.D.

43. *See infra* Section III.D.

44. *See infra* Section III.C–D.

45. *See infra* Section III.D.

46. This Article interrogates legal differences between categories of terrorism under U.S. law, and does not purport to answer whether and how the law should distinguish terrorism from other crime. In future work, I plan to address how terrorism relates to other offenses, including hate crimes, and to trace the evolution of the U.S. legal approach to political violence through earlier periods. In addition, while recognizing that the United States deems itself to be in armed conflict with a subset of international terrorist groups, this Article does not address the legitimacy of military responses to terrorism abroad, focusing instead on the criminal law mechanisms almost exclusively used against suspects within the United States.

I. THE LEGAL DIVIDE BETWEEN DOMESTIC AND INTERNATIONAL TERRORISM

To a significant degree, law enforcement polices, prosecutes, and punishes terrorism differently according to whether it is considered international or domestic in nature, even with respect to conduct by U.S. citizens and residents within the United States. The law treats international terrorism more harshly than domestic terrorism and requires less oversight of law enforcement and intelligence activities investigating it.

The threshold question is what constitutes terrorism. U.S. law has multiple definitions across and even within agencies.[47] A leading definition in the federal criminal code identifies terrorism, whether domestic or international, as activities that "involve violent acts or acts dangerous to human life" that violate the criminal law and "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."[48] Other U.S. legal definitions specify whether the targets must be noncombatants, whether the violence must be premeditated, and whether acts against property qualify.[49] For present purposes, when not referring to a specific legal definition, this Article applies the term to violence or the threat of violence used in pursuit of a political objective. This definition accords with most U.S. legal definitions and prevailing academic usage in requiring a political or ideological motive.[50] It thus excludes violent acts stemming from personal grievances even if they victimize large numbers of people or provoke widespread fear.

The dividing line between domestic and international terrorism—and the consequences of the division—varies across legal contexts. The differences are sharpest with respect to surveillance and the use of material support charges. By contrast, some investigative and regulatory mechanisms, like terrorist watchlist systems, make little formal distinction between domestic and international terrorism.[51] Even where the law is formally neutral, however, the prevalence of the distinction in other laws administered by the same agencies may reinforce a bifurcated approach to terrorism—where terrorism is conceptualized and treated more harshly when committed by Muslims.

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47. *See* BRUCE HOFFMAN, INSIDE TERRORISM 32–36 (3d ed. 2017) (distinguishing leading U.S. legal definitions).

48. 18 U.S.C. § 2331(1) (2012) (defining international terrorism); *id.* § 2331(5) (defining domestic terrorism).

49. HOFFMAN, *supra* note 47, at 31–33.

50. *See id.* at 2–3, 31 (noting that terrorism is political under most standard conceptions and citing legal definitions that refer to "politically motivated violence," the use of force or violence "in furtherance of political or social objectives," and the "pursuit of goals that are generally political, religious, or ideological objectives").

51. *See infra* Section I.A.2.

This Part maps the legal divide in the investigation, prosecution, and sentencing of terrorism. Across these contexts, the discussion demonstrates two related phenomena: first, the existence of different legal standards for domestic and international terrorism; and second, the elastic application of the international category to U.S. Muslims with limited international connections. Part II.B traces the historical origins of the terrorism divide. Part II.C shows how the terrorism divide contributes to a racialized understanding of terrorism and reinforces discriminatory policies.

A. *The Operation of the Divide*

1. Electronic Surveillance

If law enforcement officials suspect an individual within the United States of connections to "international terrorism," they can ask the FISA Court for permission to wiretap the person's phone or email under a relatively permissive standard and with little oversight.[52] By contrast, if officials suspect a person has links to "domestic terrorism," they must persuade a judge to authorize the wiretap surveillance under the conventional probable cause standard used in criminal cases.[53]

Unlike the conventional criminal standard, FISA does not require probable cause that a crime has been, or will be, committed. Instead, it requires probable cause that the surveillance target is a "foreign power" or an "agent of a foreign power."[54] A foreign power includes "a group engaged in international terrorism or activities in preparation therefor."[55] According to a leading treatise, a group need not be formally designated as a terrorist organization to qualify as a foreign power and can include as few as two people engaged in international terrorism.[56] Agents of foreign powers include those who knowingly engage in, or aid and abet, international terrorism or preparatory activities "for or on behalf of" foreign powers.[57] Thus,

52. For a description of the FISA Court, see generally Emily Berman, *The Two Faces of the Foreign Intelligence Surveillance Court*, 91 IND. L.J. 1191, 1192 (2016). In addition to electronic surveillance, FISA Court jurisdiction over individual targets extends to physical searches, the capture of metadata through "pen register" and "trap-and-trace" devices, and business records and other "tangible things." *Id.* at 1197.

53. *See* DAVID S. KRIS & J. DOUGLAS WILSON, 2 NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS 2D 264 (2d ed. 2012) (stating that the federal wiretapping statute, Title III, would be used for wiretapping groups engaged in domestic terrorism). The conventional federal standard for wiretapping comes from Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522 (2012).

54. 50 U.S.C. § 1805(a)(3)(A) (2012). The statute also requires that the surveillance be aimed at places used by the foreign power or an agent. *Id.* § 1805(a)(3)(B).

55. *Id.* § 1801(a)(4).

56. KRIS & WILSON, *supra* note 53, at 265.

57. 50 U.S.C. § 1801(b)(2)(C), (E).

this definition excludes supporters of groups engaged in entirely domestic activities.[58]

In addition, for individuals who are not U.S. citizens or legal permanent residents, the statute dispenses with the requirement that there be any connection to a foreign group. The 2004 "lone wolf" amendment to FISA authorized surveillance of unaffiliated individuals engaging in international terrorism or preparatory activities,[59] and Congress has reauthorized that controversial provision several times.[60] The government has reportedly never used the lone wolf provision and has relied instead on its ability to demonstrate a connection to international terrorist groups.[61]

Like federal judges reviewing conventional wiretapping requests, FISA judges approve warrants ex parte after reviewing the evidence supporting the government's probable cause determination.[62] In addition, FISA applications require internal approval by the attorney general or a deputy before submission to the FISA Court.[63] But in several respects, FISA orders are broader than conventional wiretapping orders and provide for less oversight. First, the duration of FISA surveillance is longer: the statute authorizes surveillance of U.S. citizens and permanent residents for 90 days and other individuals for 120 days before the government must request an extension,[64] as opposed to 30 days under the federal criminal standard.[65] Second, unlike the conventional federal requirement, the government does not notify targets of the surveillance after it ends except where it seeks to use the evidence in a criminal or other proceeding.[66]

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58. *See* KRIS & WILSON, *supra* note 53, at 264 ("A group engaged in 'terrorism of a purely domestic nature' would not qualify as an international terrorist group." (quoting H.R. REP. NO. 95-1283, pt. 1, at 30 (1978))).

59. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3742 (codified as amended at 50 U.S.C. § 1801(b)(1)(C)). The provision includes within the definition of an "agent of a foreign power" a non-U.S. person who "engages in international terrorism or activities in preparation therefore [sic]." *Id.*

60. *See* Stephanie Cooper Blum, *"Use It* and *Lose It": An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*, 16 LEWIS & CLARK L. REV. 677, 696 (2012) (noting repeated congressional reauthorization).

61. *Id.* at 721 (describing nonuse of the provision); *see also* Shane Harris, *The Patriot Act May Be Dead Forever*, DAILY BEAST (May 28, 2015, 8:00 PM), https://www.thedailybeast.com/the-patriot-act-may-be-dead-forever [https://perma.cc/5NVN-ZFKW] (referencing an FBI spokesperson's statement that the agency has established connections to terrorist groups in all cases).

62. 18 U.S.C. § 2518(3) (2012); 50 U.S.C. § 1805(a) (2012). Eleven judges, selected by the Chief Justice from among district court judges, serve on the FISA Court. 50 U.S.C. § 1803(a)(1).

63. 50 U.S.C. § 1804(a); *In re* Sealed Case, 310 F.3d 717, 737–42 (FISA Ct. Rev. 2002) (finding differences between FISA and Title III to have little constitutional relevance).

64. 50 U.S.C. § 1805(d)(1).

65. 18 U.S.C. § 2518(5).

66. *In re Sealed Case*, 310 F.3d at 741 (distinguishing notice under Title III from that under FISA). Note that while federal law requires notification of suspects following the inter-

Third, even where the government provides notice of FISA surveillance, defendants have a limited ability to contest its legality. While defendants have a Fourth Amendment right to suppress evidence derived from search warrants issued because of untruthful police affidavits,[67] they have no right to access the government's application to the FISA Court, making it virtually impossible to challenge the lawfulness of the warrant.[68] In 2014, in the case of Adel Daoud, a mentally unstable nineteen-year-old who attempted to bomb a Chicago bar in an FBI sting operation, a federal appeals court overturned the first-ever court order requiring disclosure of a FISA application.[69] The court denied disclosure despite a government admission that seventy-five past terrorism-related FISA applications had "contained misstatements and omissions of material facts."[70] Thus, FISA limits a defendant's rights at trial and undercuts deterrence of law enforcement misconduct.

Moreover, FISA creates a nebulous dividing line between domestic and international terrorism. "International terrorism" encompasses activities either that "occur totally outside the United States" or that "transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum."[71] This definition is expansive: a leading treatise by the former head of the Justice Department National Security Division suggests that domestic activities conducted with the intent to influence a global audience would qualify, since the persons they appear "intended to 'coerce or intimidate' " transcend national boundaries.[72]

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ception, state law may not necessarily require it. *See* Helen B. Shaffer, *Wiretapping in Law Enforcement*, 1961 EDITORIAL RES. REP., http://library.cqpress.com/cqresearcher/cqresrre1961110900 [https://perma.cc/Z27M-EF9X].

67. Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (requiring exclusion of evidence derived from search where defendant establishes that search warrant affidavit contained a false statement made "knowingly or intentionally, or with reckless disregard for the truth," and where affidavit could not otherwise provide sufficient basis for probable cause).

68. *See* United States v. Daoud, 755 F.3d 479, 490 (7th Cir. 2014) (Rovner, J., concurring) (observing that FISA defendants "face an obvious and virtually insurmountable obstacle" in making "a substantial preliminary showing of deliberate or reckless material falsehoods or omissions in the FISA application without having access to the application itself").

69. *Id.* at 480–81, 485. In 2016, a federal judge declared the defendant, Adel Daoud, mentally unfit for trial after noting that "his belief in the Illuminati, the Freemasons and lizard people is sincere and escalating." Jason Meisner, *Suspect in Terrorism Plot to Bomb Loop Bar Found Mentally Fit for Trial*, CHI. TRIB. (Mar. 13, 2018, 2:20 PM), https://www.chicagotribune.com/news/local/breaking/ct-met-terrorism-suspect-fit-for-trial-20180313-story.html [https://perma.cc/9WMF-554R]. In 2018, after a government psychiatrist found that Daoud had been rehabilitated by his psychiatric treatment, both sides agreed that Daoud was now stable enough to stand trial. *Id.*

70. *Daoud*, 755 F.3d at 491 (Rovner, J., concurring).

71. 50 U.S.C. § 1801(c)(3) (2012).

72. *See* KRIS & WILSON, *supra* note 53, at 294 ("The definition's third prong reaches terrorist groups whose acts of terrorism are intended to 'coerce or intimidate' foreign governments or populations, even if, at the moment that the government seeks FISA authorization . . .

In a recent law review comment exploring FISA's dividing line, Nick Harper argues that the government may have adopted a "greatly relaxed interpretation of the international-nexus requirement."[73] In two cases involving U.S. Muslims charged with plotting attacks on military facilities inside the United States, the international activity appeared to consist only of posting videos and writing comments on various international platforms via YouTube or seeking a religious opinion in support of an intended attack.[74] Unsurprisingly, given limited published case law from the FISA Court and FISA Court of Review as a whole, no public decision analyzes the international nexus requirement.[75]

There are some indications that the government selectively applies a broad definition of international terrorism to threats related to Islamic extremism. Michael Leiter, former director of the National Counterterrorism Center, has stated that acts by a person "born, raised, and basically everything here in the U.S." can be labeled international terrorism if they are motivated by a "transnational ideology."[76] He further explained:

> What the intelligence and law enforcement communities in the U.S. say, and this has been something accepted by Congress, is that simply being motivated by trans-nationalist ideology that is violent Sunni extremism and embodied by ISIS or al Qaeda, make something international terrorism. There is always a sufficient nexus back to those international groups even if an individual is simply motivated by them, and there is no direct communication.[77]

FISA secrecy makes it difficult to determine how the government or court interprets the international nexus criterion and whether they consistently determine the existence of a nexus across ideologies.[78] In other con-

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the group has not engaged in any action outside of the United States or that transcends national boundaries.").

73. Harper, *supra* note 20, at 1144.

74. *Id.* at 1144–49.

75. *Id.* at 1138.

76. Michael Leiter, *'Muddy Distinctions' Between International, Domestic Terror*, CIPHER BRIEF (Nov. 1, 2017), https://www.thecipherbrief.com/muddy-distinctions-international-domestic-terror (on file with the *Michigan Law Review*).

77. *Id.* Leiter observes that "September 11 and the subsequent rise of homegrown terrorism has really muddled the traditional line between international terrorism and domestic terrorism," and acknowledges that even right-wing violence in the United States has "potential international linkages" because domestic groups "get motivation and encouragement from their counterparts internationally." *Id.* Leiter did not specify the areas of law he was referring to, or how Congress has approved it.

78. Because the government is required to notify criminal defendants when it intends to use FISA evidence in criminal cases, 50 U.S.C. § 1806(d) (2012), further research could examine the factual predicates in a broader set of cases where the government has notified defendants of FISA use. Even that investigation would be limited, however, as it would only factor in cases that have led to prosecution and where the government has complied with disclosure obligations. *See* Patrick C. Toomey, *Why Aren't Criminal Defendants Getting Notice of Section 702 Surveillance—Again?*, JUST SECURITY (Dec. 11, 2015), https://www.justsecurity.org/28256/

texts, government agencies classify white supremacists as domestic terrorist threats,[79] despite international contacts and influences, raising the possibility that threats related to Islam are selectively deemed transnational.[80]

Beyond the definition of "international terrorism," the FISA definition of agency may also pull in U.S. individuals with limited connections abroad. Leaving aside the lone wolf provision, FISA requires that a person act "for or on behalf of" a group involved in international terrorism.[81] But the court might interpret a person inspired by ISIS to be acting "for or on behalf of" the group, even if she had no contact with the group. In fact, because FISA permits the classification of a group of two people engaged in international terrorism as a foreign power,[82] a U.S. citizen could qualify as an agent so long as she conspired to support international terrorism with one other person. All this might explain why the government has never used the lone wolf provision; with such broad definitions of international terrorism and agents of a foreign power, it would rarely need to.[83] In sum, FISA subjects international terrorism to broader and less accountable surveillance and may apply to Islamic extremist activities with marginal international connections.

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arent-criminal-defendants-notice-section-702-surveillance-again/ [https://perma.cc/86B7-7UEB] (describing the government's narrow construction of notification requirements with respect to certain surveillance programs).

79. *See, e.g.*, U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 59 (2006) (identifying "animal rights extremists, eco-terrorists, anarchists, anti-government extremists such as 'sovereign citizens' and unauthorized militias, Black separatists, White supremacists, and anti-abortion extremists" as domestic terrorism threats).

80. Despite the predominant conception of white supremacist threats as domestic, individual right-wing terrorists in both the United States and Europe have found transnational inspiration. For instance, Dylann Roof, the Charleston shooter, sported South African and Rhodesian flags on his clothing, while Norwegian right-wing terrorist Anders Breivik, who killed more than seventy people in 2011, was a registered user of the Stormfront white nationalist website founded by a former U.S. Klan leader. Morris Dees & J. Richard Cohen, Opinion, *White Supremacists Without Borders*, N.Y. TIMES (June 22, 2015) https://www.nytimes.com/2015/06/22/opinion/white-supremacists-without-borders.html [https://perma.cc/462R-HVCJ]. Dees and Cohen report that U.S. white nationalists traveled abroad more than thirty times in a two-year period to strengthen international connections. *Id.*; *see also* Natasha Bertrand, *'A Model for Civilization': Putin's Russia Has Emerged as 'a Beacon for Nationalists' and the American Alt-Right*, BUS. INSIDER (Dec. 10, 2016, 9:29 AM), https://www.businessinsider.com/russia-connections-to-the-alt-right-2016-11 [https://perma.cc/SE2K-V9YT] (describing travel between United States and Europe, especially Russia, of white nationalist leaders).

81. 50 U.S.C. § 1801(b)(2)(C).

82. *Id.* § 1801(a)(4).

83. Robert Chesney, *Why Is the Lone Wolf FISA Provision Never Used? And Just How Broad Is the FISC Understanding of Group Agency?*, LAWFARE (June 3, 2015, 2:13 PM), https://www.lawfareblog.com/why-lone-wolf-fisa-provision-never-used-and-just-how-broad-fisc-understanding-group-agency [https://perma.cc/U2RG-FHQK].

2. Other Investigative Mechanisms

Law enforcement officials use two other far-reaching investigative tools in international terrorism cases that are off-limits for domestic terrorism. First, the FBI can apply to the FISA Court for Section 215 orders to access business records, tax returns, educational records, phone records, or other "tangible things" in investigations to "protect against international terrorism."[84] Pursuant to the Patriot Act, Section 215 orders require only a minimal showing that there are "reasonable grounds to believe" that the records are relevant to an authorized investigation.[85] For instance, the statute presumptively allows the government to seize the records of any person "known to" an individual suspected of being an agent of a foreign power, even if there is nothing suspicious about the person whose records are sought.[86]

Second, the FBI can issue National Security Letters (NSLs) to acquire records from electronic communications providers, consumer reporting agencies, and financial institutions without judicial approval.[87] The NSL statutes require the government to certify that the records are sought for a national security investigation, which is defined to include investigations of international terrorism but exclude purely domestic terrorism.[88] Shortly after 9/11, the Justice Department drafted a "boilerplate paragraph" for field offices to insert into NSLs to meet the certification requirements,[89] and by 2004, the FBI issued tens of thousands of NSLs a year.[90]

While federal agencies can access similar records in domestic terrorism cases, the legal tools to do so generally require less secrecy or a higher legal standard. For example, when federal officials use grand jury subpoenas rather than NSLs to acquire records, the recipients are not generally bound by gag orders preventing them from disclosing the subpoenas.[91] The very pro-

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84. 50 U.S.C. § 1861(a)(1); *id.* § 1861(a)(3) (requiring higher-level FBI approval for acquisition of certain records including library records, tax returns, educational records, and medical records). The definition of international terrorism in question likely tracks the definition used elsewhere in FISA. *See* KRIS & WILSON, *supra* note 53, at 696–97 (explaining that "it would make little sense for either the government or the FISA Court to use any other definition of these terms in applying FISA's tangible-things provision").

85. 50 U.S.C. § 1861(b)(2)(A).

86. *Id.* § 1861(b)(2)(A)(iii); *see also* KRIS & WILSON, *supra* note 53, at 694, 698–99.

87. KRIS & WILSON, *supra* note 53, at 728–29 (discussing five applicable NSL statutes).

88. 12 U.S.C. § 3414(5)(A) (2012); 15 U.S.C. § 1681u(5) (2012); *id.* § 1681v(a); 18 U.S.C. § 2709(b)(1) (2012); KRIS & WILSON, *supra* note 53, at 730.

89. Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L & CRIMINOLOGY 1059, 1116 (2006).

90. LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 241, 249 (2008).

91. *See* FED. R. CRIM. P. 6(e)(2); Michael German et al., *National Security Letters: Building Blocks for Investigations or Intrusive Tools?*, A.B.A. J. (Sept. 2012), http://www.abajournal.com/magazine/article/national_security_letters_building_blocks_for_investigations_or_intrusive_t/ [https://perma.cc/THZ6-YNAB].

cess of convening a grand jury may also deter prosecutorial overuse.[92] Similarly, while the Stored Communications Act permits the government to obtain customer information and phone call metadata in conventional criminal cases, orders under that provision require "specific and articulable facts" connecting the records to an ongoing criminal investigation, a higher showing than Section 215 orders.[93]

Other investigative mechanisms do not distinguish as sharply between domestic and international terrorism. For instance, terrorist watchlists include individuals suspected of domestic or international terrorism,[94] and Justice Department guidelines allow the FBI to conduct far-reaching enterprise investigations of groups in either category.[95] Justice Department guidelines do, however, require less oversight over informants in international terrorism investigations than in other contexts, allowing the FBI to use special and long-term informants without the approval of a special committee of Justice Department and FBI attorneys.[96] Many have suggested that the FBI

92. On the other hand, the attorney general's guidelines governing the FBI permit Section 215 orders and NSLs only in preliminary investigations, which require "information or an allegation indicating the existence" of a crime or national security threat, while grand jury subpoenas are available without factual predication. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 17–18, 20–21 (2008) [hereinafter MUKASEY GUIDELINES].

93. 18 U.S.C. § 2703(a), (d); *see also In re* Application of the FBI for an Order Requiring Prod. of Tangible Things from [REDACTED], No. BR 13-109, 2014 WL 5463290, at *4–5 (FISA Ct. Aug. 29, 2013) (comparing Section 215 orders to 18 U.S.C. § 2703). While the FISA Court noted that Section 215 orders provide for more back-end judicial review than Section 2703 orders, it acknowledged that no Section 215 order recipient had ever challenged the legality of the order. *Id.* at *4–5.

94. The Terrorist Screening Center's consolidated watchlist—used for screening individuals for visas, air travel, and entry into the United States—includes individuals suspected of either domestic or international terrorism, and the smaller No Fly List bars from air travel individuals who represent a threat of either international or domestic terrorism. NAT'L COUNTERTERRORISM CTR., WATCHLISTING GUIDANCE 33, 51 (2013), https://www.aclu.org/sites/default/files/field_document/March%202013%20Watchlist%20Guidance.pdf [https://perma.cc/2X5M-4EVW]. The watchlists condition certain substantive and procedural protections on citizenship and immigration status. *See id.* at 10, 18, 34.

95. MUKASEY GUIDELINES, *supra* note 92, at 23, 42–43. Such investigations require "an articulable factual basis" reasonably indicating that a "group or organization may have engaged or may be engaged in . . . planning or preparation or provision of support" for, among other things, "international terrorism . . . or other threat to the national security," or "domestic terrorism" as defined in 18 U.S.C. § 2331(5) as "involving a violation of federal criminal law." *Id.* at 23. Because federal criminal law does not cover all domestic terrorism, this investigative authority is somewhat more limited for domestic terrorism, but the difference might not be significant because the required degree of suspicion is so low.

96. A set of 2006 guidelines, approved by Attorney General Alberto Gonzales, applies to the FBI's use of confidential informants. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES 1 (2006) [hereinafter GONZALES GUIDELINES], https://www.ignet.gov/sites/default/files/files/ag-guidelines-use-of-fbi-chs.pdf [https://perma.cc/WBN7-NNT8]. In 2008, the guidelines were revised to remove separate references to international terrorism, in favor of "national security." OFFICE OF THE ATTORNEY GEN., ORDER NO. 3019-2008, CONFORMING THE ATTORNEY GENERAL'S

investigates U.S. Muslim communities more aggressively than others, including through the pervasive use of informants.[97] The relaxed oversight of international terrorism investigations may contribute to this differential treatment.

Moreover, the FBI's definitions of domestic and international terrorism facilitate the classification of threats along ideological lines.[98] Its website defines international terrorism as "inspired by or associated with designated foreign terrorist organizations or nations" and offers the San Bernardino shooters as an example because they were "inspired" by foreign organizations.[99] The website defines domestic terrorism as "inspired by or associated with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature."[100] These definitions thus treat "inspiration" alone as a sufficient link to international terrorism, and exclude Muslim suspects from the "domestic" category so long as the FBI does not consider Islamic extremism a "primarily U.S.-based movement."[101]

GUIDELINES REGARDING THE USE OF FBI CONFIDENTIAL HUMAN SOURCES TO THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2008), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-conforming-order.pdf [https://perma.cc/V3JF-YYKP]. But the 2006 guidelines' definition of "national security investigation" remains internationally focused, including "international terrorism," espionage for or on behalf of foreign powers, foreign computer intrusions, and matters consistent with E.O. 12333, but not domestic terrorism. GONZALES GUIDELINES, *supra* at 7; MUKASEY GUIDELINES, *supra* note 92, at 45. The 2006 guidelines require that, in non–national security cases, the use of "special" informants (such as those in a high-level position within organizations) and "long-term" informants (those registered for more than five consecutive years) be approved by a Human Source Review Committee set up by the FBI and Justice Department Criminal Division. GONZALES GUIDELINES, *supra* at 18–19. That committee includes attorneys from the FBI's Office of General Counsel and the Criminal Division, and must arrive at a consensus decision to approve the use of informants. *Id.* In national security investigations, however, the FBI has authority to approve the continued use of special and long-term informants and need only notify the National Security Division of its decision. *Id.* at 20. A 2015 internal FBI guide on confidential human sources leaked by *The Intercept* is consistent with the Gonzalez Guidelines in its treatment of informants in the national security context. *See* FED. BUREAU OF INVESTIGATION, CONFIDENTIAL HUMAN SOURCE POLICY GUIDE 46–47 (2015); *Confidential Human Source Policy Guide*, INTERCEPT (Jan. 31, 2017, 6:22 AM), https://theintercept.com/document/2017/01/31/confidential-human-source-policy-guide/ (on file with the *Michigan Law Review*).

97. *E.g.*, *supra* note 12 and accompanying text; *infra* note 373 and accompanying text.

98. *See What We Investigate: Terrorism*, FED. BUREAU OF INVESTIGATION https://www.fbi.gov/investigate/terrorism [https://perma.cc/8CFT-HDPC].

99. *Id.*

100. *Id.*

101. Although the website defines terrorism as either domestic or international—a binary categorization—it also refers to "Homegrown Violent Extremists," which appears to be a subset of the international category. *Id.* These are defined as "global-jihad-inspired individuals who are based in the U.S., have been radicalized primarily in the U.S., and are not directly collaborating with a foreign terrorist organization." *Id.*

3. Federal Prosecution

Federal authorities prosecute a significant number of both international and domestic terrorism cases,[102] and a large number of federal criminal charges can apply to terrorism with or without international links.[103] But in part because of differences in the coverage of federal terrorism statutes, a criminal defendant suspected of terrorism is more likely to be charged in federal, rather than state, court if the terrorism is viewed as "international."[104]

While there is no single federal crime called terrorism, Chapter 113B of the U.S. criminal code lists offenses deemed related to terrorism and defines an even wider variety of offenses as "[f]ederal crime[s] of terrorism."[105] These crimes fall into three general categories. The first category covers offenses committed with particular weapons—such as chemical, biological, and nuclear weapons or more common explosives[106]—and tactics historically associated with terrorism, such as taking hostages or hijacking aircraft.[107] As a result of this category of offenses, federal jurisdiction sometimes turns on the choice of weapon. In particular, an assailant who used a bomb would fall within various federal terrorism statutes, while a suspect using a gun might not.[108] The second category specifies targets of the violence where

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102. *Domestic Terrorism Prosecutions Outnumber International*, TRAC REP. (Sept. 21, 2017), http://trac.syr.edu/tracreports/crim/481/ [https://perma.cc/ZM6U-YTKF] (reporting 223 federal international terrorism prosecutions and 404 domestic terrorism prosecutions from 2013–2017). These numbers are difficult to assess because it is often not clear how prosecutors have defined or classified cases as international or domestic.

103. MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUSTICE, WRONG PRIORITIES ON FIGHTING TERRORISM 5–14 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%20%281%29.pdf [https://perma.cc/X392-EGEA] (listing federal offenses that can be used to prosecute domestic terrorism, including terrorism-specific charges, hate crimes charges, and more general federal criminal charges).

104. *See, e.g.*, Neiwert, *supra* note 12 (using original database of terrorism incidents from 2008 to 2016 to conclude that "federal charges of some kind were filed in 91 percent of the Islamist incidents that led to arrests" while "federal prosecutors handled 60 percent of far-right cases, leaving many in the hands of state or local authorities").

105. *See* 18 U.S.C. ch. 113B (2012) ("Terrorism"); *id.* § 2332b(g)(5) (defining a federal crime of terrorism as "an offense" that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and that violates any of approximately fifty listed statutes).

106. *See, e.g.*, *id.* § 229 (acquisition, production, use, or possession of chemical weapons); *id.* § 831 ("Prohibited transactions involving nuclear materials"); *id.* § 832 ("Participation in nuclear and weapons of mass destruction threats to the United States"); *id.* § 844(i) (destruction or damage to property used in interstate commerce "by means of fire or an explosive"); *id.* § 2332a ("Use of weapons of mass destruction"); *id.* § 2332i ("Acts of nuclear terrorism").

107. *See, e.g.*, *id.* § 1203 ("Hostage taking"); *id.* § 32 ("Destruction of aircraft or aircraft facilities").

108. *See* Hennessey, *supra* note 21 (arguing that the "legal treatment of homegrown violent extremists and domestic terrorists" depends most on "whether the crime involves a bomb

there is a distinct federal interest, such as violence against federal officials, federal facilities, and mass transit or communications systems.[109] The third category comprises crimes with an international nexus, defined variously according to the statute in question.[110]

This third category of federal terrorism offenses exposes defendants who have, or who are thought to have, more international connections to a higher likelihood of federal prosecution. The most significant of these charges—providing material support to designated foreign terrorist organizations—is considered separately in the next section. Other charges include 18 U.S.C. § 2332b, which criminalizes murder, serious assaults, and property damage risking serious injury within the United States where there is "conduct transcending national boundaries."[111] That provision converts violent acts—as well as threats, attempts, and conspiracies to commit such acts—into federal crimes where there is an international link, irrespective of political intent.[112] Moreover, marginal international connections may satisfy the "transcending national boundaries" requirement in the statute. For instance, one court approved the Section 2332b conviction of a Massachusetts man who conspired with other local individuals to murder another U.S. national within the United States, where the international conduct consisted only of a coconspirator's online communications with overseas ISIS members about the potential crime.[113]

With respect to state prosecutions, many states have terrorism laws on the books[114] but rarely use them.[115] Therefore, in practice, state-level prose-

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or a gun"); *see also* Chong, *supra* note 21 (discussing "gun-crime/bomb-terrorism binary" as a product of U.S. terrorism definitions).

109. *See, e.g.*, 18 U.S.C. § 351 (assassination, kidnapping, or assault of members of Congress, Supreme Court, and Cabinet); *id.* § 1114 ("Protection of officers and employees of the United States"); *id.* § 930(c) (killing during an attack in a federal facility involving a firearm or dangerous weapon); *id.* § 1751 (assault, kidnapping, or assassination of president or presidential staff); *id.* § 844(f)(2)–(3) (damage or destruction to federal properties causing or risking death or injury); *id.* § 1362 ("Communication lines, stations or systems"); *id.* § 1992 (attacks on railroads and mass transportation systems); *id.* § 2332f ("Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities").

110. *See, e.g.*, *id.* § 2332 (killing a U.S. national outside the United States); *id.* § 2332b ("Acts of terrorism transcending national boundaries"); *id.* § 956(a)(1) (conspiracy to kill or injure persons abroad); *id.* § 2339B (material support to foreign terrorist organizations).

111. *Id.* § 2332b(a)(1). Other jurisdictional requirements must be satisfied. *Id.* § 2332b(b). To be clear, this statutory charge does not appear to be a numerically significant driver of the greater federal prosecution of Muslim defendants, since available evidence suggests that use of this statute is rare, at least with respect to ISIS terrorism cases. CTR. ON NAT'L SEC., FORDHAM UNIV. SCH. OF LAW, THE AMERICAN EXCEPTION 29 (2017).

112. *See* 18 U.S.C. § 2332b(a)(2) (including threats, attempts, and conspiracies). The statute elliptically defines "conduct transcending national boundaries" as "conduct occurring outside of the United States in addition to the conduct occurring in the United States." *Id.* § 2332b(g)(1).

113. United States v. Wright, 285 F. Supp. 3d 443, 460–61 (D. Mass. 2018).

114. Donna Lyons, *States Enact New Terrorism Crimes and Penalties*, NCSL ST. LEGIS. REP., Nov. 2002, at 1–3.

cutions for conduct that could be classified as terrorism generally proceed using conventional criminal charges. While local authorities principally handle domestic rather than international cases, they have occasionally prosecuted individuals inspired by ISIS or other foreign organizations.[116] It appears that federal authorities deferred to the states in these (unusual) cases because state law offered broader conspiracy charges, the ability to charge a minor as an adult, or other features making conviction more certain or consequential.[117] The greater federal role in international terrorism prosecutions thus produces several notable consequences. First, concurrent federal and state jurisdiction enables federal prosecutors to "forum shop" for the jurisdiction more likely to convict and impose a severe sentence. Indeed, federal guidelines advise prosecutors to choose between federal and state proceedings in part based on the likely punishment.[118] Second, federal prosecution exposes defendants to federal terrorism sentencing enhancements and the federal death penalty—discussed further below.[119] And third, uneven federalization may direct greater federal resources and public attention to international terrorism.

4. Material Support Charges

Material support to terrorism laws supply some of the most common—and controversial—charges in federal terrorism cases.[120] But they do not ap-

115. Lisa Daniels, *Prosecuting Terrorism in State Court*, LAWFARE (Oct. 26, 2016, 11:33 AM), https://www.lawfareblog.com/prosecuting-terrorism-state-court [https://perma.cc/VP7A-GFXC]; *see also* INST. FOR SOC. POLICY & UNDERSTANDING, *supra* note 3, at nn.98–100 and accompanying text. (describing state prosecutions on terrorism charges as uncommon based on report's dataset).

116. Daniels, *supra* note 115.

117. *Id.* (collecting examples). In a recent case, the federal government ceded the prosecution of a seventeen-year-old allegedly plotting an ISIS-inspired shooting to the state of Texas, because state law permitted his prosecution as an adult. Valerie Wigglesworth, *Plano Teen Arrested in ISIS-Inspired Plot to Commit Mass Shooting at Frisco's Stonebriar Mall*, DALL. MORNING NEWS (May 2, 2018), https://www.dallasnews.com/news/crime/2018/05/02/plano-teen-arrested-isis-inspired-plot-commit-mass-shooting-local-mall [https://perma.cc/CNG2-Y7X8]; *see also* William K. Rashbaum & Joseph Goldstein, *Informer's Role in Terror Case Is Said to Have Deterred F.B.I.*, N.Y. TIMES (Nov. 21, 2011), https://www.nytimes.com/2011/11/22/nyregion/for-jose-pimentel-bomb-plot-suspect-an-online-trail.html [https://perma.cc/E9EZ-EWL9] (suggesting that federal authorities avoided case because of informant's conduct and noting that state law permitted charging of a conspiracy between defendant and informant alone).

118. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, §§ 9-2.301, 9-27.240 (2018) [hereinafter JUSTICE MANUAL], https://www.justice.gov/jm/title-9-criminal [https://perma.cc/5LQZ-R68X].

119. *See infra* Section I.A.5.

120. *See* SAID, *supra* note 5, at 51 (characterizing § 2339B as "the most important statute employed in terrorism prosecutions"); HUMAN RIGHTS WATCH, *supra* note 5, at 62–63 (finding that material support charges constituted the "largest share of convictions" based on analysis of 494 international terrorism-related cases from September 11, 2001 through 2011); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42

ply equally to domestic and international terrorism. A key material support provision, 18 U.S.C. § 2339B, prohibits support to designated *foreign* terrorist organizations and therefore excludes domestic terrorism on its face. The other significant charge, 18 U.S.C. § 2339A, is not limited to international terrorism, but its statutory predicates make it somewhat more available in international cases, and in practice, federal prosecutors rarely apply it to domestic terrorism.[121]

In its current form, 18 U.S.C. § 2339B prohibits the provision of "material support or resources" to a designated foreign terrorist organization where a person knows that the organization is designated or that it has engaged in terrorism.[122] In consultation with the treasury secretary and the attorney general, the secretary of state designates organizations upon finding that an organization is foreign, has engaged in "terrorist activity" or has the capacity and intent to do so, and threatens U.S. security or U.S. nationals.[123]

Congress passed the provision to cut off financial support for foreign terrorist organizations, but since 9/11, the government has used the charge extensively against individuals who join, train with, or act on ostensible behalf of designated organizations.[124] In some cases, the government has prosecuted individuals for political and religious speech deemed to be coordinated with foreign terrorist organizations, such as a Massachusetts man's translation of pro-jihad tracts for a website allegedly linked to al Qaeda.[125]

Apart from the broad scope of material support, several features of § 2339B allow the government to use it expansively. First, as compared with other inchoate crimes such as attempt or conspiracy, the charge does not require a connection to a specific act of violence or a specific intent to advance the organization's illegal goals.[126] Some broad criminal statutes are "saved" by a high mens rea requirement. But here, liability attaches to knowing support of a designated group, whatever the purpose behind that support.

HARV. J. ON LEGIS. 1, 19–20, 26–28 (2005) (describing escalating use of material support charges and post-9/11 shift to preventative approach to terrorism); *Domestic Terrorism Prosecutions Outnumber International*, *supra* note 102 (stating that § 2339B was the most commonly filed lead charge in federal terrorism cases in 2017).

121. *See infra* notes 135–37 and accompanying text.

122. 18 U.S.C. § 2339B(a)(1) (2012).

123. 8 U.S.C. § 1189(a)(1), (d)(4) (2012).

124. *See* SAID, *supra* note 5, at 53; Chesney, *supra* note 120, at 2, 15–18, 45–46.

125. United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013) (upholding material support conviction of Boston man on separate grounds); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (upholding constitutionality of material support statute as applied to plaintiffs' activities of training designated terrorist organizations in international law and engaging in political advocacy on their behalf); Akbar, *supra* note 5, at 828–32 (describing prosecutions for political and religious speech in relationship to material support charges).

126. *See* SAID, *supra* note 5, at 64 (describing 2004 amendment to clarify mens rea required).

Second, because prosecutors can charge individuals with attempt or conspiracy to violate § 2339B, they can apply it to scenarios even further removed from violence—for instance, scenarios where individuals agreed with others to travel abroad to join a terrorist group but did not actually do so.[127] Indeed, attempt or conspiracy to provide material support are exceedingly common charges in international terrorism cases.[128]

Third, the use of the charge operates in conjunction with the FBI's extensive use of informants to encourage—and arguably entrap—individuals in pursuing terrorist plots.[129] Undercover agents or government informants can *create* the statutorily required connection to a foreign terrorist organization by guiding individuals to support a specific group. Informants often claim to act on behalf of various foreign groups despite a suspect's lack of prior relationship to those groups.[130] Thus, the § 2339B charge enables law enforcement to transform apparent sympathy for terrorism into criminal acts on the purported behalf of designated groups.

By contrast, federal law criminalizes support to domestic organizations engaged in illegal activity only where that support crosses the line into attempt or conspiracy to commit some other crime,[131] or where it meets the

127. Liability for conspiracy usually attaches when individuals have the intent to commit an unlawful act and agree with others to commit that act. Some conspiracy laws also require proof of an overt act or concrete step in support of the conspiracy. CHARLES DOYLE, CONG. RESEARCH SERV., R41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 8 (2016).

128. *See* Akbar, *supra* note 5, at 829 (describing frequent combination of material support and conspiracy charges).

129. *See id.* at 843 (arguing that "a growing number of high-profile prosecutions that feature a violent terrorist plot—the majority, it seems—rely on government informants that encourage, design, or facilitate the plots"); *see also* CTR. ON NAT'L SEC., *supra* note 111, at 24, 28 (finding that 61 percent of ISIS-related prosecutions from 2014 to 2017 involved undercover agents or informants and that ISIS cases were primarily prosecuted under material support charges).

130. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 5, at 39–40 (describing FBI informant's pretense to act in support of Jaish-e-Mohammed, a Pakistani terrorist group, despite suspect's lack of prior relationship to the group).

131. While the Racketeer Influenced and Corrupt Organizations Act (RICO) enables federal prosecutors to target either foreign or domestic terrorist organizations as criminal enterprises, material support charges under § 2339B go further than RICO charges in several respects. RICO amplifies criminal penalties against individuals involved with a criminal enterprise and allows for broad asset forfeiture. Unlike § 2339B, however, RICO applies to acts that already violate state or federal law. *See* 18 U.S.C. § 1962 (2012) (listing prohibited activities); *id.* § 1961(1) (defining "racketeering activity" prohibited). Therefore, it does not criminalize otherwise legal support to an organization. In addition, RICO does not reach isolated criminal acts, but only applies to a "pattern of racketeering activity," which requires commission of two or more criminal acts within a ten-year period. *Id.* § 1961(c); *id.* § 1961(5). Furthermore, the Court has interpreted 18 U.S.C. § 1862(c), which prohibits conduct and participation in an organization's affairs through a pattern of racketeering activity, to require that a person "have some part in directing those affairs." Reves v. Ernst & Young, 507 U.S. 170, 179 (1993). Thus, RICO does not reach domestic terrorism in an equivalent manner to § 2339B. Note also that, while some states have created material support to terrorism offenses, most of these statutes

more demanding intent requirement of a second material support charge. That second material support offense, 18 U.S.C. § 2339A, criminalizes material support where an individual knows or intends that it will be used to commit, or prepare to commit, an enumerated federal terrorism offense.[132] Thus, it requires a connection to terrorist activities rather than organizations.[133]

While Section 2339A does not exclude domestic terrorism, its statutory predicates replicate the selective reach of federal terrorism law. For instance, the charge applies to material support for a mass shooting or vehicular attack "transcending national boundaries," but it might not reach material support for similar acts committed without an international nexus.[134]

Scott Sullivan's recent empirical research finds that, between 2012 and 2017, nearly all of the forty-five indictments on § 2339A charges involved individuals perceived to sympathize with "self-proclaimed Islamist militants abroad."[135] Sullivan argues that federal prosecutors do not use § 2339A charges in other cases even where the facts and the law might have supported such a charge.[136] For instance, in a recent case where prosecutors charged an anti-government extremist in "a truck bomb plot evocative of Timothy McVeigh's attack on the federal building in Oklahoma City," they might also have charged his associates with material support for assisting in the plot.[137] Thus, the lopsided use of § 2339A against Muslim suspects likely results from some combination of statutory availability and other factors. In addition to the popular association of terrorism with Muslims, those factors may include a tendency to identify material support charges, in general, with international cases because the other material support charge, § 2339B, applies only to foreign organizations.

require the provision of support to acts of terrorism, not designated organizations. Daniels, *supra* note 115.

132. 18 U.S.C. § 2339A(a). The list of predicate statutes also includes a "catch-all" offense that includes violations defined as "federal crimes of terrorism." *Id.* (listing § 2332b(g)(5)(B)).

133. The connection to terrorist activities does not mean that other aspects of this charge's use are not problematic. Indeed, the manner in which it has been used against some Muslim defendants has raised concerns over the preemptive punishment of individuals who may not have presented a real threat. *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 484 (2007).

134. *See id.* at 476 (noting use of § 2339A in conjunction with 18 U.S.C. § 2332b).

135. Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/ [https://perma.cc/2C79-2Z37].

136. *Id.*

137. *Id.* The government has used the § 2339A charge against at least four individuals accused of providing material support to domestic terrorism. *See* GERMAN & ROBINSON, *supra* note 103, at 8.

5. Sentencing and Confinement

At the sentencing stage, the uneven coverage of federal terrorism law means that a severe federal terrorism sentencing enhancement disproportionately applies to cases with an international nexus.[138] Federal judges must consider the U.S. Sentencing Guidelines in all federal criminal cases.[139] The Guidelines require judges to determine the base offense level for a crime—generally related to the statute violated—and the extent of a defendant's past criminal history, and then consider enhancements or departures on account of other circumstances.[140]

Section 3A1.4 of the Sentencing Guidelines applies to felonies that "involved, or [were] intended to promote, a federal crime of terrorism."[141] This sentencing enhancement affects three categories of offenses: (1) federal terrorism crimes that are "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and that violate any of more than fifty separate criminal provisions;[142] (2) the harboring or concealing of terrorists or obstruction of a federal terrorism investigation;[143] and (3) non-enumerated offenses "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," as well as enumerated offenses intended to "intimidate or coerce a civilian population" rather than to affect government conduct.[144]

Where applicable, the enhancement ratchets up sentences in two ways. First, it elevates the offense level that judges assign to a crime.[145] Second, it assigns defendants the most serious criminal history level available, thus treating even first-time offenders like individuals with extensive criminal

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138. To be clear, some states also have terrorism sentencing enhancements on the books. Lyons, *supra* note 114. If it turned out that states used these enhancements regularly and with substantial effects on sentences, it would make the greater availability of the federal terrorism enhancement in international terrorism cases less consequential.

139. Since *United States v. Booker*, 543 U.S. 220 (2005), federal judges are no longer required to sentence defendants within Guidelines ranges. But they must still "consider Guidelines ranges" while taking account of "other statutory concerns." *Id.* at 245–46; *see also* 18 U.S.C. § 3553(a)(4) (2012) (requiring judges to consider sentencing ranges for "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines"). In 2016, nearly 77 percent of sentences complied with Guidelines ranges or did so before reductions based on prosecutorial actions. U.S. SENTENCING COMM'N, QUARTERLY DATA REPORT 11 tbl.8 (2016).

140. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2018).

141. *Id.* § 3A1.4.

142. *Id.* § 3A1.4(a); 18 U.S.C. § 2332b(g)(5).

143. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.2.

144. *Id.* § 3A1.4 cmt. n.4 (providing for upward departures not within the terms of § 3A1.4 and capped at the range established by that enhancement).

145. *Id.* § 3A1.4(a).

records.[146] Together, these provisions result in a minimum sentence of between 210 and 262 months for offenses to which the enhancement is applied.[147] This enhancement produces its most significant impact on individuals who have committed less serious offenses and who have a minimal criminal past. For instance, a first-time offender convicted of maliciously damaging a building with an explosive, without injuring anyone, would ordinarily face a fine or minimum sentence of 60 months under the criminal statute and a range of 51 to 63 months' imprisonment under the Guidelines.[148] If the court were to apply a terrorism enhancement, however, the recommended Guidelines range would spike to 210 to 262 months.[149] Notably, the terrorism enhancement has a much greater effect than a separate hate crimes enhancement, which would suggest a sentence of 70 to 87 months.[150]

When an offense qualifies under Section 3A1.4, the enhancement applies whether it constitutes domestic or international terrorism.[151] Indeed, courts have applied the enhancement to militia members, white supremacists, abortion clinic bombers, and "Occupy" movement affiliates.[152] But the

146. *Id.* § 3A1.4(b).

147. *Id.* at ch. 5, pt. A.

148. I credit my research assistant, Meghan Koushik, for this hypothetical. For a conviction under 18 U.S.C. § 844(i) (2012), the Guidelines would compute a base offense level of 24, since the defendant's offense "created a substantial risk of death or serious bodily injury, and that risk was created knowingly," U.S. SENTENCING GUIDELINES MANUAL § 2K1.4(a)(1), and a criminal history category of I. The sentencing table prescribes 51 to 63 months of imprisonment in such a case. The statute creating the offense specifies a prison term of 5 to 20 years, a fine, or both. 18 U.S.C. § 844(i). While the statute itself permits up to 240 months' imprisonment, the Guidelines' range would suggest a far shorter sentence in the absence of an enhancement.

149. This calculation assumes an offense level of 32 and criminal history category of VI, based on Section 3A1.4. 18 U.S.C. § 844(i) is listed as a federal crime of terrorism under 18 U.S.C. § 2332b(g)(5)(B)(i).

150. The hate crimes enhancement would upgrade the offense by only three levels and leave the criminal history calculation unchanged. This hypothetical assumes a resulting offense level of 27 and criminal history category of I. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a).

151. Until 1996, the enhancement applied only to crimes that "involved[] or . . . intended to promote[] international terrorism." U.S. SENTENCING GUIDELINES MANUAL § 3A1.4(a) (U.S. SENTENCING COMM'N 1995). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) directed the Sentencing Commission to amend the scope of the enhancement to cover offenses involving "federal crimes of terrorism." Pub. L. No. 104–132, § 730, 110 Stat. 1214, 1303 (1996); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 539 (U.S. SENTENCING COMM'N 1996). Appellate courts have rejected arguments that the enhancement should only apply to terrorism "transcending national boundaries." United States v. Salim, 549 F.3d 67, 77–79 (2d Cir. 2008); United States v. Garey, 546 F.3d 1359, 1361–63 (11th Cir. 2008); United States v. Hale, 448 F.3d 971, 988 n.1 (7th Cir. 2006); United States v. Harris, 434 F.3d 767, 773 (5th Cir. 2005).

152. *See, e.g.*, United States v. Wright, 747 F.3d 399, 407–10 (6th Cir. 2014) (upholding application of terrorism enhancement to individuals associated with Occupy Cleveland for attempting to bomb an Ohio bridge); United States v. Jordi, 418 F.3d 1212, 1213 (11th Cir. 2005)

differential availability of federal terrorism charges means that the enhancement will reach more international cases. Wadie Said observes that, in all reported appellate decisions applying the enhancement to domestic terrorism, the cases involved "some form of violent activity or conspiracy to commit violence," in contrast to material support prosecutions for which defendants received strikingly long sentences for nonviolent conduct.[153] In one notable example, a court lengthened the sentence of a man convicted of running a cigarette smuggling operation from 57 months to 155 years based on evidence of a single $3,500 payment to Hizballah.[154] The combination of material support charges unique to foreign organizations and the sentencing enhancement thus exposes defendants to "very high sentences for what would otherwise be innocuous and constitutionally protected activity."[155]

The greater federal role in international terrorism cases can also affect sentences and confinement in other respects. For example, because the federal government maintains the death penalty while twenty states have abolished it, a federal defendant can be sentenced to death for acts of terrorism in a state that has eliminated the death penalty.[156] In addition, federal terrorism convictions can expose defendants to the use of Special Administrative Measures that isolate prisoners, subject them to constant surveillance, and sharply restrict contact with family members and legal counsel.[157] None of this is to suggest that state punishment or prison is lenient—only that the federal system regularly deploys terrorism-specific sentencing enhancements

(upholding application of terrorism enhancement to defendant convicted of attempting to bomb abortion clinics); United States v. Graham, 275 F.3d 490, 516–19 (6th Cir. 2001) (upholding application of terrorism enhancement to member of domestic militia planning to attack government targets); Sentencing Memorandum at 3–4, United States v. Harpham, No. CR-11-00420-JLQ, 2011 WL 6838070 (E.D. Wash. 2011) (applying terrorism enhancement to defendant who planted a bomb at a Spokane, Washington, Martin Luther King Jr. Unity March).

153. SAID, *supra* note 5, at 125.

154. *Id.* After *Booker*, Hammoud's conviction was vacated, and a district court resentenced him to 30 years. *Id.* at 125–26.

155. Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 506 (2014).

156. *See* Michael J. Zydney Mannheimer, *The Coming Federalism Battle in the War over the Death Penalty*, 70 ARK. L. REV. 309, 328 (2017); Mark Berman, *Washington Supreme Court Strikes Down State's Death Penalty, Saying It Is 'Arbitrary and Racially Biased*,' WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/10/11/washington-supreme-court-strikes-down-states-death-penalty-saying-it-is-arbitrary-and-racially-biased/ [https://perma.cc/LU7P-H9PX] (reporting that state of Washington's invalidation of death penalty brings total to twenty states). Since 1993, the federal government has sought the death penalty against sixty-nine defendants for crimes not punishable by death in the state where committed, Mannheimer, *supra* at 312, including Dzokhar Tsarnaev, the co-perpetrator of the Boston Marathon bombing. *Id.* at 348.

157. For accounts of such restrictions, see Rylee Sommers-Flanagan, *The Legal Story of Guantánamo North*, 19 U. PA. J. CONST. L. 1169 (2017). *See also* HUMAN RIGHTS WATCH, *supra* note 5, at 138–51; ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC & CTR. FOR CONSTITUTIONAL RIGHTS, THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS (2017).

and extreme prison regulations that do not apply to those charged with state crimes.

B. *The Origins of the Divide*

The preceding sections demonstrate that the terrorism legal divide accrues from a range of legal authorities governing state practices, from surveillance to sentencing. Congress and federal agencies adopted these legal authorities in different time periods and for varying purposes. As such, the legal divide emerged from the confluence of complex historical factors predating 9/11, rather than from any single law or motivation.

In part, the distinct approach to international terrorism stems from growing concern over transnational terrorist groups in the decades preceding 9/11.[158] Robert Chesney traces the material support laws—a centerpiece of the terrorism legal divide—to a larger category of laws proscribing economic transactions with foreign adversaries.[159] Although the earliest economic sanctions laws did not focus on terrorist groups, congressional efforts to prohibit financial support for foreign terrorists began in the 1980s.[160] Following the first World Trade Center bombing in 1993 and growing attention to U.S. citizens' financial support to groups opposing the Israel–Palestine peace negotiations, Congress passed the two key material support laws.[161] Thus, the distinct approach to international terrorism grew in part out of pre-9/11 laws designed to target foreign states and groups in response to foreign relations concerns.

A second historical source is the effort to protect Americans from abusive intelligence practices after revelations in the early 1970s that the CIA, NSA, and FBI had surveilled—and covertly disrupted—the civic and political activities of thousands of Americans.[162] Those revelations led to comprehen-

158. Several accounts identify the 1972 Munich Olympics massacre of Israeli athletes as a catalyst for growing U.S. public, academic, and governmental concern over international terrorism. *See, e.g.*, TIMOTHY NAFTALI, BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM 54–55 (2005) (describing the Munich incident as defining "the new menace of international terrorism" and triggering the first U.S. government units focused on international terrorism); LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED "TERRORISM" 21–27 (2013) (describing Munich as a turning point in conceptualization of terrorism and identifying significance of the "transnational character of the events").

159. Chesney, *supra* note 120, at 4.

160. *Id.* at 5–6.

161. *Id.* at 12–18. The passage of the 1996 ban on material support to foreign terrorist groups, however, immediately followed the Oklahoma City bombing, which was committed by domestic terrorists. *Id.*

162. *See* David Burnham, *The Silent Power of the N.S.A.*, N.Y. TIMES Mag., Mar. 27, 1983, at 60, 63, https://www.nytimes.com/1983/03/27/magazine/the-silent-power-of-the-nsa.html [https://perma.cc/32XS-S7HK] (explaining that the NSA secretly surveilled more than one thousand Americans during the late 1960s and early 1970s); Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, § 1, at 1 https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html [https://perma.cc/FN82-GKH9]

sive hearings by a special Senate committee, chaired by Senator Frank Church, into abuses by intelligence and security agencies.[163] Concerns over domestic intelligence gathering contributed to the passage of FISA, which was designed to curb investigations of political speech and dissent while authorizing surveillance of foreign intelligence activities within the United States.[164] Thus, the distinction between domestic and international terrorism grew in part out of 1970s efforts to strike a balance between executive surveillance powers and the civil liberties of Americans.

Third, the severity of the 9/11 attacks fundamentally shaped the U.S. response to—and conception of—international terrorism. In the wake of those attacks, the United States launched a global war against al Qaeda–linked terrorists and adopted a "preventative" law enforcement paradigm at home aimed at thwarting attacks long before they materialized.[165] The fear of further attacks, combined with broad, racialized suspicion of Muslims at large, led to the planting of informants across U.S. Muslim communities[166] and the expanded use of material support charges.[167] As the threat appeared to shift from a centralized al Qaeda organization to a more dispersed threat, government officials applied the tools developed for prototypical "international" terrorism to unaffiliated "homegrown" extremists inspired by foreign groups.[168]

These historical developments all partly explain the differentiation between domestic and international terrorism. But an account of the legal divide's origins must consider not only the antecedents of current international terrorism laws but also the historic neglect of prevalent forms of domestic terrorism. Historian Beverly Gage describes "one of the most fascinating and revealing contradictions" in U.S. responses to terrorism: "Beginning in the 1880s, bombings attributed to anarchists or labor activists often served to justify widespread campaigns of suppression against radical movements. Lynchings and race riots, by contrast, generally met with inac-

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(reporting a massive program of illegal CIA surveillance within the United States); Mark Mazzetti, *Burglars Who Took On F.B.I. Abandon Shadows*, N.Y. TIMES (Jan. 7, 2014), https://www.nytimes.com/2014/01/07/us/burglars-who-took-on-fbi-abandon-shadows.html [https://perma.cc/GPF3-N6VE] (describing 1971 theft of FBI documents that revealed the agency's counterintelligence program).

163. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 94-755, at 1–11 (1976) (describing mission and work of committee).

164. *See infra* Section II.A.2.

165. For descriptions of this shift, see, for example, Chesney, *supra* note 120, at 26–28, and Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099–1108 (2008).

166. *See* Akbar, *supra* note 5, at 861–65.

167. *See, e.g.*, Chesney, *supra* note 120, at 39–46 (describing post-9/11 use of material support charges). For more on the racialization of Muslims as terrorists and foreigners, see *infra* Section III.A.

168. *See infra* Section II.C.1 (describing al Qaeda decentralization).

tion, even approval, in official circles."[169] Gage observes that the United States has not responded to political violence in a uniformly "swift and active" fashion, but instead, that "[n]ormative judgments . . . have long shaped how and if acts of terrorism become national emergencies."[170]

Historians estimate that between the 1880s and World War II, thousands of people were lynched, three-quarters of whom were African American, to enforce a "racial caste system of white supremacy."[171] Similar political objectives underlay campaigns of violence against other racial minority groups.[172] Local law enforcement officials often tolerated and even facilitated white racial violence.[173] From the 1880s through the civil rights era, the federal government largely failed to enforce criminal civil rights laws, and Congress rejected multiple attempts to pass federal anti-lynching legislation.[174]

Though the terrorism legal divide requires further historical excavation,[175] the divide likely originates in multiple roots: the extension to foreign terrorist groups of sanctions laws first designed to target foreign states, the concern over domestic intelligence gathering in the wake of midcentury abuses, the singular post-9/11 attention to international terrorism, and historical state tolerance of reactionary and white supremacist violence.

C. *The Effects of the Divide*

The terrorism legal divide has significant effects along racial and religious lines. Section I.A illustrated the disparate consequences for individuals

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169. Beverly Gage, *Terrorism and the American Experience: A State of the Field*, 98 J. AM. HIST. 73, 88 (2011).

170. *Id.*

171. MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 92–93 (2011); *see also* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA xi (2002) (observing that historians have come to view lynching as a "systematized reign of terror that was used to maintain the power whites had over blacks," rather than as a "frenzied abnormality"); AMY LOUISE WOOD, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940, at 1–4 (2009) (describing the transformation of lynchings after Reconstruction into a form of "racial terror" imparting messages about white domination).

172. *See, e.g.*, BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 1–5 (2018) (arguing that purges of Chinese communities were intended to achieve local, national, and international exclusion); JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS xxv (2007) (describing nearly 200 expulsions of Chinese people from Western towns between 1850 and 1906).

173. *See* BERG, *supra* note 171, at 153–57; FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 131 (1999).

174. LAWRENCE, *supra* note 173, at 123–32; *see also* MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 98–126 (2014) (describing the defeat of anti-lynching legislation in Congress in 1922–1923 despite a concerted NAACP campaign).

175. According to Gage, scholars have written separate histories of terrorist campaigns in the United States without stitching together a "coherent historiography of terrorism," and have particularly neglected state and societal responses to terrorism. Gage, *supra* note 169, at 81.

and communities: those labeled international terrorists are subject to electronic FISA surveillance, Section 215 orders, NSLs, less accountable informant investigations, material support charges, the greater likelihood of federal prosecution, and the punitive consequences of federalization. But these direct effects do not capture the full harm of the legal divide in producing and rationalizing a racialized understanding of terrorism.

The domestic–international legal binary affects how government officials understand and characterize political violence and promotes the spurious notion that Muslims and immigrants are primarily responsible for terrorism in the United States. For example, government officials say they hesitate to describe domestic cases as terrorism where explicit federal terrorism charges are not available. Former FBI Director James Comey claimed as much when he refused to label the Charleston church attack an act of terrorism.[176] The Justice Department National Security Division (NSD)'s top official charged with addressing domestic terrorism asserted that federal prosecutors refrain from describing domestic cases as terrorism because judges might find such statements prejudicial, but use the label in international cases because they often include explicit terrorism charges.[177] This asymmetric use of the terrorism label reinforces the popular equation of terrorism with Muslims and foreigners.[178]

The federal government's bifurcated approach also distorts public understanding of the terrorist threat in the aggregate. The NSD periodically issues a chart of unsealed "international terrorism and terrorism-related convictions" listing hundreds of defendants.[179] It does not release statistics on domestic terrorism convictions nor explain how it determines that cases are international.[180] The list includes hundreds of Muslims, including indi-

176. Reilly, *supra* note 1.

177. Reilly, *supra* note 15. This is not to say that the lack of formal terrorism charges in a given case ought to prevent federal officials from using the terrorism label where the evidence supports it. Moreover, while government officials cite a concern for not stigmatizing defendants in domestic cases, they do not display the same concern in all contexts. *See* Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, JUST SECURITY (Mar. 4, 2017), https://www.justsecurity.org/38341/misleading-claims-immigrants-terrorism/ [https://perma.cc/K2J6-HGES] (observing that the government continues to list 100 people arrested in a post-9/11 immigrant sweep on a list of "terrorism-related convictions" despite evidence that the department arbitrarily designated immigrants as terrorism suspects after 9/11).

178. This is especially so because media depend heavily on law enforcement information in the initial reporting of crime stories, allowing law enforcement to "control the narrative" after major crimes. AARONSON, *supra* note 5, at 71.

179. *See, e.g.*, U.S. DEP'T OF JUSTICE NAT'L SEC. DIV., INTRODUCTION TO THE NATIONAL SECURITY DIVISION'S CHART OF PUBLIC/UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS FROM 9/11/01 TO 12/31/15, at 1 (2016).

180. In January 2017, the Justice Department released the National Security Division (NSD) list in response to a FOIA request I submitted, but did not respond to my request for statistics related to domestic terrorism or "[a]ny description of the NSD's methodology for compiling the above records, including an explanation of how investigations are classified as relating to either 'domestic' or 'international' terrorism." Letter from Kevin Tiernan, Chief,

viduals connected to foreign groups only through the fictional representations of government informants.[181] The list's exclusive focus on "international" cases results in the statistical erasure of domestic terrorism and the corresponding inflation of threats from Muslims, immigrants, and foreigners.

Political leaders then use the slanted statistics to justify policies directed at Muslims and immigrants, such as President Trump's travel ban targeting several majority Muslim countries. Shortly before issuing the second version of the travel ban, President Trump told Congress that the "vast majority of individuals" convicted of terrorism-related offenses came from outside the United States.[182] One year later, the President tweeted that "nearly 3 in 4 individuals convicted of terrorism-related charges are foreign-born,"[183] citing a new government report that again counted only international terrorism cases.[184] Independent researchers who examined the NSD data concluded that if the data had incorporated domestic terrorism convictions, the proportion of foreign-born defendants would have plummeted to 18–21 percent.[185]

While the travel ban represents the most dramatic example, the use of skewed terrorism data to justify state discrimination did not begin with Trump. For instance, in 2011–2012, Representative Peter King convened a series of pointed congressional hearings on "[r]adicalization in the American

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Records Management and FOIA Staff, U.S. Dep't of Justice Nat'l Sec. Div., to author (Jan. 29, 2017) (on file with author). The NSD's introduction to the chart states only that cases are included where the investigation "involved an identified link to international terrorism" and where career prosecutors decide to include them on a "case-by-case basis." U.S. DEP'T OF JUSTICE NAT'L SEC. DIV., *supra* note 179, at 1–2.

181. United States v. Cromitie, 727 F.3d 194, 200–04 (2d Cir. 2013); *see also* U.S. DEP'T OF JUSTICE NAT'L SEC. DIV., *supra* note 179, at 7.

182. *Trump's Speech to Congress: Video and Transcript*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/us/politics/trump-congress-video-transcript.html [https://perma.cc/7HBG-PCLR]. The Justice Department supported this claim the following day with a more specific reference to the NSD list. *See* Matt Shuham, *What Are 'Terrorism-Related' Offenses Trump Claims Foreigners Commit?*, TPM (Mar. 1, 2017, 5:23 PM), https://talkingpointsmemo.com/news/what-are-trump-terrorism-related-offenses [https://perma.cc/9TTZ-P3EK]; *see also* Sinnar, *supra* note 177.

183. *See* Lisa Daniels et al., *Trump Repeats His Lies About Terrorism, Immigration and Justice Department Data*, LAWFARE, (Jan. 16, 2018, 10:30 PM), https://www.lawfareblog.com/trump-repeats-his-lies-about-terrorism-immigration-and-justice-department-data [https://perma.cc/M5QD-DAWB] (citing presidential tweet).

184. DEP'T OF HOMELAND SEC. & DEP'T OF JUSTICE, EXECUTIVE ORDER 13780: *PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES* INITIAL SECTION 11 REPORT, at 2 (2018), https://www.dhs.gov/sites/default/files/publications/Executive%20Order%2013780%20Section%2011%20Report%20-%20Final.pdf [https://perma.cc/24G7-JN35].

185. Nora Ellingsen & Lisa Daniels, *What the Data Really Show About Terrorists Who 'Came Here,' Part III: What If You Included Domestic Terrorism Cases?*, LAWFARE (Apr. 11, 2017, 10:30 AM), https://www.lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-iii-what-if-you-included-domestic [https://perma.cc/6M2L-7E2F] (using terrorism conviction data from Transactional Records Access Clearinghouse).

Muslim [c]ommunity."[186] He defended his decision to single out Muslims on the grounds that a Justice Department report showed no evidence of neo-Nazi, environmental, or other domestic terrorism incidents—even though independent researchers documented over two dozen such acts in the same time period.[187]

Skewed representations of the terrorist threat also drive up the overall punitiveness of counterterrorism policy. Social science research suggests that the perception that terrorism is committed mostly by Middle Eastern individuals fuels support for harsher state responses.[188] In addition, governmental targeting has cascading effects on Muslim communities and other racial and ethnic groups thought to be associated with them, including the licensing of private discrimination and hate violence.[189] Equally important, the overwhelming attention to Muslims diminishes law enforcement attention to other serious threats that fall outside popular conceptions of terrorists.[190]

The terrorism legal divide thus creates pernicious feedback loops, as differential legal treatment fuels social constructions of terrorists as Muslim and foreign that in turn reinforce punitive and discriminatory state policies. As elsewhere, legal categories not only impose immediate consequences on individuals but also contribute to longer-term processes of racialization.[191]

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186. David A. Fahrenthold & Michelle Boorstein, *Rep. Peter King's Muslim Hearings: A Key Moment in an Angry Conversation*, WASH. POST (Mar. 9, 2011, 10:56 PM), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/09/AR2011030902061.html [https://perma.cc/R68L-JK7N]; *see also* Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 483–87 (2011) (likening Rep. King's hearings to McCarthy-era hearings on "un-American activities").

187. *See* Neiwert, *supra* note 12 (contrasting Rep. King's 2011 statement with the Investigative Fund's data revealing twenty-seven domestic extremist incidents in the same two-year period).

188. *See* Kelly Welch, *Middle Eastern Terrorist Stereotypes and Anti-Terror Policy Support: The Effect of Perceived Minority Threat*, 6 RACE & JUST. 117, 133 (2016) (using multivariate analysis of national survey data to conclude that those who stereotype terrorists as Middle Eastern are more likely to support punitive anti-terror policies, controlling for political ideology, race, and prejudice).

189. On the connection between state discrimination and private violence, see, for example, Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1262 (2004) (describing the "mutually reinforcing relationship between individual hate crimes [or prejudice] and governmental racial profiling").

190. *See* Neiwert, *supra* note 12; Janet 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 MAG. (Nov. 3, 2018), https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html [perma.cc/WUL8-MRYQ].

191. Critical race theorists, sociologists, and others have explored at length the processes of racialization—the social construction of racial groups and the assignment of relative privilege across them—and the relationships between law and racialization. Classics in this vast literature include IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006) (arguing that law constructs race both by imposing rules and by transmitting ideas); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010) (tracing the historical emergence of ideas of black criminality, including through pseudoscientific statistical representa-

II. THE UNPERSUASIVE RATIONALES FOR THE LEGAL DIVIDE

Part I showed that the gap between domestic and international terrorism law has serious effects on individuals, communities, and the nation. The legal divide operates to subject one group of people—mostly Muslim and nonwhite—to a harsher and less accountable legal regime than other groups. Part II shows how none of the three leading rationales for the legal divide—civil liberties, federalism, and the magnitude of threats—provides a persuasive justification.

A. *Civil Liberties Rationales*

Perhaps the single most common rationale advanced for the legal divide is that it protects the privacy and civil liberties of Americans. This rationale goes beyond citizenship and territoriality distinctions in differentiating between those accused of supporting domestic and international terrorism—even if all are U.S. citizens or residents within the United States. Thus, Susan Hennessey has asserted that not all "politically-motivated violence" is treated the same way because "the civil liberties consequences of doing so could be profound."[192] She contends that the domestic use of intelligence tools designed to address overseas threats "risks infringing into areas of constitutionally protected speech, religion, and association" and "risks toppling a carefully calculated balance."[193] Andrew McCarthy has argued that the constitutional rights and privacy of Americans justify more protections for domestic terrorism than for terrorism "driven by foreign forces."[194]

The civil liberties rationale appears most often in two contexts: the criminalization of material support for terrorist organizations, which implicates First Amendment rights, and the scope of permissible surveillance within the United States, which implicates the Fourth Amendment.[195] Civil liberties arguments address both the individual and government-interest sides of the constitutional balance. One claim is that domestic terrorism laws threaten

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tions); and MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (1986) (setting out a theory of racial formation and foregrounding the role of state policy in racial formation); *see also* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149 (2014) (listing core CRT claims and exploring benefits of collaboration with social science methods). Part III further discusses racialization as an explanation for the persistence of the legal terrorism divide.

192. Hennessey, *supra* note 21. Her civil liberties claim also merges with a federalism claim, which Part III will consider separately. *See id.*

193. *Id.*

194. Andrew C. McCarthy, *Let Virginia Prosecute the Charlottesville Terrorism*, NAT'L REV. (Aug. 14, 2017, 9:50 PM), https://www.nationalreview.com/2017/08/charlottesville-terrorist-attack-virginia-should-prosecute-not-feds/ [https://perma.cc/QY35-5RJU].

195. This is not to say that terrorism investigations and prosecutions do not implicate other constitutional rights, like due process or Sixth Amendment rights, only that the civil liberties argument has been offered as an explanation for the divide primarily in the First and Fourth Amendment contexts.

individual rights to a greater degree. A second claim is that the government has more compelling interests in countering terrorism with an international nexus. But these arguments do not convincingly justify the terrorism legal divide.

1. The First Amendment and Material Support

Recent debate on the asymmetric treatment of domestic terrorism has often focused on 18 U.S.C. § 2339B, the criminal provision banning material support to designated foreign organizations. While some have called for the designation of various right-wing or left-wing groups, others have argued that extending the material support ban to domestic organizations would raise civil liberties concerns that are tolerable only with respect to foreign organizations.

The Supreme Court's decision in *Holder v. Humanitarian Law Project* (*HLP*) provides a natural starting point for this claim.[196] In *HLP*, U.S. citizens and nonprofit organizations sought to support the lawful political activities of two designated foreign terrorist organizations, the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), by advocating on their behalf and training them to petition international bodies and use international law.[197] Although the Court held that the plaintiffs' proposed activities constituted speech, it deferred heavily to congressional and executive findings that all support to foreign terrorist organizations promotes their violence.[198] The decision opined that contributions to peaceful activities could enable organizations to divert other resources to violent activities, legitimize the organizations, strain U.S. relations with allies, and undercut international efforts to address terrorism.[199] While rejecting the plaintiffs' First Amendment challenge, the Court suggested two limits to its decision. It drew a distinction between speech coordinated with foreign terrorist organizations, which could be prohibited, and independent speech benefiting them.[200] And it suggested that a similar ban on material support for domestic organizations might fail constitutional scrutiny.[201]

Although the Court did not explain what would distinguish a material support ban on domestic organizations, others have attempted to do so. Two proposed rationales relate to the relative cost of speech suppression in the case of domestic and foreign terrorist groups; two other rationales relate to the strength of government interests. None of these rationales, however, is persuasive.

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196. 561 U.S. 1 (2010).

197. *HLP*, 561 U.S. at 9–10, 21–23.

198. *Id.* at 27–29, 33–35.

199. *Id.* at 30–33.

200. *Id.* at 39.

201. *Id.*

First, some have argued that speech and association with domestic organizations are more central to the First Amendment's purpose of protecting democratic self-government.[202] David Cole argues, for instance, that while self-government is "virtually impossible" if the state can prohibit speech coordinated with domestic political groups, "restrictions on speech with foreign organizations arguably pose a less direct challenge to the mechanisms of democracy."[203]

While it stands to reason that a ban on speech or association with *all* domestic political groups would exact a more crippling effect on democracy, the question here is not the relative impact of suppressing speech coordinated with domestic or foreign organizations writ large. On the narrower question of suppressing speech coordinated with organizations found to engage in terrorism, the democratic impact of speech suppression does not turn on an organization's domestic or foreign status. At least where U.S. citizens or residents are doing the speaking, the value and volume of that speech is not necessarily greater for speech coordinated with domestic groups.[204]

Aziz Huq has argued that the existing material support ban distorts the "national political market" by excluding certain speech from the public sphere.[205] Foreign affairs "occupy a meaningful tranche of the national political debate initiated by domestic actors," and such actors often have significant interests in U.S. foreign policy on Ireland, the Middle East, and other regions.[206] Even with the distinction the Court attempted to create between coordinated and independent speech, the existing ban might reach a fair amount of speech, potentially including the filing of an amicus brief, a newspaper's publication of an op-ed, or a filmmaker's documentary produced in coordination with such a designated foreign organization.[207]

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202. *See, e.g.*, David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 173 (2012). Cole represented the plaintiffs in *HLP* and offered the domestic–international distinction only to limit the harm of the decision, not because he endorsed application of a material support ban on foreign terrorist organizations. *See id.* at 147 n.*, 172–73.

203. *Id.* at 173.

204. Under existing law, the organizations themselves might enjoy different due process protections based on their citizenship or connections with the United States. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208 (D.C. Cir. 2001) (finding limited due process rights for a foreign organization with an interest in a U.S. bank account); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) (noting that foreign entities lack due process rights). But if the focus is on the rights of individuals supporting the organizations, as in *HLP*, then the value of U.S. citizens' speech should not diverge across domestic and foreign groups.

205. Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 22 (2012).

206. *Id.*

207. *See* Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 511, 516–17 (2017) (noting that the federal government acknowledged that the ban might cover an amicus filing and observing that major U.S. newspapers have published op-eds by Hamas spokespeople).

Second, some have argued that designating domestic organizations poses a greater First Amendment threat because administrations will be tempted to target their political opponents. Cole argues that the risk is greater because "domestic organizations are potentially in a position to challenge the incumbent administration's hold on political power, while foreign organizations generally are not."[208]

Although the concern over designating domestic political adversaries is legitimate—especially in a polarized political environment—the foreign designations equally tempt leaders to target U.S. communities for disfavored ideas or because of racial or ethnic status. The historical record demonstrates the opportunistic targeting of groups with perceived foreign connections, whether Eastern and Southern European immigrants during the Red Scares or Japanese Americans during World War II.[209] Government officials target such groups not because they threaten their power, but because their relative *lack* of power enables officials to pander to prejudice with limited backlash. The discretionary nature of the designation process, and the difficulty of mounting a selective prosecution challenge, facilitates politically motivated designations.[210]

For instance, the Trump Administration considered designating the Muslim Brotherhood, a broad-based Islamist movement with millions of followers, as a foreign terrorist organization, arguably to undermine U.S. Muslim civic institutions.[211] If it made such a move, the domestic political reaction would likely be muted given the marginal political power of the affected community. By contrast, the mere disclosure of a Department of Homeland Security (DHS) intelligence report on "rightwing extremism" in 2009—far less consequential than a designation—led to political backlash so

208. Cole, *supra* note 202, at 173; *see also* Andrew C. McCarthy, *'Designating' Antifa a Terrorist Organization Is a Bad Idea*, NAT'L REV. (Aug. 31, 2017, 4:55 PM), https://www.nationalreview.com/2017/08/antifa-domestic-terror-designation-terrible-idea/ [https://perma.cc/C799-V84V] (expressing fear of a future Democratic administration harassing its opponents "under the guise of 'designating' domestic terrorist threats").

209. *See infra* Section III.A.

210. *See* Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 573–76 (2011). A recent Brennan Center for Justice report observes that the United States lists few white nationalist or neo-Nazi organizations as foreign terrorist organizations, even when they appear to meet the definition. GERMAN & ROBINSON, *supra* note 103, at 3–4 (noting the transnational dimensions of white supremacist movements and the lack of designation of the Nordic Resistance Movement and National Action Group, despite U.S. government recognition that they threaten U.S. lives).

211. *See* Peter Baker, *White House Weighs Terrorist Designation for Muslim Brotherhood*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/world/middleeast/muslim-brotherhood-terrorism-trump.html [https://perma.cc/RYH6-K7HB] (quoting critics who believed the proposed designation was directed at an "imaginary fifth column" of Muslims in the United States). For now, the administration appears to have decided to designate particular factions rather than the whole organization. *See* Eli Lake, *U.S. Shows Beginning of a Response to Muslim Brotherhood*, BLOOMBERG OP. (Jan. 31, 2018, 10:48 AM), https://www.bloomberg.com/opinion/articles/2018-01-31/u-s-shows-beginning-of-a-response-to-muslim-brotherhood (on file with the *Michigan Law Review*).

severe that the Obama Administration gutted an intelligence unit focused on domestic extremism, canceled briefings on militia groups, and held up nearly a dozen other reports on domestic extremism.[212] In sum, the risk of administrations branding domestic organizations as terrorists for ill-motivated reasons does not necessarily exceed the parallel threat with respect to foreign designations.[213]

Third, one might argue that domestic terrorist organizations present less risk of disrupting U.S. foreign relations. The *HLP* decision cited diplomatic concerns as a justification for banning material support to foreign terrorist organizations, noting, for instance, that Turkey might vigorously protest U.S. individuals' support for the PKK.[214]

But it is not clear what weight to give such foreign relations considerations in distinguishing between domestic and international terrorism. While designated foreign groups threaten foreign interests, they may pose a lesser threat to the United States than domestic groups. While current law requires the Secretary of State to conclude that an organization threatens U.S. national security or U.S. nationals in order to list it, it does not require that the threat be substantial or direct.[215] The list of foreign terrorist organizations includes groups engaged in various local conflicts in foreign countries with an unclear relationship to U.S. foreign relations or economic interests.[216] In contrast, domestic terrorist organizations, by definition, threaten Americans. Hence, the foreign relations concern does not necessarily give the government a greater interest in curtailing speech related to international terrorism.

A fourth—and more plausible—rationale for according greater protection to domestic terrorist organizations is that the government can more easily control such groups and therefore does not need blunt bans on speech or association.[217] Outside U.S. jurisdiction, the government cannot regulate financial activity, freeze assets, undertake investigations, take custody of indi-

212. R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, WASH. POST (June 7, 2011), https://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html [https://perma.cc/DM6T-9YHT].

213. Even if the targeting of minorities does not destabilize a democracy as much as the targeting of viable political opponents, it is normatively no less troubling. Moreover, even if targeting minorities exacted a lesser harm in sheer numerical terms, the likelihood of such targeting occurring probably exceeds the likelihood of targeting mainstream political opponents given the minority group's limited political power to resist such designations.

214. Holder v. Humanitarian Law Project, 561 U.S. 1, 32–33 (2010).

215. 18 U.S.C. § 1189(a)(1)(C) (2012).

216. *See* Said, *supra* note 210, at 568–69, 575 (describing composition of the FTO list and legal challenges by groups contesting the finding that they threatened the United States).

217. Cole, *supra* note 202, at 173–74. For a similar argument in support of the immigration plenary power doctrine, see David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 42–44 (2015).

viduals, or prevent the acquisition of resources as easily or completely as it can within U.S. borders.[218]

Yet for several reasons, this claim understates U.S. power to counter terrorist funding or activity outside its borders. First, the United States exercises substantial coercive influence over other states and international legal bodies. At U.S. behest, within weeks of the 9/11 attacks, the U.N. Security Council required all states to adopt extraordinary measures to suppress terrorist financing, criminalize terrorism, and submit to U.N. monitoring—an unprecedented Security Council demand on states to change their domestic laws.[219] When the United States decides a country has insufficiently thwarted terrorism, it can pressure international organizations to apply devastating sanctions.[220] Second, U.S. prosecutors and courts have expansively interpreted U.S. law to cover extraterritorial conduct. U.S. anti–terrorism financing laws increasingly reach the extraterritorial activities of non-U.S. financial institutions.[221] The U.S. government has increasingly brought foreigners to stand trial in the United States for crimes committed abroad, even where the defendants neither targeted, nor had previously set foot in, the United States.[222] Third, U.S. power is less constrained abroad because of fewer rights accorded to noncitizens outside the United States. From military strikes to dragnet surveillance, the United States does abroad what it could never do at home. So long as such latitude exists, U.S. criminal law should recognize that the government's capacity abroad in some respects *exceeds* that within the

218. *See* Martin, *supra* note 217.

219. Paul C. Szasz, Notes and Comments, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 902–03 (2002); *see also* Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 347, 352–54 (Sujit Choudhry ed., 2006) (discussing post-9/11 measures adopted by the U.N. Security Council in 2001).

220. *See, e.g.*, Salman Masood, *At U.S. Urging, Pakistan to Be Placed on Terrorism-Financing List*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/world/asia/pakistan-terror-finance-list.html [https://perma.cc/VE9F-QL7Y].

221. Alex Lakatos & Jan Blöchliger, *The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws*, 2009 GESKR 344, 346, https://www.geskr.ch/journal/previous-issues/geskr-03-2009.html [https://perma.cc/R5W5-3WB6].

222. Stephanie Clifford, *Growing Body of Law Allows Prosecution of Foreign Citizens on U.S. Soil*, N.Y. TIMES (June 9, 2015), https://www.nytimes.com/2015/06/10/nyregion/growing-body-of-law-allows-prosecution-of-foreign-citizens-on-us-soil.html [https://perma.cc/N57A-AYZ9]; *see e.g.*, United States v. Ahmed, No. 10 CR. 131 (PKC), 2011 WL 5041456, at *1 (S.D.N.Y. Oct. 21, 2011) (rejecting jurisdictional challenge to prosecution of Eritrean national and Swedish resident for providing material support to al-Shabaab on the grounds that he was brought to the United States for prosecution and that al-Shabaab was a designated foreign terrorist organization); *see also* Nora Ellingsen & Lisa Daniels, *What the Data Really Show About Terrorists Who "Came Here," Part I: Introduction and Overview*, LAWFARE (Apr. 11, 2017, 10:29 AM), https://www.lawfareblog.com/what-data-really-show-about-terrorists-who-came-here-part-i-introduction-and-overview [https://perma.cc/A6WG-6XAP] (noting 100 terrorism convictions of individuals brought to the United States for prosecution).

United States.[223] Thus, claims of heightened government interests with respect to international terrorism must account for the reality of U.S. global power, not an artificial view of sovereignty ending at the water's edge.

None of this is to deny that the tools for suppressing transnational terrorist financing or activity may differ from those available with respect to domestic groups. But the powerful tools available to the United States abroad make the civil liberties rationale an unpersuasive basis for categorical distinctions between domestic and international terrorism.

2. The Fourth Amendment and the Scope of Surveillance

In contrast to the relatively recent material support ban, the surveillance regime has distinguished between domestic and international terrorism for forty years. Largely directed at intelligence collection on foreign states and counterespionage, the 1978 Foreign Intelligence Surveillance Act also established standards to surveil international terrorism within the United States that would not apply to domestic terrorism.[224] This Section argues that: (1) the reasons for distinguishing between the surveillance of U.S. individuals connected to domestic and international terrorism are overdrawn; and (2) even if the distinction were plausible, the government may be stretching FISA to reach individuals with a scant connection to international terrorist organizations.

In *United States v. U.S. District Court (Keith)*, the Supreme Court first suggested that Fourth Amendment rights might apply differently to surveillance connected to domestic and foreign organizations.[225] The case arose out of the bombing of a CIA office in Michigan.[226] The Attorney General had wiretapped the defendants "to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government."[227] No evidence linked the threat to a foreign power, "directly or indirectly."[228] The Court had earlier required a warrant for wiretapping related to conventional crime,[229] and Congress had accordingly legislated wiretap-

223. The sheer reach of U.S. military presence abroad is stunning. As of March 2017, the U.S. military has active members in at least 170 nations and special operations forces in at least 138 countries. Niall McCarthy, *All the Countries Worldwide with a U.S. Military Presence*, FORBES (Mar. 28, 2017, 8:56 AM), https://www.forbes.com/sites/niallmccarthy/2017/03/28/all-the-countries-worldwide-with-a-u-s-military-presence-infographic/ [https://perma.cc/97YU-A5HJ].

224. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, § 101(a)(4), 92 Stat. 1783, 1783 (codified as amended at 50 U.S.C. § 1801(a)(4) (2012)) (noting that "a group engaged in international terrorism" constitutes a "foreign power" subject to surveillance); *see also supra* Section I.A.1.

225. 407 U.S. 297 (1972).

226. *Keith*, 407 U.S. at 299.

227. *Id.* at 300.

228. *Id.* at 309.

229. Katz v. United States, 389 U.S. 347, 359 (1967).

ping rules in Title III of the 1968 Omnibus Crime Control and Safe Streets Act.[230] The question remained whether the Fourth Amendment also required judicial authorization for electronic surveillance in a national security case.[231] *Keith* held that it did in cases involving the "domestic aspects of national security," but disclaimed an opinion on surveillance involving foreign powers or their agents.[232]

In the years following *Keith*, lower courts split on whether foreign intelligence surveillance also required a court warrant.[233] Congress responded to the legal uncertainty by enacting FISA. The law created a specialized foreign intelligence court to approve surveillance warrants on a less demanding standard, but left domestic organizations—including those suspected of terrorism or other security threats—subject to Title III.[234]

At the time of FISA's passage, courts and Congress typically recognized that even the surveillance of foreign threats could implicate Americans' privacy and civil liberties. The Senate Church Committee, established to investigate surveillance abuses, had concluded that elastic claims of *foreign* influence had led to improper surveillance of U.S. activists like Dr. Martin Luther King.[235] Therefore, defenders of reduced Fourth Amendment protection for foreign threats generally pointed to the government-interest side of the equation. They advanced either the formal claim that the president enjoyed greater constitutional authority over foreign affairs or various functional claims related to investigative needs or relative institutional expertise in foreign intelligence cases.[236]

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230. *See* Omnibus Crime Control and Safe Streets Act of 1968, Title III, Pub. L. No. 90-351, §§ 801–02, 82 Stat. 197, 211–24 (codified at 18 U.S.C. §§ 2510–20 (2012)).

231. *Keith*, 407 U.S. at 309.

232. *Id.* at 321–22, 322 n.20 (citing authorities for the "view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved").

233. *See* United States v. Truong Dinh Hung, 629 F.2d 908, 913–14 (4th Cir. 1980) (holding that a prior warrant is not required for foreign intelligence surveillance); Zweibon v. Mitchell, 516 F.2d 594, 613–14 (D.C. Cir. 1975) (plurality opinion) (holding that a warrant is required for surveillance of a domestic organization not collaborating with a foreign power, even if justified as a means of obtaining foreign intelligence, and opining that all electronic surveillance requires a warrant, absent exceptional circumstances); United States v. Butenko, 494 F.2d 593, 603–05 (3d Cir. 1974) (holding that the Fourth Amendment applies to presidential surveillance in foreign affairs realm but that a prior judicial warrant is not required); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973) (holding that the president may collect foreign intelligence without a warrant because of constitutional power to protect national security in the foreign relations context).

234. *See* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801–1813 (2012); *see also supra* Section I.A.1.

235. S. REP. NO. 95–604, at 15 n.27 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3904, 3917.

236. *See, e.g.*, *Truong Dinh Hung*, 629 F.2d at 913; *Butenko*, 494 F.2d at 603–05; *Brown*, 484 F.2d at 426; *see also* S. REP. NO. 95–604 (considering that the president possesses "an 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes").

But a major historical argument for distinguishing between investigations of domestic and international terrorism no longer applies. For two decades, FISA's distinct legal regime could be justified on the grounds that foreign intelligence surveillance was less likely to be used to prosecute people than for other foreign relations purposes. Several courts interpreted the Fourth Amendment to allow issuance of FISA warrants only where the "primary purpose" of the surveillance was to collect foreign intelligence, rather than to gather evidence for criminal prosecution.[237] But after September 11, 2001, Congress and the FISA Court of Review permitted the use of FISA so long as a "significant purpose" of the surveillance was to gather foreign intelligence.[238] As a result of this lower bar, law enforcement officials can now use FISA even when they seek that evidence primarily to prosecute individuals for terrorism. Thus, the purpose behind surveillance no longer separates international terrorism investigations under FISA from standard criminal investigations of domestic terrorism: in each case, law enforcement officials may undertake the investigation for the primary purpose of prosecuting a suspect.

There are three remaining rationales for differentiating between the surveillance of domestic and international terrorism, though none is ultimately persuasive. First, some argue that the nature of international terrorism investigations calls for greater flexibility with respect to secrecy, duration, and oversight.[239] For instance, the FISA Court of Review acknowledged that, unlike in Title III cases, the government typically left FISA surveillance devices on continuously and only minimized the impact on privacy in the "indexing and logging" of those communications.[240] But the court suggested that this reduced protection might be justified because the communications might use "guarded or coded language," reflect a widespread conspiracy, take place in a foreign language, or involve "multiple actors and complex plots."[241]

Yet these same investigative challenges also apply in domestic terrorism cases. Indeed, *Keith* observed that *domestic* security investigations often require long-term intelligence collection, seek interrelated information, present special difficulties in the identification of targets, and aim to prevent unlawful activity or prepare for future emergencies.[242] The complexity and

237. *See, e.g.*, United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1991); United States v. Duggan, 743 F.2d 59, 77 (2nd Cir. 1984); *Truong Dinh Hung*, 629 F.2d at 915.

238. *See* USA Patriot Act of 2001, Pub. L. No. 107–56, 115 Stat. 272, 291 (codified at 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2012)); *In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (holding revision constitutional).

239. *See* Harper, *supra* note 20, at 1153 (contending that "an elevated level of secrecy unnecessary in the domestic terrorism context is required when the government performs counterintelligence on these pseudopolitical foreign actors").

240. *In re Sealed Case*, 310 F.3d at 740.

241. *Id.* at 741.

242. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 322 (1972). For these reasons, *Keith* invited Congress to legislate more permissive requirements for domestic security surveil-

sensitivity of an investigation would seem to vary based on the scope or organized nature of the particular threat, rather than whether it emanated from a domestic or foreign source. As to language capacity, it cannot be assumed that U.S. citizens or residents attracted to foreign terrorist groups speak a language other than English.

Second, some argue that courts have less expertise in foreign relations than in domestic affairs and should have a lesser role in approving surveillance related to international terrorism.[243] Yet legal scholars have cogently challenged claims that judges lack institutional competence to evaluate foreign relations or security claims, or that the executive branch enjoys unparalleled expertise on such issues.[244] While inexpert on foreign groups, the average judge also has little expertise in the organizational structure of a right-wing militia, the threat it poses, or the government's need for particular information. A judge draws on law enforcement affidavits, not prior experience, to assess the facts in a warrant application. Moreover, if Justice Department lawyers can write warrant applications, it is not clear why federal judges cannot evaluate whether a legal standard is met based on the factual information and context provided.

Third, some claim that foreign relations concerns necessitate a more aggressive response to international terrorism, because a failure to suppress terrorism implicates U.S. relationships with other nations and international obligations.[245] This argument reprises the claim of heightened diplomatic interests made with respect to the material support ban on foreign terrorist organizations.[246] But again, such foreign relations concerns do not necessarily elevate government interests beyond those applicable in domestic terrorism cases. In a polarized environment, violence by right-wing or left-wing political groups may threaten society as much as, or more than, the displeasure of foreign states.[247]

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lance than for ordinary crime and to designate a special court to hear such requests. *Id.* at 322–23.

243. *See* Zweibon v. Mitchell, 516 F.2d 594, 641–45 (D.C. Cir. 1975) (plurality opinion) (evaluating judicial competence argument against requiring a warrant in foreign intelligence cases).

244. *See, e.g.*, Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1404–26 (2009) (contesting claims of judicial institutional weaknesses in access to information and expertise); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–05 (2012) (arguing that political science and empirical research undermine assumptions regarding relative institutional competence); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1598–1618 (2009) (identifying costs of executive flexibility, unity, and insularity); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1936–37 (2015) (arguing that the executive's comparative expertise applies to domestic issues as well, and that judges routinely adjudicate domestic affairs questions on which they have no special expertise).

245. Harper, *supra* note 20, at 1154.

246. *See supra* Section II.A.

247. *See* Byman, *supra* note 3 (arguing that "[v]iolent white supremacists thus poke at bigger political wounds than do jihadists, with many Americans sympathizing for the cause but

Finally, even if these rationales for distinguishing between domestic and international terrorism were plausible, the law appears to permit FISA surveillance in contexts far removed from these stated justifications. For instance, as discussed earlier, FISA's lone wolf provision allows surveillance within the United States of non-U.S. persons engaged in international terrorism who are unconnected to any organization. Furthermore, even with respect to U.S. citizens and permanent residents, FISA definitions of international terrorism and "agents of a foreign power" seem to permit surveillance of those with limited actual contact with foreign organizations—perhaps even of U.S. individuals who join one other person in domestic acts aimed at influencing a global audience.[248] If the court and government interpret FISA in that fashion, then the rationales for a permissive approach to international terrorism break down altogether. Investigations of U.S. individuals with limited international relationships do not present the kind of complexity or foreign relations concerns that courts have offered in defense of FISA.[249] Moreover, in many cases, little besides ideology distinguishes Americans in the heartland attracted to ISIS from others reveling in violent white nationalist rhetoric online.[250] Thus, the rationales for FISA's distinctive legal regime do not extend to the surveillance of individuals with scant international ties.

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The civil liberties rationales for differentiating between domestic and international terrorism are overbroad: the investigation and prosecution of both forms of terrorism can impinge on Americans' privacy and civil liberties, and the strength of government interests does not correspond to the domestic or international character of the threat. Moreover, a conception of international terrorism that encompasses Islamic extremism wherever it is based would subvert those rationales altogether.

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rejecting the killing"); Sasha Polakow-Suransky, Opinion, *White Nationalism Is Destroying the West*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/opinion/sunday/white-nationalism-threat-islam-america.html [https://perma.cc/72M4-XSWJ] (arguing that "white nationalism poses a significantly greater threat to Western democracies" than Islamism because its "proponents and sympathizers" have won power or substantial vote shares in multiple countries). Part II.C considers whether the scale of international terrorism justifies different approaches to domestic and international terrorism.

248. *See supra* Section I.A.1.

249. In fact, these are the same reasons that some argue that FISA's lone wolf provision violates the Fourth Amendment. *See* Patricia L. Bellia, *The "Lone Wolf" Amendment and the Future of Foreign Intelligence Surveillance Law*, 50 VILL. L. REV. 425, 457–58 (2005) (reviewing arguments).

250. A National Institute of Justice–funded study of modern U.S. lone wolf terrorists stresses the importance of online communities in providing personal, ideological, and practical support both to "Net Nazis" and "Cyber Jihadists." MARK S. HAMM & RAMÓN SPAAIJ, THE AGE OF LONE WOLF TERRORISM 157–58, 168 (2017).

B. *Federalism Rationales*

A second leading rationale for distinguishing between terrorism with and without an international nexus is that federalism supports such a distinction, especially with respect to the charging and prosecution of offenses. Although no full-throated defense of this idea appears in legal scholarship, the idea commonly surfaces in public legal commentary. For instance, Susan Hennessey has argued that a federal domestic terrorism statute would intrude on state authority and that states can adequately prosecute politically motivated murders within their borders.[251] By contrast, she argues that "larger foreign policy and military concerns that are exclusively the province of federal government" and a lack of state capacity justify federal prosecution of cases with a "substantial foreign connection."[252] In a similar vein, former terrorism prosecutor Andrew McCarthy has argued that state and local police are well equipped to investigate domestic threats and that an expanded federal role would "deplete the sparse but essential resources necessary to combat international terrorism."[253]

This Part contends that neither the current doctrine nor the underlying principles behind federalism justify the uneven federalization of domestic and international terrorism. First, constitutional doctrine would permit greater federal prosecution of domestic terrorism than current statutes provide. Second, the advantages and disadvantages of federal prosecution do not map onto the domestic–international divide. While there are good reasons not to expand federal jurisdiction over domestic terrorism, those reasons also raise concern over the current jurisdictional approach to international terrorism.

1. Federalism Doctrine

Constitutional doctrine suggests four points. First, the federal government can prosecute international terrorism based on its constitutionally enumerated powers to regulate commerce between states and with foreign nations, to define and punish "Offences against the Law of Nations," to declare war, and to make treaties.[254] Second, states can prosecute domestic ter-

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251. Hennessey, *supra* note 21; *see also* Byman, *supra* note 3 ("To qualify as federal, the issue must be a national one, requiring cross-state authority and federal resources.").

252. Hennessey, *supra* note 21. To be clear, Hennessey does not argue that federal prosecution should only be available where there is an international nexus. She describes, with apparent approval, the current approach of federal terrorism law that distinguishes "based on the manner in which the crime is perpetrated" for cases without a strong extraterritorial component. *Id.* Further, she acknowledges that current federal law does not encompass mass shootings without a foreign nexus, potentially leading to "disparate treatment based on ideology." *Id.*

253. McCarthy, *supra* note 208.

254. U.S. CONST. art. I, § 8, cl. 3, 8, 10, 11; *id.* art. II, § 2, cl. 2; *see, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 301(a), 110 Stat. 1214 (citing feder-

rorism occurring within their borders based on their traditional police powers to suppress violent crime.[255]

Third, states can exercise criminal jurisdiction over international terrorism committed or threatened within their borders where state law does not conflict with federal law. The Supreme Court has found state laws affecting foreign relations preempted where they conflict with a federal statute or executive agreement.[256] Under these decisions, state terrorism laws that directly contradict federal statutes or policies or that present an obstacle to the realization of Congress's objectives might be preempted.[257] For instance, the Supremacy Clause might invalidate state statutes that criminalize material support to a different set of foreign terrorist organizations than those designated by the Secretary of State under federal law. By contrast, state laws allowing for the prosecution of threats or acts of violence within state borders should not be preempted, even if applied to individuals with international links.[258]

Fourth, some constitutional limits exist on the federal government's authority to prosecute purely domestic terrorism, but under the Commerce Clause,[259] Congress would likely be able to criminalize a much greater swath of domestic terrorism than it has chosen to do. The Court partly scaled back Commerce Clause jurisdiction in *United States v. Lopez*[260] and *United States v. Morrison*.[261] In *Lopez*, the Court struck down a federal prohibition on firearm possession in a school zone, holding that gun possession near schools was not an economic activity that substantially affected interstate commerce.[262] Likewise, in *Morrison*, it rejected a federal civil remedy for gender-motivated violent crimes because such crimes did not qualify as economic activity and had too attenuated an effect on interstate commerce.[263] This precedent might not permit federal criminalization of *all* domestic terrorism,

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al authority to punish crimes against the law of nations, to carry out treaties, and to address the effect of international terrorism on foreign and interstate commerce).

255. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) (describing the power to suppress violent crime as "denied [to] the National Government and reposed in the States").

256. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (invalidating California statute on disclosure of Holocaust victims' insurance claims where Court found a "clear conflict" with executive agreements); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (invalidating Massachusetts statute imposing sanctions on companies doing business with Burma because it conflicted with congressional sanctions statute).

257. *See Crosby*, 530 U.S. at 373, 377 (describing and finding obstacle preemption).

258. Courts have upheld state laws that heighten the impact of federal terrorism designations. *See* Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (sustaining Florida law prohibiting funding of state university employees' travel to countries designated by the federal government as state sponsors of terrorism).

259. U.S. CONST. art. I, § 8, cl. 3 (conferring power to "regulate Commerce . . . among the several States").

260. United States v. Lopez, 514 U.S. 549 (1995).

261. United States v. Morrison, 529 U.S. 598 (2000).

262. *Lopez*, 514 U.S. at 567.

263. *Morrison*, 529 U.S. at 613, 616–17.

if courts view terrorism as a noneconomic activity with too remote an impact on interstate commerce.[264]

Nonetheless, Congress could likely criminalize a lot of domestic terrorism through creating specific offenses more closely tied to interstate commerce. *Lopez* and *Morrison* leave unchanged the regulation of the "channels" and "instrumentalities" of interstate commerce—two traditional categories of Commerce Clause regulation.[265] *Lopez* also suggests that federal statutes will survive scrutiny where they require prosecutors to establish a connection to interstate commerce in individual cases.[266]

Thus, under the power to regulate the "channels" of interstate commerce, Congress could criminalize the interstate transportation of people or resources to facilitate terrorism.[267] That might include individuals who crossed state lines to commit terrorism—such as the white supremacist who plowed into protestors in Charlottesville[268]—or those who used email crossing state lines to facilitate acts of violence. In addition, the authority over the "instrumentalities" of interstate commerce extends to the regulation of "persons or things in interstate commerce, even though the threat may come only from intrastate activities."[269] That category likely encompasses not only threats to mass transportation facilities—which are already criminalized un-

264. In *Gonzales v. Raich*, the Court sustained a federal prohibition on the local cultivation and use of medical marijuana on the grounds that, unlike the Violence Against Women Act, the federal Controlled Substances Act regulated activities that were "quintessentially economic." 545 U.S. 1, 25 (2005). Terrorism does not fit within the definition of "economics" cited in *Gonzales*—the "production, distribution, and consumption of commodities"—although it certainly *threatens* the production, distribution, and consumption of commodities by potentially damaging commercial facilities, suppressing consumption, and destabilizing financial markets. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)). It is not clear whether the noneconomic status of a class of activities rules out the application of the third category of Commerce Clause power, which covers the regulation of activities that substantially affect interstate commerce. *Morrison* suggests that noneconomic activities might qualify in an unprecedented case. *See Morrison*, 529 U.S. at 613. Some appellate decisions, such as *United States v. Patton*, 451 F.3d 615, 625 (10th Cir. 2006), find the economic nature of the regulated activity relevant to, but not required for, the application of the third category.

265. *Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 609 (observing that the Violence Against Women Act was not restricted to violence "directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce").

266. *Lopez*, 514 U.S. at 562 (noting that statute at issue had "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce").

267. *See, e.g.*, *Patton*, 451 F.3d at 621 (describing regulation of channels of interstate commerce as including the power to regulate the passage of people or goods in interstate commerce).

268. *See* Joe Ruiz, *Ohio Man Charged with Murder in Fatal Car Attack on Anti-White Nationalist March*, NPR: TWO-WAY (Aug. 13, 2017, 7:30 AM), https://www.npr.org/sections/thetwo-way/2017/08/13/543176250/charlottesville-attack-james-alex-fields-jr [https://perma.cc/4Q7S-CSPC].

269. *Lopez*, 514 U.S. at 558.

der federal law[270]—but also "softer" targets of terrorism, such as shopping malls, restaurants, or workplaces of employers engaged in interstate commerce.[271] Even attenuated connections to interstate commerce might be sufficient, such as a statutory prohibition on domestic terrorism using a gun where prosecutors must demonstrate in individual cases that the gun had *at some point* passed through interstate commerce.[272]

Moreover, in a non-Commerce Clause case, the Court has already opined that terrorism does not fall within the exclusive police powers of states. In *Bond v. United States*, the Court interpreted a federal statute implementing the Chemical Weapons Convention to exclude a defendant's attempt to injure her husband's lover with two toxic chemicals.[273] The Court held that "our constitutional structure leaves local criminal activity primarily to the States" and that Congress had not clearly indicated that the law extended to such activity.[274] But the Court expressly distinguished terrorism from other crime, stating that "[t]he Federal Government undoubtedly has a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering."[275] Those crimes "have not traditionally been left predominantly to the States, and nothing we have said here will disrupt the Government's authority to prosecute such offenses."[276] Thus, *Bond* suggests that the Court views some federal power—perhaps including the Commerce Clause[277]—as authorizing the federal prosecution of terrorism and other crimes with the potential to cause mass harm.

Wherever the precise boundaries, constitutional doctrine likely allows much greater federal regulation of domestic terrorism than current statutes

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270. 18 U.S.C. § 1992 (2012) ("Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air").

271. To be sure, there are limits to what the Court might consider "things in interstate commerce," and terrorism targeting a place of worship or a school might not qualify. In *Jones v. United States*, the Court refused to find that arson of a private home constituted damage to a property "used in interstate or foreign commerce," in part on constitutional avoidance grounds. 529 U.S. 848, 850–51 (2000) (quoting 18 U.S.C. § 844(i) (1994)). Nonetheless, *Jones* did not overturn a previous ruling that the statute applied to a building used as rental property. *Id.* at 853 (citing Russell v. United States, 471 U.S. 858 (1985)). While *Jones* indicates that there are outer limits to the theory, there seems to be ample room for federal jurisdiction over domestic terrorism targeting facilities with a reasonable relationship to interstate commerce.

272. *See* Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. MARSHALL L. REV. 385, 413 & n.139 (2006) (stating that federal appeals courts have uniformly upheld federal convictions for felons in possession of a firearm upon a mere showing that the firearm had once crossed state lines); *see also Patton*, 451 F.3d at 636 (upholding federal prohibition on possession by a felon of body armor as mandated by precedent, while observing the inconsistency with *Lopez*).

273. 572 U.S. 844 (2014).

274. *Bond*, 572 U.S. at 848.

275. *Id.* at 864.

276. *Id.* The Court cited, with apparent approval, several other prosecutions involving domestic terrorism or other plots to commit serious harm. *Id.*

277. *Id.* at 854–55 (noting that government had waived a Commerce Clause defense).

permit. If existing federalism *doctrine* does not justify the gap between the federal criminalization of international and domestic terrorism, it leaves the question whether the *principles* behind federalism justify the divide.

2. Federalism Principles

Scholarship on federal criminal jurisdiction suggests at least three considerations in the choice between state and federal jurisdiction: (1) democratic accountability; (2) institutional competence; and (3) the relative need for centralization.[278] These considerations, however, do not weigh in favor of a federal approach for international terrorism and a state/local approach for domestic terrorism.[279]

Democratic Accountability. Legal scholars frequently cite democratic accountability concerns as a reason for greater state and local, rather than federal, control over criminal law and policing. Some argue that local communities can shape crime policy in ways that respond to local preferences.[280] Others contend that citizens can better oversee law enforcement activities at the local level because police chiefs report to local elected officials, communities can monitor police performance, and police departments care about community relations.[281] If such ideas are driving support for a limited federal approach to domestic terrorism, however, they both simplify federal and local dynamics with respect to terrorism and fail to explain why domestic and international terrorism should be treated differently.

As an initial matter, the historical record suggests that state and local dominance in counterterrorism does not necessarily serve democratic ac-

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278. *See generally* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995); Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377 (2006); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 301–09 (2012).

279. To be clear, the current approach is not a strict dichotomy. As discussed in Part I, federal terrorism law does cover some, but not all, domestic terrorism, and other federal non-terrorism-specific criminal charges can also be used to prosecute domestic terrorism. In addition, the intelligence-gathering structures of federal, state, and local authorities are intertwined. For a description of local and state involvement in terrorism-related intelligence gathering, see Waxman, *supra* note 278, at 301–09 (describing FBI-led Joint Terrorism Task Forces that coordinate local, state, and federal responses to terrorism and DHS-funded Fusion Centers that share intelligence).

280. *See, e.g.*, Beale, *supra* note 278, at 995 ("If state rather than federal law governs, local conditions and the policy preferences of a smaller community will govern such important matters as the definition of the conduct that should be criminal and the penalties that should be imposed."); Brickey, *supra* note 278, at 1172–73 (arguing that federal assumption of responsibility over "local law and order . . . interferes with a state's ability to exercise discretion in a way that is responsive to local concerns"); *see also* Waxman, *supra* note 278, at 325–26.

281. Richman, *supra* note 278, at 420.

countability—at least if accountability is defined to include the protection of minority communities. Indeed, the failure of state and local authorities to protect black communities from domestic terrorism well into the twentieth century led to concerted advocacy for federal intervention.[282] While overt state complicity in racial terrorism may have declined, some concern remains that state-level prosecutions for racial violence are not always adequate.[283] Thus, the intuition that state and local criminal jurisdiction protects democratic control over policing—however true in other criminal justice contexts—may be misplaced with respect to terrorism.[284]

To the extent that state and local involvement in counterterrorism does serve democratic accountability, such benefits may also apply to international terrorism. Several legal scholars have assessed the role of state and local law enforcement in post-9/11 counterterrorism policing and oversight.[285] They observe that some local and state agencies resisted intrusive federal intelligence-gathering programs directed at Muslim communities[286] and may have greater structural incentives to protect rights than federal authorities.[287] Yet these scholars also observe that local authorities are subject to weak formal constraints on intelligence gathering and that existing local oversight mechanisms operate poorly under limited transparency.[288] These evaluations of "national security federalism" do not distinguish baldly between domestic and international terrorism but center on terrorism threats with a significant U.S. component, regardless of whether there are international links.[289] If a stronger local role can keep law and law enforcement more accountable, that benefit likely straddles the domestic–international divide.

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282. BERG, *supra* note 171, at 153–54; *see also* LAWRENCE, *supra* note 173, at 131–43 (describing failure of Reconstruction-era federal criminal civil rights laws and failed push to enact federal anti-lynching laws until the second Reconstruction).

283. LAWRENCE, *supra* note 173, at 155–58 (advocating federal hate crimes laws).

284. There is also a long history of local police forces engaging in abusive intelligence gathering, including the infiltration of political groups, in a quest to find anarchists, communists, and other perceived radicals linked to international movements. *See, e.g.*, Waxman, *supra* note 278, at 298–99.

285. *See, e.g.*, Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941 (2005); Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX L. REV. 1715 (2010); Richman, *supra* note 278; Waxman, *supra* note 278.

286. Herman, *supra* note 285, at 947–49; Richman, *supra* note 278, at 418–19; Waxman, *supra* note 278, at 316–17.

287. Rascoff, *supra* note 285, at 1738–39.

288. *Id.* at 1741–42; Waxman, *supra* note 278, at 336–37.

289. Waxman, *supra* note 278, at 290 (coining the term "national security federalism"); *see, e.g.*, *id.* at 346. These accounts focus nearly exclusively on terrorism linked to Islam and therefore do not analyze whether the efficacy or accountability of intelligence arrangements would differ with respect to other terrorism threats. *See, e.g.*, Rascoff, *supra* note 285, at 1725 n.38; Waxman, *supra* note 278, at 321. But Rascoff states that his account could apply to "homegrown terrorism inspired by any ideology." Rascoff, *supra* note 285, at 725 n.38.

Institutional Competence. A second claim is that federal authorities are better equipped than states to respond to international terrorism, while states can handle domestic terrorism on their own.[290] But that is not always so: local authorities are fully able to prosecute certain cases labeled international terrorism, while federal agencies have greater expertise to address some types of domestic terrorism.

Among international cases, those involving substantial extraterritorial activities or extensive relationships with foreign groups benefit from federal prosecution. Federal prosecutions may be superior where key information comes from U.S. or foreign intelligence agencies, where foreign governments have a direct interest in a case, or where cases target networks with substantial international ties. In addition, prosecutors and courts in certain federal districts have developed expertise in terrorism trials, including in the management of classified information.[291]

But not all—or even most—international terrorism cases have such characteristics. Legal scholars have argued for some time that the fragmentation of the international threat—from a once-centralized al Qaeda organization to dispersed individuals and groups—increases the importance of police identifying threats through their presence and relationships in local communities.[292] In cases with limited foreign or federal intelligence sources, federal prosecutors do not have a clear advantage over local prosecutors.

Furthermore, in certain cases, federal prosecutors and courts may appear to have greater expertise only because law enforcement previously treated a case as international. For instance, once federal agents obtain a FISA warrant, a federal prosecution may appear to be preferable because federal prosecutors and judges are more familiar with FISA. But at the outset of the investigation, the nature of the threat may not have exceeded the capacity of local law enforcement or state courts. Only the *choice* to treat the case as an international terrorism matter triggered FISA surveillance, which then made a federal prosecution more desirable.[293]

On the other side of the divide, local and state authorities are not necessarily better, or even adequate, at addressing all forms of domestic terrorism.

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290. *See* Hennessey, *supra* note 21; McCarthy, *supra* note 194.

291. *See, e.g.*, Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 1006–26 (2018).

292. *See* Rascoff, *supra* note 285, at 1727–36 (arguing that local police's size, diversity, mandate, and community relations enable them to conceptualize and gather intelligence related to "homegrown terrorism"); Waxman, *supra* note 278, at 321–22 (arguing that local intelligence, rather than federal intelligence surveillance, will likely become more important as terrorism threats include more domestic elements).

293. Note that the FISA statute contemplates state prosecutions based on FISA evidence. *See, e.g.*, 50 U.S.C. § 1806(d) (2012) (requiring that states and political subdivisions provide notification of intended use of FISA evidence). But the statute requires that *federal* district courts hear motions for the disclosure or suppression of FISA evidence, even where the state prosecutes a case. *Id.* § 1806(f); United States v. Isa, 923 F.2d 1300 (8th Cir. 1991) (denying motion to suppress FISA evidence in Missouri state murder case).

Local agencies may lack the capacity to pull together information from other sources or to analyze data, hindering investigations of more organized forms of domestic terrorism.[294] In addition, federal agencies may have greater resources than local law enforcement. All told, the relative competence of federal or local/state institutions must be assessed at a lower level of generality than the international–domestic distinction.

The Relative Need for Centralization. A third federalism consideration involves the merits of a uniform, centralized approach versus a varying, decentralized one. International terrorism cases often benefit from a coordinated national strategy, especially where cases relate to a foreign terrorist group, involve witnesses or defendants from other jurisdictions, or otherwise intersect with foreign policy or defense interests involving other government agencies. Federal investigations and prosecutions facilitate such coordination. Indeed, in international terrorism cases, the Justice Department requires U.S. attorneys around the country to notify, consult with, and sometimes obtain approval from the NSD Counterterrorism Section because of "the obvious need to ensure a well-coordinated Federal response."[295]

The value of coordination also applies to some domestic terrorism, however, and does not characterize all international terrorism. Domestic terrorism that involves multistate connections, organized training or recruitment efforts, and national trends benefits from a centralized approach. In fact, the Justice Department requires U.S. attorneys to notify the Counterterrorism Section in federal domestic terrorism cases because, "[t]o a significant degree, this threat arises in connection with movements and groups whose existence spans multiple jurisdictions or even the entire nation, making effective coordination of these matters critical."[296]

The perception that international terrorism requires a more centralized response may reflect the traditional conception of that threat as centralized. To the extent that the threat instead comes from "lone wolves" or small groups, it resembles decentralized forms of right-wing violence.[297] As prevalent forms of international and domestic terrorism in the United States exhibit parallel manifestations, the relative need for national treatment varies less across them.

* * *

Federalism supplies unconvincing reasons for distinguishing between domestic and international terrorism. The benefits of a federal approach to international terrorism, including greater resources and national coordina-

294. *See* Rascoff, *supra* note 285, at 1735–36 (describing local police's limited analytical capabilities).

295. JUSTICE MANUAL, *supra* note 118, § 9-2.136 ("Notification, Consultation, and Approval Requirements for International Terrorism Matters").

296. *Id.* § 9-2.137 ("Notification Requirements in Domestic Terrorism Matters").

297. For further discussion of this shift, see Section II.C.1.

tion, also apply to domestic terrorism. The potential burdens of an expanded federal approach to domestic terrorism, including reduced local oversight and the exposure of defendants to unfavorable procedural and sentencing rules,[298] also characterize federal jurisdiction over international terrorism.

Increased federalization of domestic terrorism is not necessarily the solution. A system of dual jurisdiction tends to ratchet up punishment as a whole, allowing prosecutors to select the jurisdiction that is more likely to convict and impose a harsh sentence.[299] Moreover, there are good reasons to hesitate before enacting new terrorism offenses at any level: legislators often create new laws hastily in response to high-profile incidents and with insufficient regard to civil liberties and democratic values.[300] While these concerns caution against adopting new federal domestic terrorism charges, they also challenge the fairness and accountability of the existing jurisdictional approach to international terrorism.

C. *Magnitude-of-the-Threat Rationales*

In addition to civil liberties and federalism, a third rationale invoked in support of the legal divide is that international terrorism presents a significantly greater threat than domestic terrorism. Commentators contrast the seriousness of Islamic extremist violence with that of other terrorism threats and map that distinction onto the international–domestic divide. Some make an explicit claim of incomparable harm.[301] In other cases, the belief operates as an unstated background intuition, perhaps driven by the sheer scale of the September 11, 2001 attacks.[302] Indeed, in the wake of those attacks, the magnitude of the harm figured centrally in the move—by govern-

298. In other areas of the law where dual state and federal criminal jurisdiction exists, differences related to the length of sentences, pretrial detention, access to discovery, the suppression of evidence, and the amount of prison time served generally disfavor federal defendants. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 669–75 (1997).

299. Indeed, the Justice Manual encourages this selection by stating that the "ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted." JUSTICE MANUAL, *supra* note 118, § 9-27.240.

300. Laura K. Donohue, *The Perilous Dialogue*, 97 CALIF. L. REV. 357, 370–73 (2009).

301. *See, e.g.*, Neiwert, *supra* note 12 (statement of Rep. Peter King, chair of the House Homeland Security Committee, in 2011) ("There is no equivalency of threat between al Qaeda and neo-Nazis, environmental extremists or other isolated madmen. Only al Qaeda and its Islamist affiliates in this country are part of an international threat to our nation."); Reilly, *supra* note 1 (statement of FBI Director James Comey) ("[T]here really isn't a domestic terrorism threat that poses the risk of actors in every state engaging in random, nearly random acts of violence coordinated in the way that ISIL is attempting to inspire direct activities.").

302. *See, e.g.*, *In re* Sealed Case, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (upholding post-9/11 FISA surveillance and distinguishing FISA purpose from "ordinary crime control" on the grounds that "it is hard to imagine greater emergencies facing Americans than those experienced" on 9/11).

ment officials as well as some legal scholars—to conceptualize terrorism as a form of war, not crime.[303]

The claim that international terrorism is more dangerous than domestic terrorism is difficult to assess for a host of reasons. Terrorism risk studies typically define terrorism risk as the product of three factors: threat (the probability of an attack), vulnerability (the probability of an attack's success if it occurs), and consequences (the losses from a successful attack).[304] These studies consider "threat" the most difficult factor to estimate, as it requires sensitive information and subjective evaluations of the intent and capabili-

303. For instance, Robert Chesney and Jack Goldsmith argued that, prior to the 1990s, terrorism was thought to present a "relatively limited threat" that could be addressed through criminal law, but that increasing recognition of its potential to cause mass casualties shifted analysis toward an armed-conflict model. Chesney & Goldsmith, *supra* note 165, at 1094–95. Chesney and Goldsmith advocated a convergence of the criminal and military models to meet the "central legal challenge of modern terrorism"—the prevention of harm by "uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act." *Id.* at 1081. Other legal commentators also argued for a combination of the two models and viewed the severity of the threat as a factor pointing toward the "war" framing. *E.g.*, Benjamin J. Priester, *Who Is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1257, 1320 & n.313 (arguing that the scale, organization, and pattern of al Qaeda attacks distinguished them from ordinary crime, while concluding that most suspects should be treated as criminal defendants); Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 457, 461 (2002) (citing the scale of hostilities as a factor pointing to conceptualizing large-scale terrorist acts as war). While Section II.C considers whether the scale of domestic and international threats justifies a differential criminal law regime, a full exposition of the war/crime dichotomy is beyond the scope of this Article. Nonetheless, as this distinction may lead some to ask whether international terrorism even qualifies as crime, a few points are in order. First, many legal scholars have critiqued the "war" framing of terrorism as inapt, contrary to international law, or threatening to democratic norms. *See* MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 105–07 (2012) (arguing that the idea of "wartime" provides a justification for controversial war powers and human rights infringements); PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY 19–33 (2003) (arguing that describing conflict with al Qaeda as "war" is misleading and dangerous in the longer term); Mary Ellen O'Connell, *Introduction: Defining Armed Conflict in the Decade After 9/11*, *in* WHAT IS WAR? AN INVESTIGATION IN THE WAKE OF 9/11, at 3–11 (Mary Ellen O'Connell ed., 2012) (critiquing U.S. military response to terrorism as contrary to narrower international law conception of "armed conflict"). Second, even if one accepts that *some* international terrorism rises to the level of armed conflict, or justifies military responses, it does not follow that all international terrorism has such characteristics for perpetuity. Even under U.S. law, where there is a rich debate over how far the post-9/11 Authorization to Use Military Force extends, no one has argued that the United States is at war with every international terrorist group. Moreover, even with respect to international terrorism threats that are partly countered by military responses, the United States applies a criminal law paradigm to a large portion of individuals associated with such threats, especially within the United States. Within that paradigm, a two-tiered approach to terrorism must be independently justified, not simply rationalized on the grounds that individuals supporting certain organizations are engaged in acts of war.

304. *See, e.g.*, HENRY H. WILLIS ET AL., ESTIMATING TERRORISM RISK 5–11 (2005); Barry Charles Ezell et al., *Probabilistic Risk Analysis and Terrorism Risk*, 30 RISK ANALYSIS 575, 577 (2010); Robert Powell, *Defending Against Terrorist Attacks with Limited Resources*, 101 AM. POL. SCI. REV. 527, 528–29 (2007). Many such studies assume a single adversary and focus on the relative risk to various targets, rather than the relative risk from different groups.

ties of terrorist actors.[305] Each of the sources used for such assessments—historical data, intelligence agency judgments, and expert opinions[306]—have serious limitations, even the evaluations of intelligence and law enforcement agencies.[307]

In light of these difficulties, the relative risk of international and domestic terrorism is highly uncertain.[308] But to the extent that the legal divide rests on the assumption of a greater international threat, its defenders have more work to do. First, some evidence related to the scale of recent incidents, the potential for mass casualties, and the organized nature of the violence suggests that domestic and international threats may not be as different as assumed. An asymmetric legal regime ought to be supported by a greater burden of proof. Moreover, even if one threat exceeded the other in the aggregate, this would have a limited bearing on how the law should investigate and penalize individuals in the United States associated with each threat.

1. Assessing the Scale of Threats

At least five recent comparative quantitative studies cast doubt on the assumption that Islamic extremist terrorism is significantly more common or more deadly than terrorism based on other ideologies in the United States. These studies—produced by criminologists, the Government Accountability Office, think tanks, and journalists—vary considerably in their methodologies and results, and not all define their categories or methods with precision. Nonetheless, in the aggregate, this research suggests that: (1) fewer *incidents* of Islamic extremist violence than right-wing extremist violence have occurred in the United States in recent decades; and (2) if one excludes the 9/11 attacks and the Oklahoma City bombing, the *fatalities* from Islamic extremist violence are either somewhat higher or substantially lower

305. *See* WILLIS ET AL., *supra* note 304, at 14; Ezell et al., *supra* note 304, at 577.

306. WILLIS ET AL., *supra* note 304, at 14; Ezell et al., *supra* note 304, at 577.

307. While intelligence and security agencies have greater information than the public, their assessments are affected by the agencies' institutional mandates, jurisdiction, and biases. For instance, it is unsurprising that outward-focused federal security agencies describe Islamic extremist violence as the most significant terrorist threat, *see, e.g.*, *Threats to the Homeland: Hearing Before S. Comm. on Homeland Security & Gov't Affairs*, 115th Cong. 2 (2017) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation), while state and local law enforcement agencies characterize anti-government violent extremists as a greater threat in their own jurisdictions, Charles Kurzman & David Schanzer, Law Enforcement Assessment of the Violent Extremism Threat 3–4 (June 25, 2015) (working paper) (on file with the *Michigan Law Review*) (reporting that, of 382 law enforcement agencies, 74 percent identified anti-government extremism as one of top three terrorist threats facing their jurisdictions while 39 percent listed al Qaeda–inspired violent extremism or related Islamist threats as one of top three threats). In addition, political and partisan dynamics influence the intelligence production process. Early in the Obama Administration, for instance, political pressure led DHS to disband an intelligence unit focused on right-wing extremists and focus nearly exclusively on Muslim extremists. Smith, *supra* note 212.

308. For a discussion of the high level of uncertainty in terrorism risk assessments as a whole, see WILLIS ET AL., *supra* note 304, at 13–14.

than those from right-wing violence, depending on the study.[309] Either way, the studies discredit the common belief that Islamic extremists have claimed substantially more U.S. lives than other extremists in the post-9/11 period.

Of course, the implications from such numbers are subject to dispute. For one thing, the inclusion of the 9/11 attacks and Oklahoma City bombing would significantly change the results.[310] In addition, the death toll from terrorism represents the fatalities that occurred, not those that might have occurred in the absence of government intervention. Differential government

309. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ASSESS PROGRESS OF FEDERAL EFFORTS 28–34 (2017) (identifying, based on data from the U.S. Extremist Crime Database, 62 fatal incidents and 106 deaths from "[f]ar [r]ight [v]iolent [e]xtremist-[m]otivated [a]ttacks" between September 12, 2001 and December 31, 2016; 23 fatal incidents and 119 deaths resulting from "[r]adical Islamist [v]iolent [e]xtremist-[m]otivated [a]ttacks"; and no deaths from extremist environmental, animal liberation, or far-left beliefs during that time period); WILLIAM S. PARKIN ET AL., NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, TWENTY-FIVE YEARS OF IDEOLOGICAL HOMICIDE VICTIMIZATION IN THE UNITED STATES OF AMERICA 2 (2016) (concluding, based on data from the United States Extremist Crime Database, that between 1990 and 2014, and excluding the 9/11 and Oklahoma City attacks, offenders associated with al Qaeda and affiliated movements killed 62 individuals in 38 incidents within the United States at least in part for ideological motivations, while far-right extremists killed 245 individuals in 177 incidents); Peter Bergen et al., *Terrorism in America After 9/11: Part IV. What Is the Threat to the United States Today?*, NEW AM., https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/ [https://perma.cc/UY28-AWHP] (concluding, based on New America Foundation's online database on post-9/11 terrorism, that "[j]ihadist" terrorist attacks since 9/11 have imposed a death toll comparable to "other forms of political . . . violence Americans face today" and identifying 104 deaths inside the United States caused by "jihadist" perpetrators, 86 by "[f]ar [r]ight [w]ing" individuals, and 8 by "[b]lack [s]eparatist/[n]ationalist/[s]upremacist" perpetrators); Neiwert, *supra* note 12 (reporting, based on an original database constructed by the Investigative Fund at the Nation Institute and Reveal from the Center for Investigative Reporting, 63 cases of "Islamist domestic terrorism," defined as "incidents motivated by a theocratic political ideology espoused by such groups as the Islamic State," from 2008–2016, compared to 115 incidents by right-wing extremists in the same period, but observing a higher total of 90 deaths associated with Islamist incidents compared to 79 deaths from right-wing extremist terrorism); Alex Nowrasteh, *Terrorism Deaths and Injuries by Ideology: Excluding the Outlier Attacks*, CATO INST. (Aug. 14, 2017, 3:14 PM), https://www.cato.org/blog/terrorism-deaths-ideology-excluding-outlier-attacks [https://perma.cc/7UR7-NCBL] (identifying, based on data from sources including the University of Maryland Global Terrorism Database, RAND Corporation, and ESRI, 102 deaths in Islamist terrorist attacks, 51 from nationalist and right-wing terrorism, 23 from left-wing terrorism, and 15 from unknown/other sources from 1992–2017, excluding 9/11 and the Oklahoma City attacks); William Parkin et al., *Analysis: Deadly Threat from Far-Right Extremists Is Overshadowed by Fear of Islamic Terrorism*, PBS NEWS HOUR (Feb. 24, 2017, 6:53 PM), https://www.pbs.org/newshour/nation/analysis-deadly-threat-far-right-extremists-overshadowed-fear-islamic-terrorism [https://perma.cc/YY79-JC3E] (updating statistics based on preliminary results from 2015–2017 to total 43 incidents and 136 deaths from Islamist extremism and 185 incidents and 272 deaths from far-right extremism).

310. PARKIN ET AL., *supra* note 309, at 2 (noting how results would change); Nowrasteh, *supra* note 309 (noting a change in the ratio of murders by ideology).

attention could skew the observed lethality of terrorism in either direction.[311] Other quantitative metrics suffer from similar problems.[312]

Besides incident and casualty data, risk assessment takes into account factors such as the potential use of weapons of mass destruction and the organized nature of terrorist groups. A particular fear is that international groups may seek to inflict mass casualties through chemical, biological, radiological, or nuclear weapons. Intelligence experts believe that al Qaeda and ISIS aspire to acquire weapons of mass destruction, and some say ISIS has used chemical weapons over seventy times.[313] Furthermore, greater concern over international terrorism stems from the organization and sophistication of international terrorist groups. While most far-right terrorism is linked to lone offenders and small groups,[314] the role of large, well-resourced organizations in international terrorism suggests the potential for more sophisticated and more frequent incidents.

Although these concerns may differentiate current international and domestic threats, the differences may be less sharp than commonly assumed. For instance, with respect to weapons of mass destruction, one study observed that, while not one "homegrown jihadist extremist in the United States" had acquired or used chemical, biological, radiological, or nuclear weapons, sixteen individuals motivated by "domestic" ideologies had used, acquired, or tried to acquire such weapons from 2001 to 2013.[315] These include a former National Socialist Movement member seeking to poison Afri-

311. Extensive U.S. efforts to counter international terrorism likely prevented some terrorist attacks by degrading al Qaeda's capabilities and intercepting plots. BIPARTISAN POLICY CTR., DEFEATING TERRORISTS, NOT TERRORISM: ASSESSING U.S. COUNTERTERRORISM POLICY FROM 9/11 TO ISIS 33 (2017), https://bipartisanpolicy.org/wp-content/uploads/2017/09/BPC-National-Security-Defeating-Terrorist-Not-Terrorism.pdf [https://perma.cc/28CM-H6KD]. But certain U.S. actions, like the U.S. invasion of Iraq, the Abu Ghraib prisoner abuse scandal, and drone strikes in Pakistan, likely increased support for terrorism. *See, e.g.*, MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 138–39 (2008) (stating that U.S. invasion of Iraq and human rights abuses recruited additional terrorists). Thus, it is difficult to say which way greater government intervention skews the observed lethality of threats.

312. For instance, criminal conviction data largely reflect law enforcement priorities rather than the "natural" size of threats. The investigative focus on Muslim communities generates relatively more convictions of Muslims for inchoate crimes, material support, and routine crimes detected in the course of investigations. *See* Akbar, *supra* note 5, at 861–65 (describing preventative counterterrorism focus on Muslim communities).

313. *See* BIPARTISAN POLICY CTR., *supra* note 311.

314. *See, e.g.*, Brent R. Klein et al., *Opportunity, Group Structure, Temporal Patterns, and Successful Outcomes of Far-Right Terrorism Incidents in the United States*, 63 CRIME & DELINQ. 1224, 1238 (2017) (citing studies showing increasing utilization of "lone wolf" strategies by far-right extremists); DEP'T OF HOMELAND SEC. & FED. BUREAU OF INVESTIGATION, *supra* note 9, at 5 (assessing white supremacist violence as likely to come from "lone offenders or small cells, rather than the resources of larger groups, due to the decentralized and often disorganized status of the [White Supremacist Extremist] movement").

315. PETER BERGEN ET AL., BIPARTISAN POLICY CTR., JIHADIST TERRORISM: A THREAT ASSESSMENT 15–16 (2013).

can Americans with sarin nerve gas, anti-government extremists intending to deliver hydrogen cyanide gas through a building's ventilation system, and an anarchist who hid toxic chemicals in a Chicago transit tunnel.[316] While this historical data does not imply equivalent risk from international and domestic threats,[317] it does suggest that the intent and capability to use highly lethal weapons is not limited to international terrorists.[318]

In addition, both domestic and international terrorist threats have become less centralized in response to government interventions and the rise of the internet. Within two years of the September 11 attacks, researchers were noting al Qaeda's growing decentralization.[319] In 2008, terrorism analyst Marc Sageman argued that a new "leaderless jihad"—centered on autonomous groups training online and financing their own operations—had largely replaced "al Qaeda Central" as a threat.[320] Others countered that core al Qaeda continued to represent a significant threat.[321] But in the ensuing years, the publication of an al Qaeda magazine seeking to motivate individual terrorism and several terrorist incidents by U.S. individuals further indicated a shift to unaffiliated terrorism.[322]

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316. FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., INTELLIGENCE ASSESSMENT: DOMESTIC TERRORISTS' INTENT AND CAPABILITY TO USE CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR WEAPONS 6–8 (2008), https://info.publicintelligence.net/FBIdomesticcbrn.pdf [https://perma.cc/3GYM-G823].

317. *See* Ezell et al., *supra* note 304, at 577 (noting importance of knowledge of "motivations, intent, and capabilities of terrorists . . . in addition to or instead of knowledge about historical attacks and their relevance to current risk").

318. FED. BUREAU OF INVESTIGATION & DEP'T OF HOMELAND SEC., *supra* note 316, at 8. The 2008 FBI assessment concluded that, among domestic terrorists, "it is likely that a handful of lone offenders will continue to pursue chemical and biological materials," but that most domestic terrorists lacked the "intent or capability" to use such weapons, and that most such plots would be relatively small-scale because of technical and logistical limitations. *Id.* The assessment also noted that, while the use of radiological material by domestic terrorists was "highly unlikely," a "rudimentary radiological dispersion device" was within their "technical capability," *id.*, and that a successful attack using chemical, biological, radiological, or nuclear weapons would spread fear and likely inspire copycat attacks, *id.* at 9.

319. Jessica Stern, *The Protean Enemy*, FOREIGN AFF., Jul.–Aug. 2003, at 27, 28, 33 (describing al Qaeda's constant evolution and its interest in the nonhierarchical, "leaderless resistance" model popularized by U.S. neo-Nazi leader Louis Beam); *see also* Chesney, *supra* note 133, at 437–41 (describing the rise of unaffiliated terrorism as a result of technological developments and the spread of a "global jihad movement").

320. SAGEMAN, *supra* note 311, at 139–40.

321. *See* Bruce Hoffman, *The Myth of Grass-Roots Terrorism: Why Osama Bin Laden Still Matters*, FOREIGN AFF., May–June 2008, at 133, 134; *see also* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 431 (2010) (describing debate among terrorism analysts as to the top-down or bottom-up nature of the terrorist threat).

322. *See* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 1, 9, 17 (2013); *see also* Rascoff, *supra* note 285, at 1728 (citing evidence that "the contemporary jihad is increasingly organized around small groups of men who become radicalized at certain virtual and bricks-and-mortar nodes").

The rise of ISIS has reinforced attention to lone actors and very small groups of people with no formal organizational ties, such as those who claimed to act on behalf of ISIS in San Bernardino, Orlando, and Manhattan.[323] In late 2017, FBI Director Christopher Wray testified that the availability of online propaganda and training enabled individual violence and represented a "significant transformation from the terrorist threat our nation faced a decade ago."[324] Such assessments do not discount the seriousness of the threat or deny the possibility of direct plots by international groups.[325] But they suggest that the international threat has changed considerably since 9/11 shaped U.S. perceptions of international terrorism.

2. The Relevance of Scale

Even if the threat of international terrorism, in the aggregate, represents a greater threat than domestic terrorism, that difference does not support the differentiated legal treatment of individuals within the United States. There are at least three objections to the idea that greater expected harm from international terrorism would justify the legal divide in criminal law.

The first objection relates to the overinclusiveness of the international terrorism category. The distinctive legal treatment of international terrorism applies to an exceedingly diverse set of threats, only some of which present a real threat to the United States.[326] As discussed, the ban on material support to foreign terrorist groups applies to organizations engaged in national conflicts that only marginally affect the United States.[327] Such groups present far less of a threat than domestic militias or anti-government groups targeting Americans.[328] Similarly, FISA surveillance targets "agents of foreign powers" within the United States but treats groups of as few as two individuals as foreign powers.[329] Nothing in FISA law limits its application to established or-

323. *See, e.g.*, Katie Worth, *Lone Wolf Attacks Are Becoming More Common—And More Deadly*, PBS: FRONTLINE (July 14, 2016), https://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly/ [https://perma.cc/ZK4P-XASS].

324. *World Wide Threats: Keeping America Secure in the New Age of Terror: Hearing Before the H. Comm. on Homeland Sec.*, 115th Cong. 2 (2017) (statement of Christopher A. Wray, Director, Fed. Bureau of Investigation).

325. *Id.* Other sources indicate that, in some cases, ISIS provides logistical and even financial support to those who act in its name. *E.g.*, Clare Ellis, *With a Little Help from My Friends: An Exploration of the Tactical Use of Single-Actor Terrorism by the Islamic State*, PERSP. ON TERRORISM, Dec. 2016, at 41, 41; Rukmini Callimachi, *Not 'Lone Wolves' After All: How ISIS Guides World's Terror Plots from Afar*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html [https://perma.cc/4XNT-MW5Y].

326. HEYMANN, *supra* note 303, at 22–26 (disaggregating size and nature of terrorism threats and warning against tendency to view them as part of a single conflict with a single enemy).

327. *See supra* Section II.A.

328. *See supra* Section II.A.

329. *See supra* Section I.A.1.

ganizations, substantial threats, or groups remotely analogous to foreign states.[330]

The image of Islamic extremist violence as a single global conspiracy likely affects the categorical treatment of international terrorism. That framing may account for the tendency to view U.S. individuals supporting militant groups abroad, like Somalia's al-Shabaab, as a direct threat to the United States.[331] The framing may also serve law enforcement officials' strategic objectives, such as convicting defendants for crimes by individuals far removed from them on expansive theories of a "global jihadist" conspiracy.[332] But neither international terrorism nor Islamic militancy are unitary categories.[333]

Second, even if some international threats pose grave risks, domestic intelligence and law enforcement activities are not the sole response. For instance, diplomatic efforts to secure nuclear material are key to preventing foreign terrorist organizations from acquiring weapons of mass destruction.[334] In addition, even those who reject the United States' expansive war on terror acknowledge that, under international law, significant attacks or the imminent threat of a terrorist attack can justify military strikes under the law of armed conflict.[335] The legitimate scope of military responses to terrorism is subject to intense debate. But to the extent that fears of "existential" threats sustain the distinctive criminal law approach to international terrorism, domestic criminal law operates alongside other mechanisms to counter such concerns.

Third, the current approach to international terrorism within the United States makes little effort to distinguish between individuals with and without a plausible connection to grave international threats. If the domestic–international legal divide turns on the fear of sophisticated plots inflicting large-scale violence, many international terrorism defendants appear ex ante

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330. *See supra* Section I.A.1.

331. *See* ARUN KUNDNANI, THE MUSLIMS ARE COMING! ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR 211–12 (2014) (describing investigation of Somali community premised on fear that U.S. recruits to al-Shabaab would threaten United States, despite evidence of al-Shabaab's exclusive focus on East Africa).

332. *See, e.g.*, Chesney & Goldsmith, *supra* note 165, at 1105 (describing conviction of Jose Padilla on the government's "sweeping account of the global jihad movement as a single conspiracy").

333. For one account of internal divisions within the "jihadist movement," including the rise of groups like al Qaeda focused on transnational jihad, see generally FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL (2d ed. 2009).

334. U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM, CHAPTER 4: THE GLOBAL CHALLENGE OF CHEMICAL, BIOLOGICAL, RADIOLOGICAL, OR NUCLEAR (CBRN) TERRORISM (2016), https://www.state.gov/j/ct/rls/crt/2016/272236.htm [https://perma.cc/Q3QM-89EN] (describing the importance of international diplomatic initiatives in preventing terrorist groups from acquiring chemical, biological, radiological, or nuclear weapons).

335. *See, e.g.*, Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002) (arguing that international law allows states to use self-defense in response to significant armed attacks or imminent attacks where target states bear responsibility and where the attacks comply with international humanitarian law).

to lack the capabilities or relationships to carry out such plots. A litany of international terrorism cases involve defendants who were mentally unstable or incompetent,[336] who learned of particular foreign organizations only from FBI informants,[337] or whose only connection to an organization was ideological.[338] For example, in one informant-generated plot to attack New York targets at the ostensible behest of foreign terrorists, the trial judge called the lead defendant, James Cromitie, "incapable of committing an act of terrorism on his own."[339] While sentencing him to the statutory minimum of 25 years, she opined, "Only the government could have made a terrorist out of" Cromitie, "whose buffoonery is positively Shakespearean in scope."[340]

In such cases, little connects the individuals in question to the most significant concerns surrounding foreign terrorist organizations. The concern over al Qaeda acquiring a nuclear weapon, for instance, bears little relationship to minimally functional individuals targeted for prosecution. While such individuals may still inflict substantial harm on their own, that threat resembles that of a domestic terrorist or conventional mass shooter. Threat comparisons in the aggregate mask the substantial similarities across individual U.S. defendants.[341]

III. THE PATH FORWARD

Part II of this Article challenged the leading rationales for the legal divide between domestic and international terrorism. This Part reflects on what sustains that legal divide, despite its limited coherence, and sketches a path forward. While some advocate escalating the criminal law's response to domestic terrorism to level the legal regimes, this Part contends that de-escalating the law's approach to international terrorism would better protect liberty, equality, and other core democratic values.

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336. HUMAN RIGHTS WATCH, *supra* note 5, at 27–41 (describing eight cases of individuals who "showed serious signs early on that they struggled with mental or intellectual disabilities—diagnosed mental health problems or significantly low intelligence or difficulty comprehending basic concepts").

337. AARONSON, *supra* note 5, at 143 (describing informant's pretense to act on behalf of Jaish-e-Mohammed, a terrorist organization that the defendant had never heard of).

338. *See, e.g.*, Complaint, United States v. Suarez, No. 4:15-cr-10009-JEM-1 (S.D. Fla. July 28, 2015) (filing charges against Florida man who obtained an explosive device from an undercover informant after posting on social media in favor of ISIS, but who had no actual contact with organization); Office of Pub. Affairs, *supra* note 8 (reporting conviction of Suarez on 2339B material support charge); Complaint, United States v. Loewen, No. 13-cr-10200-MLB (D. Kan. Dec. 13, 2013) (filing charges against Kansas man inspired by Anwar al-Awlaki for attempted material support to al Qaeda in Arabian Peninsula based on informant plot).

339. AARONSON, *supra* note 5, at 150.

340. *Id.* at 150–51.

341. Indeed, some defendants themselves draw the analogy. *See* Christopher Dickey, *Inside the Head of Dylann Roof, Jihadist for White Hate*, DAILY BEAST (May 22, 2017, 1:00 AM), https://www.thedailybeast.com/inside-the-head-of-dylann-roof-a-terrorist-paradigm [https://perma.cc/MK5R-GRU2] (noting Charleston shooter Roof's self-comparison to jihadists and the common elements across terrorist cases).

A. *The Invidious Nature of the Legal Divide*

If the rationales for separating the legal treatment of domestic and international terrorism are unpersuasive, it raises the question why they have traction. History and social psychology suggest that the legal divide persists, at least in part, because it tracks deep-seated tendencies to distinguish between insiders and outsiders on racial and xenophobic terms. Because foreign or nonwhite people—and their ideas—have long been perceived as threatening, the harsher treatment of international terrorism accords with implicit beliefs. Historical patterns of "othering" also make it natural for the international category to expand to cover ethnic and racial minorities who are experienced as a threat, whether or not they have true international ties.

Social psychology studies suggest that heightened threat perceptions consolidate in-group attachments and sharpen distinctions with out-groups.[342] Government policies that respond to these perceptions with measures to protect in-groups from outsiders, such as restrictive immigration policies, in turn reinforce the belief that outsiders present a threat.[343]

Historians and legal scholars have amply documented the out-casting of segments of the population in response to past security fears. In the late nineteenth and early twentieth centuries, government officials and the public regularly conflated aliens with radicals, viewing the foreign-born as security threats to be countered with exclusion, deportation, and restrictive naturalization laws.[344] David Cole has argued that the United States regularly extended policies first used against immigrants to citizens perceived to be associated with a foreign threat, as in the internment of Japanese Americans and McCarthy-era investigations of subversives.[345]

The tendency to close ranks in opposition to perceived enemies manifested prominently after the 9/11 attacks. In a classic piece juxtaposing "The Citizen and the Terrorist," Leti Volpp argued that the attacks consolidated American national identity against a new, racialized category of people who appeared to be Middle Eastern, Arab, or Muslim.[346] Government profiling and private hate crimes branded even U.S. citizens among these groups as outsiders, because popular conceptions of citizenship turn on identity and solidarity as much as legal status.[347] According to Volpp, racial and other dif-

342. *See, e.g.*, Gordon Hodson et al., *Perceptions of Threat, National Representation, and Support for Procedures to Protect the National Group*, *in* COLLATERAL DAMAGE: THE PSYCHOLOGICAL CONSEQUENCES OF AMERICA'S WAR ON TERRORISM 109, 109–29 (Paul R. Kimmel & Chris E. Stout eds., 2006) (describing studies).

343. *Id.* at 111–12.

344. WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903–1933, at 2, 7, 64–66 (2d ed. 1994).

345. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 7–9 (2003).

346. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576, 1584 (2002).

347. *Id.* at 1592–94.

ferences place some citizens at risk of "perpetual extraterritorialization"—of relegation to the status of foreigners "when their behavior affronts."[348]

While dramatic events like 9/11 sharply inflect processes of racialization, preexisting cultural associations provide ready frames by which to interpret such events. Susan Akram and Kevin Johnson argue that several decades' worth of popular stereotypes, media representations, legal policies, and efforts to build support for U.S. Middle East policy led to the pre-9/11 social construction of Arabs and Muslims as "[t]errorists and [r]eligious [f]anatics."[349] They contend that this "complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology may [have] contribute[d] to the ferocity of the U.S. government's" post-9/11 "attacks on the civil rights of Arabs and Muslims."[350]

Federal and state policies in the years since September 11 reinforced ideas of Islam as foreign, threatening, and oppositional to American identity. Amna Akbar has argued that law enforcement "radicalization" theories identified the "religious and political cultures of Muslim communities" as the source of the terrorist threat and served to justify preventative policing measures targeting the communities as a whole.[351] Because these state policies "situate[d] Muslim and American identity as antipodes," they obligated members of these communities to choose between identities.[352] Others observe that, for Somali Muslims in the United States, government surveillance programs marked them as "black twice"—subject to two levels of historically disfavored status and therefore particularly "outside the bounds of national belonging."[353]

The terrorism legal dichotomy thus exists today against a background of implicit associations linking Muslims, foreigners, nonwhites, and terrorists in the popular imagination. The "international terrorism" side of the divide conjures images of violent, dark-skinned Muslims who threaten us here and abroad. The "domestic terrorism" category conveys an entirely different social meaning: if one can envision a white Christian *American* as a terrorist at all, he remains nonetheless "one of us."

These dynamics help explain both the greater harshness of the international terrorism category and the slippage in classifications. Even where legal definitions of domestic and international terrorism center on the location of

348. *Id.* at 1596 & n.84.

349. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 301–27 (2002); *see also* Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 12 (2001) (writing several months before the attacks that Arab Americans and Muslims had been "raced" as "foreign, disloyal, and imminently threatening").

350. Akram & Johnson, *supra* note 349, at 299.

351. Akbar, *supra* note 5, at 810–17.

352. *See id.* at 877.

353. Emmanuel Mauleón, Comment, *Black Twice: Policing Black Muslim Identities*, 65 UCLA L. REV. 1326, 1331–32 (2018).

conduct, rather than the identity or ideology of suspects, legal actors bring to the interpretive enterprise a set of preexisting notions about who falls within each category. These notions make it natural both to characterize Muslim suspects as international threats and to discount the transnational connections of white supremacists or like-minded members of dominant racial groups.

In fact, the differentiation between domestic and international threats may exhibit parallel dynamics even beyond the terrorism context. Some have made analogous arguments with respect to MS-13, the criminal gang consisting of mostly Salvadoran immigrant youth. The legal and rhetorical designation of the organization as a "transnational gang" has facilitated sweeping criminal and immigration measures against suspected gang members and their communities.[354] That crackdown "shields gangs without transnational ties, such as White gangs in nonimmigrant White neighborhoods . . . ."[355] At the same time, the focus on the gang's international character obscures both its U.S. origins and the potential for domestic, non-immigration-based policies to counter its influence.[356] Domestic–international legal dichotomies seem prone to conceptualization and application along racialized lines.

B. *Formal and Substantive Equality*

The law of domestic and international terrorism violates the "generality principle." In a 1949 decision, Justice Jackson famously argued that laws of general applicability protect against the political temptation to target minorities for unfavorable treatment.[357] He wrote that "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affect-

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354. Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 347–50 (2012).

355. *Id.* at 349.

356. *See* Dara Lind, *MS-13, Explained*, VOX (May 21, 2018, 10:52 AM), https://www.vox.com/policy-and-politics/2018/2/26/16955936/ms-13-trump-immigrants-crime [https://perma.cc/59DJ-AK9J] (describing MS-13 as "born in the USA" and exported to Central America); J. Weston Phippen, *What Trump Doesn't Understand About MS-13*, ATLANTIC (June 26, 2017), https://www.theatlantic.com/news/archive/2017/06/trump-ms-13/528453/ [https://perma.cc/33ED-WK74] (describing MS-13 as similar to other domestic gangs despite "transnational" designation).

357. Ry. Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). I cite Justice Jackson for his view that general application of laws deters arbitrariness, not for his ideas on the relative merits of equal protection or due process review. For analysis of Justice Jackson's views on the equal protection/due process distinction, see Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002), and Philip B. Kurland, *Justice Robert H. Jackson—Impact on Civil Rights and Civil Liberties*, 1977 U. ILL. L.F. 551, 572–73 (assessing Justice Jackson's views).

ed."[358] Legal scholars have applied this insight to other formal legal divisions in counterterrorism law. For instance, David Cole and Neal Katyal have argued that requiring equal treatment of citizens and noncitizens helps society calibrate an appropriate liberty–security balance by internalizing the costs of counterterrorism policies.[359]

Like citizenship distinctions, the legal divide between domestic and international terrorism allows officials to impose harsh rules with respect to racial others that they would not mete out on dominant communities. A requirement of formal equality in law design and implementation broadens the class of people who will be affected, facilitating greater consideration of the benefits as well as the costs of antiterrorism policies.

Of course, formal equality does not establish substantive equality. Because in-group/out-group dynamics run deep, the unequal treatment of Muslims, immigrants, or other minority groups will not end if the law drops the domestic–international legal divide. Moreover, the intense focus on U.S. Muslim communities in counterterrorism exists even where the law does not formally distinguish between domestic and international terrorism—as in the legal standards for terrorist watchlisting or FBI enterprise investigations.[360]

Neutralizing the legal binary would nonetheless provide a significant step forward. It would remove an important set of laws that authorize differential treatment, especially in the use of material support charges. Moreover, it would undercut a core rationalization for disparities. As Ian Haney López has argued, law constructs race through "coercion and ideology"—both by imposing rules and by transmitting ideas.[361] The domestic–international legal divide today communicates the legitimacy of different treatment across threats, ideologies, and identities, and serves to insulate law enforcement actions from charges of invidious discrimination. Stripping away plausibly neutral explanations for the terrorism divide can force a confrontation with bare inequality.

C. *The Problem with Ratcheting Up*

If the uneven legal treatment of domestic and international terrorism is the problem, then the solution could be to make the overall regime either more or less harsh across the board. Many public critics of the divide have advocated *intensifying* the law's treatment of domestic terrorism through enacting new terrorism offenses, especially at the federal level.[362] They argue

358. *Ry. Express Agency*, 336 U.S. at 112 (Jackson, J., concurring).

359. COLE, *supra* note 345, at 10–11; Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1370 (2007).

360. *See supra* Section I.A.

361. HANEY LÓPEZ, *supra* note 191, at 10.

362. *See supra* note 40 (listing examples). To be clear, some civil liberties groups have actively opposed these calls. *See, e.g.*, GERMAN & ROBINSON, *supra* note 103 (rejecting calls for new federal terrorism charges); Claire G. Gastañaga, *Why We Can't Support HB 1601, Domes-*

that criminal law would thereby express a "moral equivalen[ce]" between domestic and international terrorism.[363] Law enforcement officers and prosecutors increasingly point to progressive critiques of inequality as a reason to enhance their legal powers.[364] Yet calls to "ratchet up" terrorism law ignore the potential liberty and equality costs of doing so.

Recent scholarship has argued that, despite the association of law-and-order policies with conservatives, liberals and progressives contributed to the severity of the criminal justice system over time.[365] For instance, some have argued that feminists combatting rape, domestic violence, and human trafficking shored up the "carceral state."[366] Liberal activists likewise capitalized on the war on crime to enact new hate crimes laws.[367] Critics have argued that the alliance with law-and-order politics exacted a heavy price: it reinforced mass incarceration, including that of women and minorities,[368] limited due process and privacy protections for defendants,[369] displaced radical

tic Terrorism Legislation, ACLU VA. (Jan. 24, 2018), https://acluva.org/en/news/why-we-cant-support-hb-1601-domestic-terrorism-legislation [https://perma.cc/JMC2-GWUF] (opposing proposed state legislation); Faiza Patel & Adrienne Tierney, *The Reasons Why Dylann Roof Wasn't Charged with Terrorism*, JUST SECURITY (July 30, 2015), https://www.justsecurity.org/25071/reason-dylann-roof-charged-terrorism/ [https://perma.cc/RQ9H-8SET] (opposing material support charges for domestic terrorism).

363. Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism [https://perma.cc/S4G3-FWC5].

364. *See* Reilly et al., *supra* note 40.

365. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 7–17 (2016) (arguing that the war on crime emerged out of bipartisan efforts with significant origins in the Kennedy and Johnson administrations); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 12–19 (2014) (arguing that "liberal law-and-order" reinforced ideas of black criminality, built carceral institutions, and supported the legitimacy of the carceral state); *see also* JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 9–13 (2017) (arguing that many African Americans supported tough-on-crime policies that contributed to mass incarceration).

366. *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 115–64 (2006) (describing the role of anti-rape and battered women's activists in supporting the "carceral state"); Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY & SOC'Y 233, 236, 242 (2012) (describing "carceral feminism" as the redefinition of "justice and liberation struggles . . . in carceral terms").

367. CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA 119–25 (2009).

368. GOTTSCHALK, *supra* note 366, at 130–31, 151, 161; Bernstein, *supra* note 366, at 252–53.

369. *See* GOTTSCHALK, *supra* note 366, at 131, 152.

interpretations of the underlying problems,[370] and diverted attention from alternative social, economic, or nonlegal reforms.[371]

Together with legal scholarship on terrorism and security, these critiques suggest at least three reasons not to ratchet up the legal regime for domestic terrorism. First, the serious civil liberties and accountability objections to the treatment of international terrorism caution against extending it. Scholars have forcefully critiqued material support laws, informant-driven investigations, FISA surveillance, NSLs, and other features of the policing and prosecution of international terrorism. Many observe that material support prosecutions risk punishing thought crimes without action and chilling political speech.[372] Critics argue that the FBI's use of informants operationalizes reductive theories of radicalization, targets mentally and economically vulnerable individuals, instigates crimes that would not have occurred without government inducement, and eludes meaningful regulation.[373] Further concern surrounds the limited adversarial contestation and oversight available over the powerful surveillance tools authorized for international terrorism, including FISA warrants and NSLs.[374] And others contend that the "extraordinarily punitive" sentences in terrorism cases are rooted in false notions of defendants' irredeemable nature and impose harms on Muslim communities similar to those affecting African American communities in the War on Drugs.[375] These concerns over free speech and privacy, government accountability, anticipatory prosecution, and harsh punishment weigh against subjecting more people to the international terrorism paradigm.

Second, an escalated approach to domestic terrorism would likely have unintended distributional consequences. Even if new laws seek to counter white nationalist violence, the police and prosecutors who use them may end up targeting racial minorities. Systemic racial disparities in criminal justice

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370. *See id.* at 122–25; WALDREP, *supra* note 367, at 125–26; Bernstein, *supra* note 366, at 242, 254.

371. *See* GOTTSCHALK, *supra* note 366, at 141–42, 152–53.

372. *See, e.g.*, SAID, *supra* note 5, at 68–72; David Cole, *39 Ways to Limit Free Speech*, N.Y. REV. BOOKS (Apr. 19, 2012, 3:15 PM), https://www.nybooks.com/daily/2012/04/19/39-ways-limit-free-speech/ [https://perma.cc/Q4DQ-MB6W]; Kitrosser, *supra* note 207, at 525–28; *see also* Chesney, *supra* note 133, at 486–92 (querying costs and benefits of anticipatory material support prosecutions of individuals feared capable of violence).

373. *See* SAID, *supra* note 5, at 30–45; Akbar, *supra* note 5, at 861–65; Francesca Laguardia, *Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment*, 17 LEWIS & CLARK L. REV. 171, 173–76, 186–99 (2013); *see also* Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018) (criticizing terrorism informant recruitment practices as coercive and unregulated).

374. *See* DONOHUE, *supra* note 90, at 236–43 (describing lack of limits on information obtained through NSLs and limited capacity to appeal gag orders); Stephen I. Vladeck, *The FISA Court and Article III*, 72 WASH. & LEE L. REV. 1161, 1170–72 (2015) (describing difficulty of challenging FISA warrants).

375. Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1523–25 (2017).

and the state's historical response to political threats provide reason for concern. In the 1960s, the FBI infiltrated and disrupted the civil rights movement and black dissidents more broadly than the Klan and other white supremacist groups.[376] Recent developments, including publication of a 2017 intelligence report on "Black Identity Extremists"[377] and prosecutions of black and indigenous rights activists, have aggravated concern over the chilling of political protest.[378] Although federal authorities also surveil and target white nationalists, one study concluded that the FBI uses more questionable tactics against left-wing threats.[379]

In a different context, the domestic extension of legal authorities initially directed at an international threat has already produced disparate racial effects. Sociologist Elizabeth Bernstein has argued that U.S. feminists seeking greater criminalization of prostitution and pornography faced opposition from other women's activists and liberals but secured a stronger state response by redirecting attention to the international "traffic in women."[380] Once the international campaign prevailed, federal legislation established a domestic trafficking offense "on a moral and legal par with previous cross-border understandings of the crime."[381] But the new sex trafficking offense hiked sentences for pimping from several months to up to ninety-nine years, and most of those prosecuted were African American.[382] The initial framing of a threat as international may generate simplistic representations of the problem and dampen political opposition, while the subsequent extension to the domestic realm results in punitive and racially disproportionate consequences.

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376. *See* DAVID CUNNINGHAM, THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE 127–45 (2004) (arguing that the FBI sought to control, rather than eliminate, white hate groups because it opposed their violence but accepted their beliefs).

377. FED. BUREAU OF INVESTIGATION, COUNTERTERRORISM DIV., INTELLIGENCE ASSESSMENT: BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS (2017); *see also* Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists*,*'* FOREIGN POL'Y (Oct. 6, 2017, 11:42 AM), https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/ [https://perma.cc/X6D9-G22H] (making intelligence report public).

378. *See* Martin de Bourmont, *Is a Court Case in Texas the First Prosecution of a 'Black Identity Extremist'?*, FOREIGN POL'Y (Jan. 30, 2018), https://foreignpolicy.com/2018/01/30/is-a-court-case-in-texas-the-first-prosecution-of-a-black-identity-extremist/ [https://perma.cc/8W2E-6V89]; Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, GUARDIAN, (Feb. 10, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access [https://perma.cc/HRA5-Q65P].

379. *See* Norris & Grol-Prokopczyk, *supra* note 12, at 655 (finding that "jihadi" and "left-wing" post-9/11 terrorism cases featured more indicators of entrapment or borderline entrapment than right-wing cases, but acknowledging data limitations).

380. Bernstein, *supra* note 366, at 252.

381. *Id.*

382. *Id.* at 253.

The third, and most sweeping, objection to ratcheting up is that it frames terrorism as primarily a problem of criminal law. Despite the tendency in American law and politics to understand problems in penal terms, some have advanced alternative frames. For instance, Arun Kundnani has argued that law enforcement "radicalization" theories for Islamic extremist violence misdiagnose the problem as religious pathology rather than political opposition to state practices.[383] Others have advocated strengthening social services and community-based programs, rather than coercive law enforcement practices, to prevent alienation within marginalized communities.[384] In a similar vein, those concerned with white nationalist violence might attend to its structural and political drivers rather than the crimes of individual offenders alone. For instance, if economic dislocation contributes to domestic terrorism, then socioeconomic reforms offer an alternative set of policy responses. If high-level white nationalist rhetoric licenses racist terrorism, then the problem and solution are fundamentally political. Criminal justice responses tend to win wider acceptance, but at the risk of displacing more systemic explanations and reforms.

None of this is to suggest that political or law enforcement authorities should not devote greater attention to domestic terrorism. Growing evidence suggests that government agencies failed to monitor—and devote investigative resources to—white nationalist violence and other forms of domestic terrorism over the past decade, in part due to political constraints and professional disincentives.[385] Increased data-gathering, investigation, and prosecution of terrorism, however, differs from the adoption of new criminal charges, the designation of domestic terrorist groups, or the expansion of little-regulated informant practices. Addressing domestic terrorism need not involve ratcheting up the applicable coercive legal regime.

D. *The Path to Ratcheting Down*

This Article aims primarily to destabilize the belief that separate legal regimes for domestic and international terrorism are rational and fair—not to prescribe an ideal legal regime. While a full account of costs and benefits would exceed the limits of a single article, this Section offers initial reflections.

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383. *See* KUNDNANI, *supra* note 331, at 10, 139–52.

384. HUMAN RIGHTS WATCH, *supra* note 5, at 173–77 (advising alternative approaches while cautioning against law enforcement involvement in social interventions). For a critique of existing community engagement efforts in American Muslim communities, see Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. REV. 834 (2015).

385. GERMAN & ROBINSON, *supra* note 103, at 1–5, 14–17 (discussing limited resource allocation, nonuse of statutory authorities, and lack of data collection regarding far-right violence); Reitman, *supra* note 190 (describing political backlash against attempts to address domestic terrorism and perception among FBI agents that focusing on it would inhibit professional advancement).

Several approaches are available to ratchet down the legal treatment of international terrorism. The first approach would remove or reduce the formal distinction between domestic and international terrorism in existing laws, guidelines, and practices. While eliminating the statutory prohibition on material support for foreign terrorist organizations would constitute a drastic change, more modest reforms could include requiring that prosecutors prove a defendant's specific intent to support an organization's unlawful activities, or prohibiting the prosecution of speech coordinated with foreign terrorist organizations. The last of these possibilities would overturn the result in *HLP* by giving speech in coordination with foreign organizations equal First Amendment protection as speech coordinated with domestic groups.

Other changes would equalize oversight and accountability of law enforcement practices. For instance, the Justice Department could require the same oversight of international terrorism informants as it mandates for domestic terrorism and rein in the heavy-handed use of informants. In addition, Congress or the Justice Department could mandate consistent policies for tracking and characterizing terrorism cases. For example, rather than release lists of international terrorism convictions, the department could release statistics on terrorism as a whole, covering both federal and state prosecutions and cases with or without explicit terrorism charges.

The second approach would shrink the *application* of the international terrorism category to scenarios with a substantial relationship to international terrorism. As I have argued, the international terrorism category expands to reach individuals with marginal international connections—a predictable result of law enforcement interests in maximizing their authority and the attribution of foreignness to racial, ethnic, and religious minority communities. While this slippage provides a reason to eliminate the distinction altogether, at a minimum, reformers should insist that those who are tarred with the international brush really qualify.

For instance, in the FISA context, advocates could require the government to make public the FISA Court's interpretations of the degree of international nexus required to satisfy FISA definitions of "international terrorism" and "agent of a foreign power."[386] Indeed, the USA Freedom Act requires the Director of National Intelligence to make public FISA Court orders that provide "a significant construction or interpretation of any provision of law" and mandates amicus participation in any court hearing on "a novel or significant interpretation of the law."[387] Advocates could use these provisions to press the question.[388]

386. 50 U.S.C. § 1801(a)–(c) (2012).

387. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, §§ 401–402, 129 Stat. 268, 279–81.

388. Some civil liberties groups have already sought FISA Court opinions on significant interpretations of law without specifically focusing on the international nexus requirement. *See* Motion of the ACLU for the Release of Court Records, *In re* Ops. & Orders of this Court Con-

Similarly, where the government charges defendants with crimes requiring an international nexus—material support to a foreign terrorist organization or conduct transcending national boundaries—courts should insist on meaningful international connections. The strength of such international connections affects not just individual guilt but also the legitimacy of the legal regime. While the legal categories persist, courts should insist on correctly categorizing individual conduct.

The third approach to ratcheting down the treatment of international terrorism is essential but the most difficult. Moving beyond formal equality in legal categories, it requires addressing the bigger legal, cultural, and political factors that produce the harsh regime now in place for terrorism by Muslims. Those factors include the pervasiveness of racial othering, the willingness to grant exceptional powers to the state in perceived emergencies, the punitive turn in American law and culture, and the casting of Islam as a global civilizational enemy. It requires revisiting the full matrix of laws and practices that apply differently across racial and ideological lines, no matter their formal neutrality. Ratcheting down terrorism law ends up as one piece of a larger struggle to ratchet down the carceral and security state.

CONCLUSION

Equalizing the legal treatment of domestic and international terrorism will not eliminate racial, religious, or ideological disparities in the treatment of political violence. Intense surveillance and the aggressive use of informants in Muslim communities will likely not end, while some government officials and members of the public will still treat terrorism by white suspects as aberrational and apolitical. But dislodging the domestic–international divide will undercut disparate treatment in some areas of the law and undermine the legitimizing ideas behind disparities in others.

Recent high-profile acts of white nationalist violence have led some to demand a broader and harsher terrorism legal regime. While greater attention to such forms of terrorism is warranted, ratcheting up the legal regime through new domestic terrorism laws is the wrong solution. Reformers should restore fairness and oversight to terrorism law across the board, not subject more people to extraordinary and often unaccountable law enforcement power.

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taining Novel or Significant Interpretations of Law, No. Misc. 16-01, 2017 WL 1500052 (FISA Ct. Mar. 30, 2017), https://www.aclu.org/sites/default/files/field_document/aclu_fisc_motion_for_release_of_court_records.pdf [https://perma.cc/H7D9-Q3R2].