

2021

Equal Prosecution For All: Violent Extremism at the Intersection of Hate Crime and Terrorism

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Recommended Citation

Leeman, Gabrielle "Equal Prosecution For All: Violent Extremism at the Intersection of Hate Crime and Terrorism," American University National Security Law Brief, Vol. 12, No. 1 (2021).
Available at: <https://digitalcommons.wcl.american.edu/nslb/vol12/iss1/3>

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Equal Prosecution For All: Violent Extremism at the Intersection of Hate Crime and Terrorism

Erratum

changed title to "Prosecution" from "Protection"

EQUAL PROSECUTION FOR ALL: VIOLENT EXTREMISM AT THE INTERSECTION OF HATE CRIME AND TERRORISM

GABRIELLE LEEMAN*

After a white supremacist used his vehicle as a weapon to purposefully attack anti-racism protestors in Charlottesville, Virginia in 2017, federal officials called the incident domestic terrorism. The incident, in fact, met the definition of domestic terrorism. But the perpetrator was not prosecuted under any of the available terrorism statutes. The defendant was instead charged with, and later pled guilty to, committing hate crimes. It is imperative that we recognize all forms of terrorism as terrorism and use the legal system fairly to prosecute all terrorist attacks as terrorism. But the current terrorism statutory framework hinders the ability to prosecute incidents of extreme-right violence as terrorism. This Article argues that many incidents of extreme-right violence are terrorism and should be prosecuted as terrorism. This Article also proposes Congress update the definition of “weapon of mass destruction” to include (1) the use of a vehicle as a weapon and (2) mass shootings. These definitional updates provide a viable path forward for prosecution of violent extreme-right perpetrators as terrorists because it would make available 18 U.S.C. § 2332a, 18 U.S.C. § 2339A, and the terrorism sentencing enhancement. The United States owes it to the victims of such horrific incidents of extreme-right violence to finally prosecute these perpetrators for what they are—terrorists.

*Gabrielle Leeman is a J.D. Candidate, 2022, at The George Washington University Law School. She would like to specifically thank Professor Laura Dickinson and Professor Charles Pollack for their guidance and feedback, as well as the many others who took time to discuss the nuanced issues of this topic.

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I. INTRODUCTION

On August 12, 2017, an avowed white supremacist¹ deliberately drove his car into a crowd of anti-racism protesters during a rally in Charlottesville, Virginia, killing one woman and injuring dozens.² The perpetrator pled guilty to twenty-nine hate crimes and was subsequently sentenced to two life sentences plus 419 years.³ Even though the perpetrator was charged with committing hate crimes, much of the public, and many high-level law enforcement officials, called the attack domestic terrorism.⁴ This begs the question, why was the incident not prosecuted as “terrorism”? And does it even matter?

The language of the current terrorism statutes implicitly focuses on the perpetrator’s ideology rather than their method of attacks.⁵ As a result, while domestic Islamist-extremists are able to be prosecuted as terrorists, extreme-right perpetrators who commit the same method of attack are unable to be prosecuted as terrorists.⁶ This is particularly concerning because the majority, and fastest-growing form of domestic terrorism, is perpetrated by individuals associated with the extreme-right movement.⁷ The extreme-right movement includes the white-supremacy, anti-

¹ For purposes of this Note, I will avoid using the names of the perpetrators unless unavoidable. This aligns with the “No Notoriety” movement, which seeks to limit providing the recognition that many perpetrators desire. *See* Lois Beckett, *No Notoriety: The Campaign to Focus on Shooting Victims, Not Killers*, THE GUARDIAN (July 7, 2018), <https://www.theguardian.com/us-news/2018/jul/07/no-notoriety-media-focus-victims-shooter>.

² Denise Lavoie, *Life Sentence for Killing at Charlottesville Protest*, AP NEWS (June 28, 2019), <https://apnews.com/article/2e61587a0b9c4849b4aec1ec3695ef22>.

³ *See* Denise Lavoie, *Man Sentenced to 2nd Life Term in Charlottesville Car Attack*, AP NEWS (July 15, 2019), <https://apnews.com/article/08c7dbeb08ef4ad5874cd719e7cfc6b3>.

⁴ John Bacon, *No Bail for Charlottesville Car Attack Suspect James Fields*, USA TODAY (Aug. 14, 2017, 4:38 PM), <https://www.usatoday.com/story/news/nation/2017/08/14/james-alex-fields-jr-charlottesville-car-attack-suspect-faces-hearing-today/564002001/> (FBI Director Christopher Wray said the attack meets the definition of domestic terrorism); Bob Strickley et al., *911 Calls, Records Reveal Tumultuous Past for Accused Charlottesville Driver, Family*, CIN. ENQUIRER (Aug. 15, 2017, 1:31 AM), <https://www.cincinnati.com/story/news/local/northern-ky/2017/08/14/mom-previously-accused-charlottesville-driver-james-alex-fields-jr-beating-her/566078001/> (Attorney General Jeff Sessions said the attack “meet[s] the definition of domestic terrorism”).

⁵ *See infra* Part II.B.1.

⁶ *Id.*

⁷ *See generally* *Murder and Extremism in the United States in 2020*, ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM (Feb. 2021), <https://www.adl.org/media/15825/download>.

immigrant, and anti-Muslim movements.⁸ Due to the nature of many extreme-right ideologies—believing in the inherent supremacy of the white race and the fear and hatred of non-whites—many of the violent incidents target minorities, specifically individuals who are Black, Jewish, and Muslim.⁹ This lends to the categorization and prosecution of such incidents as hate crimes, especially because the current terrorism statutes are insufficient to capture most violent extreme-right attacks, even though the facts resemble those of domestic Islamist extremist attacks.¹⁰ These extreme-right perpetrators¹¹ therefore are typically prosecuted under hate crime and civil rights statutes.¹²

It is true that these violent extreme right perpetrators often receive lengthy, and sometimes fatal, sentences.¹³ But mere prosecution of these individuals as criminals is not enough. It is imperative that we identify terrorism as terrorism.¹⁴ “Terrorism” is not just a word; it signifies

⁸ In the United States, the extreme-right primarily consists of three slightly overlapping groups: (1) the white supremacist movement, (2) anti-government extremist movements, and (3) “single-issue” movements, such as anti-immigrant and anti-Muslim extremists. *Extreme Right/Radical Right/Far Right*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/extreme-right-radical-right-far-right>.

⁹ See, e.g., JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW 17 (2017); see also Sukhmandir Khalsa, *10 Ways Sikhism Differs From Islam: A Comparison of Sikh and Muslim Faiths*, LEARN RELIGIONS (Jan. 21, 2019), <https://www.learnreligions.com/ways-sikhism-differs-from-islam-2992956> (Sikhs are also frequently targeted due to the mistaken belief that they are Muslim). It is further impossible to discuss hate crimes without addressing the massive increase in anti-Asian hate crimes over the past two years, in part due to the use of racially-charged language by political leaders in response to the COVID-19 pandemic. See N’dea Yancey-Bragg, *‘Stop Killing Us’: Attacks on Asian-Americans Highlight Rise in Hate Incidents Amid COVID-19*, USA TODAY (Feb. 11, 2021, 9:40 PM), <https://www.usatoday.com/story/news/nation/2021/02/12/asian-hate-incidents-covid-19-lunar-new-year/4447037001/>. However, because of the recency of these growing attacks, it is unclear who is committing these attacks and where on the spectrum of hate and extremism these crimes fall.

¹⁰ See, e.g., Joshua A. Geltzer, Mary B. McCord, & Nicholas Rasmuyssen, *The Christchurch Shooting: Domestic Terrorism Goes International*, LAWFARE (Mar. 19, 2019, 1:23 PM), <https://www.lawfareblog.com/christchurch-shooting-domestic-terrorism-goes-international>; *Confronting Violent White Supremacy (Part III): Addressing the Transnational Terrorist Threat: Hearing Before the Subcomm. on Civil Rights & Civil Liberties and on Nat’l Sec. of the H. Comm. on Oversight and Reform*, 116th Cong. (Sept. 20, 2019) [hereinafter *Confronting Violent White Supremacy (Part III)*] (statement of Dr. Joshua A. Geltzer, Director, Institute for Constitutional Advocacy and Protection, Georgetown Law); see also Courtney Kurz, Comment, *Closing the Gap: Eliminating the Distinction Between Domestic and International Terrorism Under Federal Law*, 93 TEMP. L. REV. 115, 137–38 (2020).

¹¹ Because the term “domestic terrorism” has a specific statutory definition, this Note will avoid using the term “domestic terrorism” unless it is arguing that an incident of violent extremism satisfies the legal definition.

¹² See, e.g., 18 U.S.C. §§ 247, 249.

¹³ See, e.g., Lavoie, *supra* note 3; see also Debbie Elliott, *5 Years After Charleston Church Massacre, What Have We Learned?*, NPR, (June 17, 2020), <https://www.npr.org/2020/06/17/878828088/5-years-after-charleston-church-massacre-what-have-we-learned> (the Charleston Church shooter was found guilty under 18 U.S.C. § 247 and sentenced to death).

¹⁴ Jane Chong, *White Hate but Islamist Terror? Charleston, Hate Crimes and Terrorism Per Quod*, LAWFARE (June 21, 2015, 10:00 PM), <https://www.lawfareblog.com/white-hate-islamist-terror-charleston-hate-crimes-and-terrorism-quod> (“the issue of nomenclature is obviously deeply emotional for the public.”).

particularly abhorrent crimes in our society.¹⁵ Prosecuting only certain instances of terrorism under the relevant terrorism statutes is inappropriate because it treats violent attacks differently based, inherently, on the beliefs of the actor rather than the act itself. This underappreciates the threat of the extreme-right and leads to the implicit opinion that certain actors, victims, or incidents are less threatening and less important than others.¹⁶

This Note argues that the current terrorism statutes are insufficient to prosecute the most violent extreme-right perpetrators as terrorists because the statutes fail to account for the most common form of extreme-right attacks, using a vehicle as a weapon and mass shootings.¹⁷ This leads terrorists to be charged and prosecuted based, fundamentally, on their ideology rather than the violent attack itself. Perpetrators of violent extreme-right attacks, such as the Charlottesville car attack, should be charged and prosecuted under the terrorism statutes to ensure fairness of the laws and equality of the victims. Congress must thus update the statutory definition of “weapon of mass destruction,” which includes not only the traditional nuclear, biological, and chemical weapons, but also certain explosive and projectile-expelling devices,¹⁸ to include the use of a vehicle as a weapon and mass shootings. Part II of this Note provides an overview of the domestic terrorist threat, the hate crime and terrorism statutes, and recent domestic extremist attacks. Part III then argues that the current terrorism statutes are insufficient to prosecute all types of terrorism, the most violent extreme-right attacks are terrorism, and these crimes must be prosecuted as terrorism. Lastly, Part IV explores how updates to the definition of “weapon of mass destruction” would provide the most

¹⁵ Priscilla Parada, *White Supremacists Have Committed Domestic Terrorist Attacks, But Why Have the Attackers Not Been Indicted As Domestic Terrorists?*, 41 U. LA VERNE L. REV. 104, 124 (Fall 2019).

¹⁶ See Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>.

¹⁷ By arguing that the terrorism statutes should be updated to reflect method of attack rather than ideology, this proposed recommendation does not implicate protected speech.

¹⁸ 18 U.S.C. § 2332a(c)(2).

succinct and efficient solution and allow a clearer path to prosecute many instances of the most egregious extreme-right violence as terrorism.

II. BACKGROUND

Federal law defines terrorism as (1) an act dangerous to human life that violates, or would violate, the criminal laws of the United States and (2) appears intended to (i) intimidate or coerce a civilian population, (ii) influence the policy of a government by intimidation or coercion, or (iii) affect the conduct of a government by mass destruction, assassination, or kidnapping.¹⁹ Terrorism is often categorized as either international or domestic. Whereas international terrorism must “transcend national boundaries,”²⁰ domestic terrorism occurs “primarily within the territorial jurisdiction of the United States.”²¹ This section will discuss the history and present threat of domestic terrorism and how the United States prosecutes domestic violent extremists, including the historical developments and current usage of the hate crime and terrorism statutes.

A. Domestic Terrorism Threat

Incidents of domestic terrorism in the United States have been increasing in recent years.²² The Anti-Defamation League (ADL), one of the leading policy groups on the issue of domestic terrorism, recorded fifteen incidents of domestic terrorism in 2020 that led to seventeen deaths.²³ Additionally, extremist-related attacks led to forty-five deaths in 2019 and fifty-four deaths in 2018.²⁴

¹⁹ 18 U.S.C. § 2331(1), (5).

²⁰ 18 U.S.C. § 2331(1)(C); *see also* 18 U.S.C. § 2332b(g)(1) (“transcending national boundaries” means “conduct occurring outside of the United States in addition to the conduct occurring in the United States.”).

²¹ 18 U.S.C. § 2331(5).

²² *See* MARK PITCAVAGE, ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, MURDER AND EXTREMISM IN THE UNITED STATES IN 2020 7 (2020); *see also* *Global Terrorism Index: Measuring the Impact of Terrorism*, INST. FOR ECON. & PEACE 48 (2020), <https://www.visionofhumanity.org/wp-content/uploads/2020/11/GTI-2020-web-1.pdf>.

²³ PITCAVAGE, *supra* note 22 at 4.

²⁴ *Id.*

While the 2020 numbers seem to show a decrease in domestic terrorism, these numbers are misleading. Due to the COVID-19 pandemic in 2020, stay-at-home orders and social distancing protocols had the effect of decreasing mass gatherings, the typical environment for mass casualty incidents.²⁵ And although extremist-related deaths were lower in 2020, extremists were more active overall.²⁶ Data compiled by the Center for Strategic and International Studies (CSIS) concluded that “far left and far right attacks hit groundbreaking levels in 2020.”²⁷

The federal government has similarly acknowledged an increase in domestic terrorism.²⁸ An October 2018 report from the National Strategy for Counterterrorism concluded domestic terrorism is on the rise in the United States.²⁹ In January 2020, the Department of Homeland Security’s Strategic Framework for Countering Terrorism and Targeted Violence discussed the concerning rise in severity and number of attacks by individuals motivated by domestic terrorist ideologies.³⁰ In February 2020, the FBI elevated racially-motivated violent extremism to “top-level priority,” putting it on the same footing as threats by ISIS³¹ and homegrown violent extremism.³² And the Department of Justice recently announced that its National Security Division is and will continue to

²⁵ *Id.*

²⁶ *Id.* at 8 (reporting the number of extremist-related terrorist attacks or plots increased from 2019 to 2020).

²⁷ Robert O’Harrow, Jr. et al., *The Rise of Domestic Extremism in America: Data Shows a Surge in Homegrown Incidents Not Seen in a Quarter-Century*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/>.

²⁸ *But see* Zolan Kanno-Youngs & Nicholas Fandos, *D.H.S. Downplayed Threats from Russia and White Supremacists, Whistle-Blower Says*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/us/politics/homeland-security-russia-trump.html>.

²⁹ EXEC. OFF. OF THE PRESIDENT, National Strategy for Counterterrorism of the United States of America 10 (2018).

³⁰ *See* U.S. DEP’T OF HOMELAND SEC., Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence 4-5 (2019).

³¹ *See also* TERRENCE K. KELLY ET AL., RAND CORP. KNOWING THE ENEMY: UNDERSTANDING THE ISLAMIC STATE AND PRINCIPLES FOR DEFEATING IT, n.1 (2017) (noting that ISIS is also commonly referred to as Islamic State of Iraq and Syria (ISIS), the Islamic State of Iraq and the Levant (ISIL), or simply as the Islamic State (IS)).

³² *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Christopher Wray, Dir., Fed. Bureau of Investigation); *see* U.S. DEP’T OF HOMELAND SEC., Homeland Threat Assessment 17, n.7 (2020).

(defining Homegrown Violent Extremists (HVEs) as persons operating primarily in the United States who “engage in ideologically-motivated terrorist activities...in furtherance of political or social objectives promoted by an [FTO], but is acting independently of direction by an FTO.”)

focus on the rise of domestic terrorism by increasing training and resources to directly address the threat.³³

While there are certainly incidents of far-left extremist attacks, the majority of domestic extremist incidents are carried out by individuals tied to extreme-right ideologies.³⁴ In fact, extreme-right incidents reached an all-time high in 2020.³⁵ Three of the most notable incidents of extremist violence over the past two years—the conspiracy to kidnap Michigan Governor Gretchen Whitmer, the attack on a federal district judge’s family, and the January 6 attack on the U.S. Capitol—were all carried out by members associating with the extreme-right.³⁶

Although the extreme-right movement incorporates many groups and ideologies, the majority of extreme-right attacks are carried out by white supremacists.³⁷ Over half of all domestic extremist-related killings in the United States between 2009-2018 were committed by white supremacists, and four out of every five extremist-related murders in 2019 were committed by white supremacists.³⁸ Extreme-right terrorist plots or attacks increased from 2019 to 2020,³⁹ and white supremacist propaganda also increased significantly in that same period of time.⁴⁰ Propaganda, often

³³ U.S. DEP’T OF JUST., FY 2019 Annual Performance Report/FY 2021 Annual Performance Plan 28 (2019).

³⁴ SETH G. JONES ET AL., CTR. FOR STRATEGIC AND INT’L STUDIES, THE ESCALATING TERRORISM PROBLEM IN THE UNITED STATES 1-3 (2020) (concluding far-right terrorism significantly outpaces other types of terrorism, including those from far-left networks and individuals inspired by foreign Islamist terrorist organizations); O’Harrow Jr. et al., *supra* note 27 at n.28 (reporting that CSIS recorded 73 incidents of far-right extremism and 25 incidents of far-left extremism in 2020); PITCAVAGE, *supra* note 22 at 4,11 (stating that the remaining instances of domestic terrorism are typically carried out by domestic Islamist extremists and left-wing extremists (including anarchists and black nationalists)).

³⁵ See O’Harrow et al., *supra* note 27.

³⁶ See *infra* Appendix B.

³⁷ PITCAVAGE, *supra* note 22 at 4, 11-12. See *White Supremacy*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/white-supremacy> (defining the term “white supremacist” as encompassing a variety of individuals having one or more of the following beliefs: (1) whites should have dominance over people of other ethnicities; (2) whites should live in a whites-only society; (3) white culture is superior to other cultures; (4) white people are genetically superior to other people).

³⁸ Seamus Hughes et al., *White Supremacist Terror: Modernizing our Approach to Today’s Threat*, GEO. WASH. PROGRAM ON EXTREMISM 4 n.5 (April 2020).

³⁹ PITCAVAGE, *supra* note 22, at 4, 11–12.

⁴⁰ *Id.* at 4, 8 (documenting 4,500 incidents of white supremacist propaganda in 2020 and only 2,724 in 2019); see generally ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, WHITE SUPREMACISTS DOUBLE DOWN ON PROPAGANDA IN 2019 (2020).

spread via the Internet and social media platforms, increases the numbers of individuals espousing white supremacist views and encourages those individuals to engage in more destructive and violent behavior.⁴¹ It also furthers the interconnectivity between groups and individuals in the United States and those internationally who espouse similar white supremacist ideologies.⁴²

Not only is the threat of extreme-right violence increasing, but the methods of attack are increasingly moving outside the current terrorism statutory framework, which focuses on traditional notions of terrorism, such as use of explosive devices.⁴³ But between January and August 2020, vehicle and firearm attacks made up over half of all violent extreme-right attacks and plots, whereas explosives and incendiaries were only one-fourth.⁴⁴ Since 2014, perpetrators have used firearms to cause the majority of extreme-right related killings.⁴⁵ And the use of vehicles as a weapon, specifically, is the fastest growing type of extreme-right violence.⁴⁶ This increase is likely due to the ease of carrying out such an attack coupled with the devastating impact such an attack can have when used to target large groups of people.⁴⁷

⁴¹ See *Terrorism and Social Media: #IsBigTechDoingEnough?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 115th Cong. 1 (2018) (statement of Sen. Bill Nelson, Ranking Member, S. Comm. On Com., Sci., & Transp.) (“today, a terrorist can be radicalized and trained to conduct attacks...through social media”).

⁴² See Kurz, *supra* note 10, at 128–29.

⁴³ See 18 U.S.C. §§ 2332a–b (defining and imposing penalties for use of weapons of mass destruction and acts of terrorism transcending national boundaries); see also 18 U.S.C. § 2332b(g)(5)(B) (defining acts of terrorism including destruction of property or violence at mass transit systems or federal property, use of chemical, biological, nuclear weapons, violence against federal government officials, use of explosives, arsons, and bombing, destruction of certain infrastructure, such as communication lines, stations, systems, energy facilities, national defense facilities).

⁴⁴ SETH G. JONES ET AL., CTR. FOR STRATEGIC AND INT’L STUDIES, *THE WAR COMES HOME: THE EVOLUTION OF DOMESTIC TERRORISM IN THE UNITED STATES* 5 (2020).

⁴⁵ PITCAVAGE, *supra* note 22

⁴⁶ JONES ET AL., *supra* note 44, at 2 (concluding that vehicles were used in eleven extreme-right attacks between January and August 2020, whereas a vehicle was only used as a weapon once between 2015–2019); see also Hannah Allam, *Vehicle Attacks Rise as Extremists Target Protesters*, NPR (June 21, 2020, 7:01 AM), <https://www.npr.org/2020/06/21/880963592/vehicle-attacks-rise-as-extremists-target-protesters> (reporting at least eighteen deliberate vehicle-ramming attacks targeting those protesting against police brutality between May–June 2020); *Toronto is the Most Recent of Many Deliberate Attacks Involving Vehicles*, USA TODAY (Apr. 23, 2018, 10:27 PM), <https://www.usatoday.com/story/news/world/2018/04/23/list-fatal-vehicle-attacks/544603002/> (cataloguing a growing trend of perpetrators using vehicles as a weapon to target mass amounts of civilians).

⁴⁷ JONES ET AL., *supra* note 44, at 5 (quoting DEP’T HOMELAND SEC., *VEHICLE RAMMING: SECURITY AWARENESS FOR SOFT TARGETS AND CROWDED PLACES* 1).

B. Paths to Prosecution and Sentencing

Due to the lack of a specific “domestic terrorism” charge,⁴⁸ the Government uses a variety of statutes to prosecute extreme-right attacks.⁴⁹ This Note considers the most commonly used tool to prosecute extreme-right violence, the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009,⁵⁰ as well as three relevant terrorism statutes, 18 U.S.C. § 2332a (use of weapon of mass destruction), 18 U.S.C. § 2339A (provision of material support to terrorists), and 18 U.S.C. § 2339B (provision of material support to a foreign terrorist organization (“FTO”)), and the terrorism sentencing enhancement.⁵¹

1. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009⁵²

Various forms and iterations of hate crime statutes have existed since the late-1800s in response to the reign of terror perpetrated by the Ku Klux Klan and similar organizations following the Civil War.⁵³ Currently, the most prominent hate crime statute is the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (hereinafter “Hate Crime Act”) named after two individuals brutally murdered because of their sexuality and race respectively.⁵⁴

⁴⁸ See CHARLES DOYLE, CONG. RESEARCH SERV., LSB10340, DOMESTIC TERRORISM: SOME CONSIDERATIONS 1 (2019).

⁴⁹ MICHAEL GERMAN & SARA ROBINSON, WRONG PRIORITIES ON FIGHTING TERRORISM 10–13 (2018) (compiling a list of statutes used in domestic terrorism prosecutions); see also *Domestic Terrorism Prosecutions Reach All-Time High in FY 2020*, TRAC REP. (Jan. 11, 2021), <https://trac.syr.edu/tracreports/crim/636/> (listing a variety of lead charges in domestic terrorism prosecutions, including 18 U.S.C. §§ 111 (assaulting, resisting, or impeding officers or employees), 871 (threats against the President and successors), 1752 (knowingly entering or remaining in any restricted building or grounds), 844 (importation and storage of explosives), 231 (civil disorders), 875 (interstate communications), and 876 (making threatening communications)).

⁵⁰ 18 U.S.C. § 249.

⁵¹ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2021).

⁵² 18 U.S.C. § 249.

⁵³ Eric Shimamoto, *Rethinking Hate Crime in the Age of Terror*, 72 UMKC L. REV. 829, 833 (Spring 2004).

⁵⁴ Press Release, Laws. Comm. for C.R. under Law, *11th Anniversary of Matthew Shepard and James Byrd Hate Crimes Prevention Act* (Oct. 28, 2020), <https://lawyerscommittee.org/11th-anniversary-of-matthew-shepard-and-james-byrd-hate-crimes-prevention-act/>.

The Hate Crime Act provides for prosecution of a perpetrator who “willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, [or] attempts to cause bodily injury to any person because of the actual or perceived race, color, religion, or national origin of any person.”⁵⁵

In order to prosecute a defendant under the Hate Crime Act, the Government must prove that (1) defendant committed an act prohibited by law, (2) defendant selected a victim because of the victim’s protected characteristic, such as race, ethnicity, religion, or sexual orientation, and (3) defendant demonstrated bias or prejudice against a protected characteristic of the victim.⁵⁶ Many violent extreme-right perpetrators clearly satisfy these elements, as they often post their ideologies on social media and write manifestos explaining their views and reasons for committing the attack.⁵⁷

2. Terrorism Statutes

While there is a statutory definition of domestic terrorism,⁵⁸ there is no specific domestic terrorism charge for prosecutors to pursue.⁵⁹ Some scholars argue the difference in treatment between extreme-right perpetrators and Islamist extremists⁶⁰ comes down to the weapon used—e.g., a bomb or a gun.⁶¹ But regardless of weapon, the current terrorism statutes provide a clearer avenue to prosecution for extremists who have an international connection. While there is no standalone

⁵⁵ 18 U.S.C. § 249(a)(1).

⁵⁶ 57 AM. JUR. 3d PROOF OF FACTS 1, 20–21.

⁵⁷ Indictment at ¶¶ 2, 4, *United States v. Crusius*, (No. EP-20-CR) 2020 U.S. Dist. LEXIS 132901 (defendant drafted and uploaded a document titled “The Inconvenient Truth,” in support of his violent attack to “defend[] [his] country from cultural and ethnic replacement brought on by the [Hispanic] invasion.”); Frances Robles, *Dylann Roof Photos and a Manifesto Are Posted on Website*, N.Y. TIMES (June 20, 2015), <https://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html>.

⁵⁸ See 18 U.S.C. § 2331(5).

⁵⁹ See generally DOYLE, *supra* note 48; Mary McCord, *Filling the Gap in Our Terrorism Statutes*, GEO. WASH. PROGRAM ON EXTREMISM (Aug. 2019).

⁶⁰ Islamist extremism is rooted in the perception that Western culture is a threat to Islam and Islamic religious identity. See DINA AL RAFFIE, *IDENTITY-EXTREMISM NEXUS: COUNTERING ISLAMIST EXTREMISM IN THE WEST*, 8 (2015).

⁶¹ Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1352 (2019) (quoting Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015, 11:34 AM), <https://www.lawfareblog.com/goodreasons-not-charge-all-terrorists-terrorism>).

domestic terrorism charge, there is a charge dedicated to terrorism that “transcends national boundaries”⁶² or where the individual is connected to a designated FTO.⁶³ Given that the United States has primarily only designated Islamist extremist groups as FTOs,⁶⁴ most terrorism cases brought are against homegrown Islamist extremists, even if the facts seem comparable to those of violent extreme-right perpetrators.⁶⁵

Although it is significantly more common for terrorism charges to be brought against homegrown Islamist extremists,⁶⁶ violent extreme-right perpetrators can still be prosecuted under the various terrorism statutes.⁶⁷ But extreme-right perpetrators are commonly charged under non-terrorism related statutes.⁶⁸ The most relevant terrorism statutes for purposes of this Note are 18 U.S.C. § 2332a (use of weapon of mass destruction) and the two material support statutes—18 U.S.C. §§ 2339A (provision of material support to terrorists) and 2339B (provision of material support to an FTO).⁶⁹

⁶² 18 U.S.C. § 2332b.

⁶³ 18 U.S.C. § 2339B. This international focus can likely be attributed, at least in part, to the timing of the statutes, which were enacted in 1992 following the Gulf War, and later amended in 2001 following the September 11 attacks.

⁶⁴ See *Terrorist Designations and State Sponsors of Terrorism: Foreign Terrorist Organizations*, U.S. DEPT OF STATE, <https://www.state.gov/foreign-terrorist-organizations/>.

⁶⁵ See discussion *infra* Part III.A.

⁶⁶ *FY 2019 Domestic Terrorism Prosecutions Twice Number for International Terrorism*, TRAC REP. (Aug. 29, 2019) [hereinafter *FY 2019 Domestic Terrorism Prosecutions*], <https://trac.syr.edu/tracreports/crim/572/> (finding that 18 U.S.C. §2339B (material support to an FTO) was the most commonly filed lead charge in federal terrorism-related prosecutions).

⁶⁷ Most of the terrorism statutes do not explicitly require an international nexus. See GERMAN & ROBINSON, *supra* note 49, at 5 (finding 51 of the 57 listed terrorism offenses are applicable to both international and domestic terrorism).

⁶⁸ See Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), <https://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/> (concluding that “domestic terrorists, unlike their international counterparts, are rarely prosecuted for terrorism-related crimes.”); see Shirin Sinnar, *More Misleading Claims on Immigrants and Terrorism*, JUST SECURITY (Mar. 4, 2017), <https://www.justsecurity.org/38341/misleading-claims-immigrants-terrorism/> (arguing that prosecutors often do not charge extreme-right violence under any of the terrorism statutes); see Eric Halliday & Rachael Hanna, *How the Federal Government Investigates and Prosecutes Domestic Terrorism*, LAWFARE (Feb. 16, 2021, 11:17 AM), <https://www.lawfareblog.com/how-federal-government-investigates-and-prosecutes-domestic-terrorism> (listing each of the four § 2339A domestic terrorism cases); see also German & Robinson, *supra* note 49 at 9–11 (finding that, between 2013–2017, prosecutors used at least 66 different statutes in 412 “Domestic Terrorism” prosecutions); but see *id.* at 14, 17 (finding that the data are inconclusive as to how many of the domestic terrorism prosecutions involved far-right violence).

⁶⁹ 18 U.S.C. § 2332a (weapons of mass destruction); 18 U.S.C. § 2339A (material support to terrorists); 18 U.S.C. § 2339B (material support to foreign terrorist organizations); See generally Sinnar, *supra* note 61, at 1352–53 (explaining the three categories of terroristic crimes under federal law).

First, under 18 U.S.C. § 2332a (use of weapon of mass destruction), a perpetrator may be liable if they use, threaten, attempt, or conspire to use a weapon of mass destruction.⁷⁰ Prosecutors must thus prove defendant (1) used or attempted to use a weapon of mass destruction, (2) against any person within the United States, and (3) the incident affects interstate commerce by one of four conditions.⁷¹ “Weapon of mass destruction” is defined, in part, as “any destructive device as defined in [18 U.S.C. § 921].”⁷² A destructive device generally refers to explosive or incendiary devices, other weapons that may be converted to expel a projectile, or any combination of parts designed or intended to be used as a destructive device.⁷³ This expands the criminalization of use of a “weapon of mass destruction” beyond just the traditional concept of nuclear, biological, and chemical weapons.⁷⁴

Second, under 18 U.S.C. § 2339A (provision of material support to terrorists), a perpetrator may be liable for providing material support,⁷⁵ including property, services, or personnel, for a

⁷⁰ For example, a white supremacist who planted an explosive device at a Martin Luther King Jr. day parade in Spokane, Washington in 2011 was sentenced to thirty-two years for attempting to use a weapon of mass destruction. *See, e.g.,* Michael Martinez, *Man Who Placed Bomb on MLK Day Parade Route Sentenced to 32 Years*, CNN (Dec. 20, 2011, 4:35 PM), <https://www.cnn.com/2011/12/20/justice/washington-mlk-bomb-sentencing/index.html> (citing law enforcement officials determination that the bomb plot, if successful, could have injured many more people).

⁷¹ 18 U.S.C. § 2332a(a)(2) provides that, if the weapon is used against a person or property within the United States, (1) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense, (2) such property is used in interstate or foreign commerce or in an activity that affects interstate or foreign commerce, (3) any perpetrator travels in or causes another to travel in interstate or foreign commerce in furtherance of the offense; or (4) the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce.

⁷² 18 U.S.C. § 2332aI(2)(A); 18 U.S.C. § 921(a)(4)(A)(i)–(vi) (definition for a “destructive device”).

⁷³ 18 U.S.C. § 921(a)(4). The term “destructive device” means –

(A) any explosive, incendiary, or poison gas . . . ;

(B) any type of weapon (other than a shotgun . . .) . . . which may be readily converted to[] expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

⁷⁴ *See, e.g.,* United States v. McVeigh, 940 F. Supp. 1571, 1575 (D. Colo. 1996) for a case that invokes Section 921 to include a truck bomb as a “destructive device” and thus a “weapon of mass destruction.”

⁷⁵ 18 U.S.C. § 2339A(b)(1). “The term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouse, false documentation or identification, communications equipment, facilities, weapons, lethal substantives, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

variety of defined terrorist acts.⁷⁶ Prosecution under this statute requires evidence that (1) defendant provided material support, (2) for a specified underlying terrorist act, and (3) defendant knew their support would be used to perpetrate the underlying terrorist act.⁷⁷

Third, another possible pathway to prosecution is under 18 U.S.C. § 2339B (provision of material support to an FTO).⁷⁸ To violate this statute, a person must (1) provide material support,⁷⁹ (2) to a designated FTO, and (3) have knowledge that the organization is a designated FTO,⁸⁰ or has engaged or does engage in terrorist activities or terrorism.⁸¹

3. Terrorism Sentencing Enhancement

Lastly, following a guilty plea or conviction, the court may impose a terrorism sentencing enhancement where the offense was a felony that involved, or was intended to promote, a “federal

⁷⁶ 18 U.S.C. § 2339A(a) (listing the defined terrorist acts, including destruction of, or violence at, mass transit systems or federal property, use of chemical, biological, nuclear weapons, violence against federal government officials, use of explosives, arsons, and bombing, destruction of certain infrastructure, such as communication lines, stations, systems, energy facilities, national defense facilities, 2332a (relating to the use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries)). See GERMAN & ROBINSON, *supra* note 49, at 6–7 (compiling and defining list of all predicate offenses).

⁷⁷ See, e.g., COMMITTEE ON PATTERN JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 407 (2019), <https://www.lb5.uscourts.gov/viewer/?/juryinstructions/Fifth/crim2019.pdf>, on the Fifth Circuit’s pattern guidelines concerning the Government’s burden for proving a Section 2339A case beyond a reasonable doubt; United States v. Feight, No. 14-CR-12 (GLS) (N.D.N.Y. 2014), <https://storage.courtlistener.com/recap/gov.uscourts.nynd.97017.24.0.pdf> (plea agreement).

⁷⁸ For example, a defendant associated with both Nazi ideology and radical Islam was found guilty of attempting to provide material support to an FTO for transmitting \$245 worth of gift cards in order to help facilitate fighters’ travel to ISIL-controlled territory. United States v. Young, 916 F.3d 368, 375 (4th Cir. 2019).

⁷⁹ 18 U.S.C. § 2339A(b)(1).

⁸⁰ The organization must be a designated terrorist organization under 8 U.S.C. § 1189 as an FTO. This requires a finding by the Secretary of State that (1) the organization is a foreign organization, (2) the organization engages in terrorist activity (as defined in 8 U.S.C. § 1182(a)(3)(B) or terrorism (as defined in 22 U.S.C. § 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism, and (3) the terrorist activity or terrorism threatens the United States or its nationals. See *Terrorist Designations and State Sponsors of Terrorism*, *supra* note 64.

⁸¹ “Terrorist activities,” as used in this definition, means any activity which is unlawful in the place it was committed, or would be unlawful if committed in the United States, and involves: high jacking or sabotage of transportation; seizing, detaining, or threatening to injure or kill an individual in order to compel a third person to act or abstain from acting; engaging in a violent attack upon an internationally protected person; committing an assassination; using biological, chemical, nuclear, or other dangerous weapons; or threatening, attempting, or conspiring to do any of the foregoing. 8 U.S.C. § 1182(a)(3)(B)(iii)(I)–(VI); “Terrorism,” as used in this definition, means “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2).

crime of terrorism,” as defined in 18 USC § 2332b(g)(5).⁸² A “federal crime of terrorism” is an offense that (1) “is calculated to affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and (2) is a violation of one of the enumerated offenses.⁸³ The upward departure is further appropriate where (1) the act was intended to influence the government, but was not covered by one of the enumerated statutes, or (2) the act was covered by one of the enumerated statutes, but was intended to intimidate or coerce a civilian population rather than the government.⁸⁴ Many instances of extreme-right violence would fall into this latter category, as the attacks are generally intended to intimidate a civilian population. The act would, thus, need to be covered by one of the enumerated statutes.

C. *Violent Extremist Incidents*⁸⁵

There have unfortunately been many recent incidents of violent extremism in the United States.⁸⁶ The chart below specifically highlights certain violent extremist incidents particularly recognizable due to their mass casualties and publicity.⁸⁷ All of these incidents were carried out by perpetrators who were inspired by extremist incidents, propaganda, or individuals, and the violent

⁸² U.S. SENT’G GUIDELINES MANUAL § 3A1.4 cmt. n.4 (U.S. SENT’G COMM’N 2004).

⁸³ 18 USC § 2332b(g)(5). The list of enumerated offenses is the same as that which appears in 18 U.S.C. § 2339A. *See* GERMAN & ROBINSON, *supra*, note 76.

⁸⁴ U.S. SENT’G GUIDELINES MANUAL § 3A1.4 cmt. n.4 (U.S. SENT’G COMM’N 2004).

⁸⁵ For more case details, *see infra* Appendix A. The case examples will study the details available about the incident, government response to the incident, public reaction to the incident, the possible motivation behind the attack, and any charges levied against the perpetrators or co-conspirators.

⁸⁶ FED. BUREAU INVESTIGATION & DEP’T HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 22 (2021) (counting the number of domestic terrorism-related arrests by or in coordination with the F.B.I. between the fiscal years 2015 and 2019) [hereinafter *Strategic Intelligence Assessment*]. This Note uses the term “violent extremism” to mean violent attacks occurring within the United States that was perpetrated by self-radicalized United States individuals espousing extremist ideologies. *See Defining Extremism: A Glossary of White Supremacist Terms, Movements and Philosophies*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/glossary-terms/defining-extremism-white-supremacy> (defining “extremism” as “religious, social or political belief systems that exist substantially outside of belief systems more broadly accepted”). This includes both Islamist extremism and the extreme-right.

⁸⁷ For purposes of brevity, this Note is unable to list and consider all relevant incidents of violent extremism. However, omission of certain violent extremist attacks is not meant to detract from the horror and pain of those incidents.

attacks were not directly planned, funded, or organized by a specific domestic or international group.⁸⁸

Date	Incident	Weapon	Ideology	Prosecution/Indictment	Number of Victims
June 17, 2015	Charleston Church Shooting	Firearm	Extreme-right	Perpetrator convicted of federal hate crimes and sentenced to death	Nine
July 16, 2015	Chattanooga Shooting	Firearm	Islamist extremism	Perpetrator killed at the scene	Seven
December 2, 2015	San Bernardino Shooting	Firearm	Islamist extremism	Perpetrators killed at the scene; co-conspirator found guilty of providing material support to terrorists and sentenced to twenty years	Thirty-six
August 12, 2017	Charlottesville Car Attack	Vehicle	Extreme-right	Perpetrator pleaded guilty to multiple hate crime charges and was sentenced to two life sentences plus 419 years	Dozens
March 2019	Germantown Car Attack Plot	Vehicle	Islamist extremism	Perpetrator charged with attempting to provide material support to an FTO	None
August 2, 2019	El Paso Walmart Shooting	Firearm	Extreme-right	Perpetrator indicted on multiple hate crime charges	Forty-five

⁸⁸ This class of perpetrators is often referred to as “lone wolf terrorists.” See Jeffrey Connor & Carol Rollie Flynn, *Report: Lone Wolf Terrorism*, GEO. UNIV. SEC. STUD. PROGRAM, NAT’L SEC. CRITICAL ISSUE TASK FORCE 9 (June 27, 2015), <https://georgetownsecuritystudiesreview.org/wp-content/uploads/2015/08/NCITF-Final-Paper.pdf> (defining “lone wolf terrorism” as “The deliberate creation and exploitation of fear through violence or threat of violence committed by a single actor who pursues political change linked to a formulated ideology, whether his own or that of a larger organization, and who does not receive orders, direction, or material support from outside sources.”); See Noah Bierman et al., *Charleston Shooting Suspect Dylann Roof Said to Be ‘A Classic Lone Wolf’*, L.A. TIMES (June 20, 2015), <https://www.latimes.com/nation/la-na-charleston-lone-wolf-20150620-story.html> (noting how lone wolf perpetrators are both unpredictable and capable of more violent attacks); For an important examination of society’s selective use of the term “lone wolf” and its effects on the prosecution of domestic terrorism (or lack thereof), see Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes and Double Standards*, 112 NW. U. L. REV. 187, 209 (2018) (arguing that racial and religious stereotypes of Muslims impact the investigation and prosecution of lone wolf terrorism).

III. ANALYSIS

Terrorism is viewed as a threat to the national security, whereas hate crimes are viewed as only a threat to a certain community.⁸⁹ It cannot be denied that the targeting of large groups of Americans, by any extremist group, constitutes a threat to America's national security.⁹⁰ But because the underlying ideology of the extreme-right is based on hatred of certain communities, society and the legal system struggle to properly identify extreme-right violence as terrorism.⁹¹ As such, many incidents of extreme-right violence are prosecuted as hate crimes.⁹² The statutory definition of "domestic terrorism," however, makes clear that these incidents are terrorism⁹³ because (1) incidents of extreme-right violence that use a vehicle as a weapon or involve a mass shooting specifically target certain groups of individuals based on extreme-right ideology,⁹⁴ and (2) these extremists use violence to intimidate a civilian population, whether these individuals are Black, perceived immigrants, or anti-racism protestors.⁹⁵

⁸⁹ Conversation with Rollie Lal, Assoc. Professor, The George Washington Univ. Elliott Sch. of Int'l Affairs (Feb. 8, 2021); *What We Investigate: Terrorism*, Federal Bureau of Investigation, (Sep. 08, 2021 3:00 PM) <https://www.fbi.gov/investigate/terrorism> (protecting the United States from terrorist attacks is the FBI's number one priority); *What We Investigate: Civil Rights- Hate Crimes*, Federal Bureau of Investigation, (Jul. 29, 2021 7:59 PM) <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (stating that hate crimes are the highest priority of the FBI's civil rights program because of the devastating impact they have on families and communities); cf. Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes: Resetting Federal Law Enforcement Priorities*, BRENNAN CTR. FOR JUSTICE 19 (July 1, 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf (finding that the government regularly categorizes extreme-right violence as gang crimes rather than terrorism).

⁹⁰ See William Braniff, *Hate Crime is a National Security Issue*, NAT'L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (Nov. 12, 2020), <https://www.start.umd.edu/news/hate-crime-national-security-issue> (claiming that hundreds of crimes are committed every year that threaten national security); see also Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, [Feb. 16 2011] Case No. STL-11-01/I, p.73 (Leb.) (stating that those who are victims of fear, terror, or panic need not necessarily make up the whole population).

⁹¹ See Engy Abdelkader et al., *Mass Violence Motivated by Hate: Are New Domestic Terrorism Laws the Answer?*, 44 HARBINGER 116, 117, 132–133 (2020).

⁹² See e.g., *Strategic Intelligence Assessment*, *supra* note 86, at 29–40.

⁹³ 18 U.S.C. § 2331(5).

⁹⁴ See Elliott, *supra* note 13 (Charleston Church shooter posted racist manifesto targeting Black individuals); Lavoie, *supra* note 2 (Charlottesville car attacker targeted individuals protesting white supremacist rally); Simon Romero, Manny Fernandez, & Mariel Padilla, *Massacre at a Crowded Walmart in Texas Leaves 20 Dead*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/el-paso-shooting.html> (El Paso Walmart shooter posted anti-immigrant manifesto).

⁹⁵ 18 U.S.C. § 2331(5).

These acts of terrorism are not being properly identified and prosecuted as such.⁹⁶ Evidence shows that non-white individuals are more frequently prosecuted as terrorists for the same crime as white individuals.⁹⁷ This section will first address the critical statutory gap that leads to this difference in prosecution of extreme-right domestic terrorists and other types of domestic terrorists. This section will next show why it actually matters that violent extreme-right terrorists be prosecuted as terrorists.

A. Arbitrary Distinction Between “Domestic” and “International” Terrorism

The current terrorism statutory framework leans on a distinction between “domestic” and “international” terrorism.⁹⁸ In its literal definitional sense, “international” captures terrorist attacks that primarily occur abroad, and “domestic” captures terrorist attacks that occur within the United States.⁹⁹ But these terms are increasingly used to bucket certain terrorist attacks into categories based on underlying ideology.¹⁰⁰ This creates the misguided view that the extreme-right movement is solely a “domestic” issue.¹⁰¹

The varied legal treatment of violent extreme-right perpetrators and homegrown violent Islamist extremists thus comes down to arbitrary distinctions between the two material support statutes—18 U.S.C. §§ 2339A (material support to terrorists) and 2339B (material support to an FTO). These differences outline the hurdles necessary to overcome in order to prosecute extreme-

⁹⁶ See *infra* Appendix A (perpetrators of the Charleston Church shooting, Charlottesville car attack, and El Paso Walmart shooting all charged with committing hate crimes)

⁹⁷ See Sinnar, *supra* note 61 (showing that the different distinctions given to white supremacy and foreign terrorism affects how these threats are perceived by government agencies).

⁹⁸ Geltzer, McCord, & Rasmuyssen, *supra* note 10 (providing that the distinction between international terrorism and domestic terrorism is counterproductive to current threats).

⁹⁹ 18 U.S.C. § 2331(1), (5).

¹⁰⁰ See Geltzer, McCord, & Rasmuyssen, *supra* note 10.

¹⁰¹ *Id.*

right domestic terrorists as terrorists. This is further exemplified by the inappropriate distinction between domestic terrorists who are connected with certain types of foreign ideologies.

1. Difference Between the Material Support Statutes

The disproportionate prosecution of domestic terrorists espousing extreme-right versus Islamist extremist ideologies often comes down to the difference between the material support statutes.¹⁰² The United States has designated zero extreme-right groups as an FTO but has designated multiple Islamist extremist groups as FTOs.¹⁰³ This makes it much easier for the government to bring terrorism charges against domestic individuals espousing Islamist extremist ideologies. These charges are typically brought under 18 U.S.C. § 2339B (material support to an FTO), even though the domestic perpetrator may be self-radicalized or merely inspired by the FTO.¹⁰⁴ To the contrary, even though violent extreme-right individuals are often also self-radicalized and inspired by various foreign attacks, groups, and ideologies, there are no international white

¹⁰² While it is impossible to discount that potential implicit biases may be leading to unequal prosecutions of white and non-white violent extremists, this Note will presume that prosecutorial discretion of this sort is not an issue. *See* Press Release, Department of Justice, Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel (June 27, 2016) (on file with author) (the Department of Justice announces its implementation of implicit bias trainings to address issues of racial disparity in policing). Implicit bias trainings focused at eliminating the discrepancy between how white and non-white individuals are viewed in terms of terrorism prosecutions may be useful in supplementing the recommended statutory updates.

¹⁰³ *See Terrorist Designations and State Sponsors of Terrorism*, *supra* note 64.

¹⁰⁴ *See infra* Appendix A (Germantown Car Attack Plot). This, however, seems counter to the statutory language of 18 U.S.C. § 2339B(h) (“Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”).

supremacist groups designated as FTOs.¹⁰⁵ This makes it unlikely and difficult for a violent extreme-right perpetrator to be prosecuted under 18 U.S.C. § 2339B.¹⁰⁶

On the other hand, nothing in 18 U.S.C. § 2339A (material support to terrorists) requires that the perpetrator be connected to international terrorism or an FTO.¹⁰⁷ This statute thus provides the clearest avenue for prosecution of violent extreme-right perpetrators as terrorists. However, unlike 18 U.S.C. § 2339B, 18 U.S.C. § 2339A requires proof of an underlying designated terroristic act and knowledge that the material support will be used to further the terrorism-related offense.¹⁰⁸ This creates a higher threshold for prosecutions under 2339A because it (1) only applies to certain specified acts linked primarily to traditional notions of terrorist activities—such as chemical, biological, and nuclear warfare, destruction of and attacks on transportation systems, such as railroads, airplanes, and airports, and use of explosive devices—and (2) implements a heightened mens rea requirement in that the defendant must have knowledge that the support will be directly used to commit the terroristic act, rather than just generally used by an FTO.¹⁰⁹

These differences—18 U.S.C. § 2339A requiring a specific predicate offense and 18 U.S.C. § 2339B requiring a connection to an FTO—explain why the Charleston Church shooter, Charlottesville car attacker, and El Paso Walmart shooter were not prosecuted as terrorists, while the

¹⁰⁵ See discussion *infra* Part III.A.2; *Terrorist Designations and State Sponsors of Terrorism*, *supra* note 64; see also Press Statement, Michael R. Pompeo, Secretary of State, United States Designates Russian Imperial Movement and Leaders as Global Terrorists (Apr. 7, 2020), <https://2017-2021.state.gov/united-states-designates-russian-imperial-movement-and-leaders-as-global-terrorists/index.html> [hereinafter Pompeo Press Statement] (designating the Russian Imperial Movement (RIM), an international white supremacist organization, and its leaders as Specially Designated Global Terrorists (SDGT)). Though, because RIM was designated as an SDGT and not an FTO, this designation is irrelevant for material support charges under 18 U.S.C. § 2339B.

¹⁰⁶ *But see*, United States v. Young, 916 F.3d 368, 378-379 (4th Cir. 2019) (upholding defendant's conviction for attempting to provide material support to ISIL in part based on evidence tending to show pro-Nazi and white supremacy beliefs, which the court found to have enough similarities to Islamist extremism to find defendant had a "particular predisposition to support ISIL.").

¹⁰⁷ See 18 U.S.C. § 2339A.

¹⁰⁸ See 18 U.S.C. §§ 2339A, 2339B. See also GERMAN & ROBINSON, *supra* note 49, 8 (explaining the difference in mens rea standards for 2339A and 2339B; where 2339A requires the defendant know their support will be used to further one of the terroristic offenses, 2339B only requires the defendant have knowledge that the group is an FTO and need not know that their support will be used to commit a criminal act).

¹⁰⁹ See *id.*

perpetrators involved in the San Bernardino shooting and the Germantown car attack plot were charged with terrorism. The Germantown car attack plot and the Charlottesville car attack both involved a self-radicalized domestic extremist who took deliberate steps to committing an attack on civilians using a vehicle as a weapon.¹¹⁰ Further, the San Bernardino, Charleston Church, and El Paso Walmart shootings were all mass shootings carried out by perpetrators inspired by extremist ideology who posted about their extremist views online.¹¹¹ The Germantown perpetrator was charged with providing material support to an FTO and the San Bernardino perpetrators (had they not been killed during the attack) likely would have also been charged with providing material support to an FTO because they were inspired by ISIS propaganda.¹¹²

But unlike the self-radicalized Islamist extremists, the similar attacks carried out by extreme-right perpetrators can be prosecuted neither under 18 U.S.C. §§ 2339A nor 2339B. Neither method of attack (use of a vehicle as a weapon and mass shooting) falls into an enumerated predicate offense under § 2339A, and these extreme-right perpetrators are not connected to a designated FTO, as required under § 2339B.

2. Blurring of the Two “Types” of Terrorism

An additional underlying reason why violent extreme-right perpetrators are infrequently prosecuted as terrorists is that the government considers them lone actors, not acting on behalf of group directive.¹¹³ But this distinction cannot alone turn a seeming terrorist into just another violent criminal. In contrast to extreme-right perpetrators, self-radicalized domestic individuals espousing

¹¹⁰ The Germantown perpetrator stole a U-Haul with the intention of committing a vehicle attack similar to the truck attack in Nice, France; the Charlottesville car attacker deliberately drove from Ohio to Virginia and rapidly accelerated his vehicle into a crowd of protestors. See *infra* Appendix A.

¹¹¹ See *infra* Appendix A (providing examples of violent extremism carried out by persons motivated by extremist ideologies).

¹¹² See *infra* Appendix A (explaining that the Germantown car attack perpetrator was charged with attempting to provide material support to an FTO because he was self-radicalized and supported ISIS); see also McCord, *supra* note 16.

¹¹³ See Hughes et al., *supra* note 38, at 27.

Islamist extremist ideologies, who similarly commit violent acts on their own accord and with no assistance from foreign groups, are still considered and prosecuted as terrorists.¹¹⁴

For instance, the San Bernardino shooting was investigated as, and deemed an act of, terrorism because the perpetrators supported ISIS and its views, even though their attack was not actually planned nor directed by a foreign terrorist group.¹¹⁵ While the main perpetrators were killed during the attack and thus never prosecuted, the government did charge and prosecute a co-conspirator with providing material support to terrorists for his provision of weapons to the perpetrators of the attack.¹¹⁶ Additionally, the perpetrator in the July 2015 mass shooting that killed three U.S. Marines and a Navy sailor in Chattanooga, Tennessee, was deemed a terrorist after the FBI determined he had been “inspired” and “motivated by foreign terrorist organization propaganda.”¹¹⁷

But the extreme-right is similarly not limited to the United States, nor has it ever been.¹¹⁸ By its very name, neo-Nazis, who are recognized as part of the domestic extreme-right,¹¹⁹ model their

¹¹⁴ See GERMAN & ROBINSON, *supra* note 49, at 4.

¹¹⁵ See Mark Berman, *One Year After the San Bernardino Attack, Police Offer a Possible Motive as Questions Still Linger*, WASH. POST (Dec. 2, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/12/02/one-year-after-san-bernardino-police-offer-a-possible-motive-as-questions-still-linger/>.

¹¹⁶ See *infra* Appendix A (providing support for the notion that domestic individuals inspired by extremist ideologies have been prosecuted under terrorism statutes).

¹¹⁷ See GERMAN & ROBINSON, *supra* note 49, at 4 (quoting Kristina Sgueglia, *Chattanooga Shootings Inspired by Terrorists, FBI Chief Says*, CNN (Dec. 16, 2015), <https://www.cnn.com/2015/12/16/us/chattanooga-shooting-terrorist-inspiration/index.html>).

¹¹⁸ See, e.g., Vikram Dodd, *How London Mosque Attacker Became a Terrorist in Three Weeks*, THE GUARDIAN (Feb. 1, 2018, 10:53 AM), <https://www.theguardian.com/uk-news/2018/feb/01/finsbury-park-london-mosque-van-attack-darren-osborne-makram-ali> (2017 Finsbury Park Mosque car attacker “styl[ed] himself as an extremist rightwing ‘soldier.’”); Jaclyn Diaz, *New Zealand Finds Intelligence Lapses Leading To Last Year’s Mosque Attacks*, NPR (Dec. 8, 2020), <https://www.npr.org/2020/12/08/944102839/new-zealand-finds-intelligence-lapses-leading-to-last-years-mosque-attacks> (2019 Christchurch Mosque shootings carried out by Australian white supremacist); *German Synagogue Shooting Was Far-Right Terror, Justice Minister Says*, BBC (Oct. 10, 2019), <https://www.bbc.com/news/world-europe-50003759> (2019 Halle Synagogue shooting was a far-right terror attack); *German Shooting: ‘Far-Right Extremist’ Carried Out Shisha Bars Attacks*, BBC (Feb. 20, 2020), <https://www.bbc.com/news/world-europe-51567971> (2020 Hanau Shisha Bar shootings carried out by “far-right extremist”).

¹¹⁹ See *Neo-Nazis*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/neo-nazis> (including Neo-Nazis as part of the United States white supremacist movement).

ideology after that of Nazi Germany.¹²⁰ Beyond its historical roots, the international nature of the extreme-right has persisted today. United States citizens who espouse white supremacist ideologies regularly communicate with, associate with, and are inspired by like-minded groups and individuals internationally, including Canada, Europe, Russia, and elsewhere.¹²¹ For example, the perpetrator of the 2019 El Paso Walmart shooting was inspired by foreign extremist propaganda and expressed admiration for the Christchurch Mosque shooter;¹²² a foreign terrorist, who in turn, was inspired by the Charleston Church shooting.¹²³ Yet this transnational connection has never been used to prosecute a violent extreme-right perpetrator under the international or transnational-specific terrorism statutes.¹²⁴

This transnational connection of domestic individuals with foreign individuals or groups espousing similar views will likely only continue to increase through the use of social media to connect and communicate.¹²⁵ But even though white supremacy is considered by some to be “the first global terrorist network,”¹²⁶ as of April 2021 the United States has never designated a foreign

¹²⁰ See *id.* (defining Neo-Nazi ideology as idolizing Adolf Hitler, Nazi Germany, and often adopting the symbology of the Third Reich); see also *Hate on Display: Hate Symbols Database*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/hate-symbols> (demonstrating that Neo-Nazi groups have adopted cultural symbols reminiscent of Nazi Germany).

¹²¹ See GERMAN & ROBINSON, *supra* note 49, at 3 (citing Rick Noack, *Did a U.S. Neo-Nazi Group Inspire the Slaying of British Lawmaker Jo Cox?*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/17/did-a-u-s-neo-nazi-group-inspire-the-murder-of-british-mp-jo-cox/?utm_term=.bb227baef804).

¹²² See Romero, Fernandez, & Padilla, *supra* note 94; Diaz, *supra* note 1188; see Lauren Villagran, *Walmart Shooter Allegedly Penned White Supremacist Rant in ‘Bible of Evil,’* EL PASO TIMES (Aug. 4, 2019, 2:21 PM), <https://www.elpasotimes.com/story/news/2019/08/04/el-paso-shooting-patrick-crusius-white-supremacist-manifesto/1914965001/>.

¹²³ *Confronting Violent White Supremacy (Part III)*, *supra* note 10 (statement of Dr. Joshua A. Geltzer, Director, Institute for Constitutional Advocacy and Protection, Georgetown Law).

¹²⁴ As there have not been many prosecutions under 18 U.S.C. § 2332b (terrorism transcending national boundaries), it is unclear what level of transnational conduct would be required for conviction. See *United States v. Wright*, 937 F.3d 8, 32–33 (1st Cir. 2019) (declining to find whether “substantial” conduct was required and instead concluding evidence that one of the co-conspirators was located overseas during the conspiracy and conveyed research and guidance in aid of the plot was sufficient to support conviction under 18 U.S.C. § 2332b(a)(1)(A)).

¹²⁵ See Hughes et al., *supra* note 38, at 4 (“the threat of domestic terrorism is no longer confined to our borders.”); *White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement*, THE SOUFAN CTR. 41 (Sept. 2019) (“social media has exacerbated the issue [of white supremacy extremism] by helping connect transnational nodes of like-minded individuals and groups.”); see also Joel Rubin, *Washington Must Treat White Supremacist Terrorism as a Transnational Threat*, FOREIGN POL’Y (Jan. 18, 2021, 5:01 AM), <https://foreignpolicy.com/2021/01/18/washington-must-treat-white-supremacist-terrorism-as-a-transnational-threat/>.

¹²⁶ Rubin, *supra* note 125.

white supremacist organization as an FTO.¹²⁷ Accordingly, domestic extreme-right perpetrators who support or are inspired by international groups espousing similar extreme-right terroristic views are currently not prosecutable under 18 U.S.C. § 2339B because there is no relevant FTO.¹²⁸

B. Why Prosecuting Extreme-Right Domestic Terrorists as Terrorists Matters

The current statutory framework allows the same crimes—use of a vehicle as a weapon and mass shootings—to be treated differently based, fundamentally, on the beliefs of the actor, rather than the act itself. Domestic extreme-right perpetrators are often treated as committing hate crimes, whereas domestic Islamist extremists are treated as terrorists. While such extreme-right terrorists often receive significant sentences, “means, not just ends, matter...”¹²⁹ Failure to prosecute extreme-right domestic terrorists as terrorists is inappropriate for four reasons. First, it furthers the societal belief that Islamist extremism is the primary type of terrorism and threat to the United States, which severely underestimates the threat of the extreme-right. Second, it reflects an implicit opinion that certain actors, victims, or incidents are less threatening and less important than others. Third, the United States’ approach to extreme-right violence—particularly in its identification and prosecution of such individuals and groups—is out of accord with the international community. Fourth, the current terrorism statutory framework makes it difficult to prevent, deter, and monitor extreme-right domestic terrorists.

¹²⁷ See Pompeo Press Statement, *supra* note 105 (noting that designation of the RIM and its leaders as SDGTs is the first white supremacist group to be designated as terrorists). If the RIM were designated as an FTO, rather than merely an SDGT, it may be possible and appropriate to prosecute a domestic extreme-right perpetrator as providing material support to an FTO under 18 U.S.C. § 2339B. If it can be shown that the individual promoted the group’s ideologies or was self-radicalized and/or inspired by the groups’ activities, such evidence would be consistent with cases such as the 2015 Chattanooga shooting. See also analysis *supra* Part III.A.2.

¹²⁸ See 18 U.S.C. § 2339B(a)(1), (h) (requiring defendant to provide support, including in the form of themselves as “personnel,” to a designated foreign terrorist organization).

¹²⁹ *Kisor v. Wilkie*, 139 S.Ct. 2400, 2425 (2019) (Gorsuch, J., concurring).

1. Underappreciates the Threat of Extreme-Right Terrorism

First, failure to identify and prosecute extreme-right domestic terrorism underappreciates the threat of the extreme-right movement. Over the past decade, members associated with the extreme-right have killed more Americans domestically than have self-radicalized Islamist extremists.¹³⁰ Yet the media continues to disproportionately cover attacks perpetrated by domestic Islamist extremists over white supremacists.¹³¹ This has the effect of minimizing the threat posed by the extreme-right by furthering the inaccurate perception that Islamist extremism is the primary terrorist threat to the United States. Labelling an attack as “terrorism” reflects what society considers its most heinous crimes and acts to delegitimize the terrorist’s underlying ideology and goals.¹³² If the United States is unable to identify extreme-right terrorism as such, it fails to outright denigrate the violent extreme-right, likely only encouraging it to grow.

2. Undervalues the Communities Targeted by Extreme-Right Terrorists

Second, distinguishing attacks carried out by the extreme-right (typically white-Christian perpetrators) and those carried out by Islamist extremists (typically Muslim perpetrators) implicitly places certain races, cultures, and religions over others.¹³³ As an initial matter, referring to only one

¹³⁰ *Murder and Extremism in the United States in 2020*, *supra* note 22, at 11.

¹³¹ See GERMAN & ROBINSON, *supra* note 49, at 15 (citing Erin M. Kearns, et al., *Yes, the Media Do Underreport Some Terrorist Attacks. Just Not the Ones Most People Think Of*, WASH. POST, (Mar. 13, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/13/yes-the-media-do-underreport-some-terrorist-attacks-just-not-the-ones-most-people-think-of/?utm_term=.4dda3333a203) (finding that attacks perpetrated by Muslims were covered up to 357% more than acts deemed “terrorism” but perpetrated by non-Muslims)).

¹³² Vito D’Orazio & Idean Salehyan, *Who is a Terrorist? Ethnicity, Group Affiliation, and Understandings of Political Violence*, 44 INT’L INTERACTIONS 1017, 1019 (2018); Connor Huff & Joshua D. Kertzer, *How the Public Defines Terrorism*, 62 AM. J. POL. SCI. 55, 56 (2018).

¹³³ See, e.g., Idean Salehyan, *Should Robert Bowers, the Pittsburgh Synagogue Shooting Suspect, Be Called a Terrorist?*, WASH. POST (Nov. 1, 2018, 11:58 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/01/should-rs-the-pittsburgh-synagogue-shooting-suspect-be-called-a-terrorist/> (“Calling an act of violence ‘terrorism’ has...psychological implications.”).

type of perpetrator—Islamist extremists—as “terrorists” reinforces the bias-laden perceptions of white versus non-white perpetrators.¹³⁴ This furthers the Islamophobia and anti-Muslim sentiment that already persists throughout our society and is a catalyst for extreme-right violence.¹³⁵ Such a failure also sends the implicit message to the minority communities that are victimized by extreme-right perpetrators that they are “second-class citizens,”¹³⁶ less deserving of the same protections and justice afforded to victims of other terrorist attacks.¹³⁷ Calling violent extreme-right attacks as anything other than terrorism thus does a disservice to the founding ideals of America.¹³⁸

3. Lagging Behind Internationally

Third, in contrast to how the United States has approached incidents of extreme-right violence, the international community has often appropriately categorized and prosecuted extreme-right violence as terrorism. Europeans routinely use the phrase “right-wing terrorists” in discussing the threat of extreme-right violence,¹³⁹ and the United Kingdom, Canada, and Germany have all designated extreme-right groups and associated individuals as terrorists.¹⁴⁰ Additionally, the white

¹³⁴ A study analyzing how the public views the term “terrorism” and the individuals deemed “terrorists,” found that “Arab-American attackers are more likely to be ascribed political or religious motives, while White suspects are more likely to be seen as mentally ill.” D’Orazio & Salehyan, *supra* note 132.

¹³⁵ See, e.g., Dalia Fahmy, *The Rise of the Alt-Right: Understanding the Sociocultural Effects of Mainstreaming Anti-Muslim Sentiment*, ATL. COUNCIL 5, 7, https://www.atlanticcouncil.org/wp-content/uploads/2018/09/12_Rise_of_Alt_Right_-_Fahmy_-_Islam_and_Human_Rights_Report.pdf.

¹³⁶ *Confronting White Supremacy (Part I): The Consequences of Inaction: Hearing Before the H. Subcomm. on Civ. Rts & Civ. Liberties of the H. Comm. on Oversight & Reform*, 116th Cong. 23, 38 (May 15, 2019) [hereinafter *Confronting White Supremacy (Part I): The Consequences of Inaction*] (statement of Rep. Pressley, Member, H. Comm. on Oversight & Reform); see also *Confronting White Supremacy (Part I): The Consequences of Inaction* at 39 (testimony of Susan Bro, Co-Founder President/Board Chair, Heather Heyer Foundation) (“Black parents lose their children, [] Muslim parents lose their children, Jewish parents lose their children, and nobody pays attention.”).

¹³⁷ See *Trump v. Hawaii*, 138 S.Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting) (quoting *Santa Fe Independent School Dist. V. Doe*, 530 U.S. 290, 309 (2000)) (“such acts send messages to members of minority faiths ‘that they are outsiders, not full members of the political community.’”).

¹³⁸ See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776); see generally U.S. CONST. amends. I, XIV.

¹³⁹ Sebastian Rotella, *Global Right-Wing Extremism Networks are Growing. The U.S. Is Just Now Catching Up.*, PROPUBLICA (Jan. 22, 2020, 5:30 AM), <https://www.propublica.org/article/global-right-wing-extremism-networks-are-growing-the-u-s-is-just-now-catching-up>.

¹⁴⁰ Executive Directorate of the U.N. S.C. Counter-Terrorism Comm., *CTED Trends Alert: Member States Concerned By The Growing and Increasingly Transnational Threat of Extreme Right-Wing Terrorism* 8 (Apr. 2020), https://www.un.org/sc/ctc/wp-content/uploads/2020/04/CTED_Trends_Alert_Extreme_Right-Wing_Terrorism.pdf.

supremacist who murdered fifty-one people in a shooting rampage in two mosques in Christchurch, New Zealand on March 15, 2019—and livestreamed the attack on Facebook—was the first person in the country’s history to be convicted as a terrorist and receive a life sentence without parole.¹⁴¹ It is clear that the United States must join the international community in identifying and prosecuting all terrorists as terrorists.

4. Attempts, Plots, and Post-Incarceration Effects

Lastly, proper prosecution of extreme-right violence is particularly important from an investigatory and post-incarceration perspective. The current statutory framework does not provide a mechanism to prosecute extreme-right individuals as terrorists before they have carried out attacks using their vehicle as a weapon or mass shootings. For example, the perpetrator of the Germantown car attack plot was charged under 18 U.S.C. § 2339B for attempting to provide material support to an FTO because the perpetrator had expressed support for ISIS.¹⁴² In contrast, there is no applicable terrorism statute that would capture a similar extreme-right perpetrator who had planned, but not yet carried out, such a violent attack.¹⁴³ This prevents the domestic terrorist from receiving a sentence at a level appropriate for defendant’s dangerousness,¹⁴⁴ which results in three main failures: (1) the perpetrator is back on the street quicker, (2) the seriousness of the perpetrator’s act is not captured for probationary and post-release purposes, and (3) proper tracking of terrorist activities is

¹⁴¹ *Christchurch Mosque Attack: Brent Tarrant Sentenced to Life Without Parole*, BBC (Aug. 27, 2020), <https://www.bbc.com/news/world-asia-53919624>.

¹⁴² *Judge Extends Hospitalization of National Harbor Truck Attack Plot Suspect*, AP, (July 4, 2020), <https://wtop.com/prince-georges-county/2020/07/judge-extends-hospitalization-of-national-harbor-truck-attack-plot-suspect/> [hereinafter *National Harbor Truck Plot*].

¹⁴³ See Hughes et al., *supra* note 38, at 15 (neo-Nazi found in possession of “two long rifles and ammunition” and believed to have been on the way to commit a mass shooting, was sentenced to just five years in prison).

¹⁴⁴ *Id.*

obstructed. As a result, these failures make it more difficult to address the long-term problem of the violent extreme-right.¹⁴⁵

However, by updating the terrorism statutes to better capture the methods extreme-right perpetrators use to carry out their violent attacks—use of a vehicle as a weapon and mass shootings—perpetrators that commit or attempt such violent attacks would be prosecutable under 18 U.S.C. § 2332a.¹⁴⁶ This update would be just as important, if not more important, for stopping would-be-perpetrators “left of boom.”¹⁴⁷ An update to the definition of “weapon of mass destruction” means that, through 18 U.S.C. § 2332a, use of a vehicle as a weapon and mass shootings becomes a predicate offense under 18 U.S.C. § 2339A (material support to terrorists) and the terrorism sentencing enhancement.¹⁴⁸ This would enable extreme-right individuals to be prosecuted as terrorists before they have actually carried out their deadly attacks, similar to the perpetrator of the Germantown car attack plot,¹⁴⁹ as well as prosecution of conspirators that provided material support for the planned attack, similar to the co-conspirator in the San Bernardino shooting.¹⁵⁰

IV. RECOMMENDATIONS

The current language of 18 U.S.C. § 2332a (use of weapon of mass destruction) fails to reflect the growing trend of terrorists using weapons other than explosive devices to carry out their

¹⁴⁵ See Amy C. Collins, *The Need for a Specific Law Against Domestic Terrorism*, GEO. WASH. PROGRAM ON EXTREMISM 19 (Sept. 2020), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf>.

¹⁴⁶ See discussion *infra* Section IV.

¹⁴⁷ “Left of boom” refers to the strategy of “detect[ing], disrupt[ing], and dismantl[ing] terrorist threats before acts of violence occur.” Barbara McQuade, *Proposed Bills Would Help Combat Domestic Terrorism*, LAWFARE, (Aug. 20, 2019), <https://www.lawfareblog.com/proposed-bills-would-help-combat-domestic-terrorism>.

¹⁴⁸ U.S. SENT’G GUIDELINES MANUAL § 3A1.4.

¹⁴⁹ See *infra* Appendix A.

¹⁵⁰ See *infra* Appendix A.

attacks.¹⁵¹ As such, incidents of extreme-right violence (many of which involve non-traditional terroristic methods of attack) are not captured by the current terrorism statutory framework, which leads to many lasting societal impacts as identified *supra*. An update to the definition of “weapon of mass destruction” to include the use of a vehicle as a weapon and instances of mass shootings would have three dramatic effects on the ability to prosecute and sentence violent extreme-right perpetrators under the terrorism framework.

First, updating the definition of a “weapon of mass destruction” would enable prosecutions under 18 U.S.C. § 2332a (use of weapon of mass destruction) for acts of violence, or attempts, involving the use of a vehicle as a weapon and mass shootings. Second, because 18 U.S.C. § 2332a is a relevant predicate offense for 18 U.S.C. § 2339A (material support to terrorists), updating the definition of a “weapon of mass destruction” would also allow for more violent extreme-right perpetrators and accomplices to be appropriately designated and prosecuted as terrorists. Third, 18 U.S.C. § 2332a is also a relevant predicate offense for the “federal crime of terrorism,”¹⁵² which is the definition used by courts to determine whether the terrorism sentencing enhancement is appropriate for a certain defendant.¹⁵³ Thus, if the language is updated as recommended, perpetrators of extreme-right violence who were not directly prosecuted as terrorists may still be eligible for the terrorism sentence enhancement.¹⁵⁴

¹⁵¹ Non-traditional methods of attack are also being encouraged and consistently carried out by lone-wolf domestic Islamist-extremists. *See generally* Robert J. Bunker & Pamela Ligouri Bunker, *Radical Islamist English-Language Online Magazines: Research Guide, Strategic Insights, and Policy Response*, U.S. ARMY WAR COLLEGE STRATEGIC STUDIES INSTITUTE 91, 125 (2018), <https://publications.armywarcollege.edu/pubs/3549.pdf>.

¹⁵² 18 U.S.C. § 2332b(g)(5).

¹⁵³ *See* U.S. SENT’G GUIDELINES MANUAL § 3A1.4.

¹⁵⁴ *See* United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001) (holding that conviction of a crime specifically enumerated in § 2332b(g)(5)(B) is not required for the domestic terrorism sentencing enhancement to apply, but rather that defendant merely must have intended to promote a federal crime of terrorism).

A few states have already begun to move their terrorism state laws in this direction by updating their statutes to capture vehicle attacks and mass shooting events.¹⁵⁵ For example, Alabama defines “weapons of mass destruction” as “[a]ny device, weapon, or vehicle designed to cause mass casualties.”¹⁵⁶ California’s definition of “weapon of mass destruction” includes a “vehicle...which is used as a destructive weapon.”¹⁵⁷ And New York created a new law for domestic acts of terrorism motivated by hate when the perpetrator acts with intent to cause the death of, or serious injury to, five or more other persons, in whole or in part because of perceived protected characteristics.¹⁵⁸ Through the incorporation of similar language into the current federal definition of “weapon of mass destruction,” to include (1) use of a vehicle as a weapon and (2) mass shootings, violent extreme-right perpetrators may finally be prosecuted for what they are—terrorists.¹⁵⁹

A. Use of a Vehicle as a Weapon

First, the definition of “weapon of mass destruction” should be revised to specifically include a vehicle when used as a weapon. There is no significant difference between the car attack in Charlottesville, Virginia, in 2017 and the attempted car attack in Germantown, Maryland, in 2019.¹⁶⁰ Both incidents were carried out by self-radicalized domestic extremists who took deliberate action in order to commit an attack on civilians using a vehicle as a weapon.¹⁶¹ Both perpetrators are terrorists

¹⁵⁵ Federal immigration law also provides a broader definition of “terrorist activity,” which includes “[t]he use of any...explosive, firearm, or other weapon or dangerous device...”. 8 U.S.C. §§ 1182(3)(B)(i)(I), (iii)(V).

¹⁵⁶ ALA. CODE § 13A-10-190 (2010).

¹⁵⁷ CAL. PENAL CODE § 11417 (2004).

¹⁵⁸ N.Y. PENAL LAW §§ 490.27, 490.28 (2020).

¹⁵⁹ This update may incidentally include other instances of vehicle and mass shooting attacks that do not satisfy the definition of terrorism. Department of Justice guidelines, however, require prosecutors to notify and get approval from the National Security Division Counterterrorism Section for investigations under 18 U.S.C. §2332a, thus confining the charge to certain appropriate instances. *See generally* Department of Justice, Justice Manual, Notification, Consultation, and Approval Requirements for Weapons of Mass Destruction (WMD) Matters, § 9-2.138.

¹⁶⁰ *See* analysis *supra* Part III.A.

¹⁶¹ *See* Hughes et al., *supra* note 113.

under federal law¹⁶² but only the Germantown perpetrator was actually charged with terrorism.¹⁶³ The definition of “destructive device,” which is cross-referenced in the definition for “weapon of mass destruction,” specifically exempts any device which is not designed for use as a weapon.¹⁶⁴ This language theoretically exempts vehicles, as they are not designed as a weapon.

Thus, a revision to specifically include “a vehicle when used as a weapon,” would have allowed the Charlottesville car attacker to be charged and prosecuted as a terrorist under 18 U.S.C. § 2332a.¹⁶⁵ Defendant satisfies the first element, that he used a weapon of mass destruction, because he used his vehicle as a weapon.¹⁶⁶ Defendant purposefully rapidly accelerated his vehicle directly into a crowd of protesters.¹⁶⁷ Defendant next satisfies the second element, that he used his vehicle as a weapon against a person within the United States, because he directed his attack at anti-racism protesters in Charlottesville, Virginia, and his attack led to the death of one individual and the injury of many others.¹⁶⁸ Lastly, Defendant satisfies the third element, that his conduct involved the use of interstate commerce,¹⁶⁹ because he drove from Maumee, Ohio, into Charlottesville, Virginia, where the attack took place.¹⁷⁰ Therefore, under similar facts, a future extreme-right attacker who uses a vehicle as a weapon to target civilians will be able to be prosecuted as a terrorist under 18 U.S.C. §§ 2332a, 2339A, or be eligible for the terrorism sentencing enhancement.¹⁷¹

¹⁶² See Press Release, Dep’t of Just. Off. Of Pub. Aff., Ohio Man Pleads Guilty to 29 Fed. Hate Crimes for Aug. 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019) (Mar. 27, 2019) (on file with author) [hereinafter Charlottesville Car Attack Press Release] (referring to the deadly attack as an act of domestic terrorism).

¹⁶³ Press Release, Dep’t of Just. Off. Of Pub. Aff., Md. Man Facing Fed. Indictment for Attempting to Provide Material Support to ISIS and for Interstate Transp. Of a Stolen Vehicle (Aug. 28, 2019) (on file with author) [hereinafter Maryland Attempted Truck Attack Press Release].

¹⁶⁴ 18 U.S.C. § 921(a)(4)(C).

¹⁶⁵ Since the Charlottesville car attack perpetrator has already pled guilty and been sentenced, this is just a theoretical application.

¹⁶⁶ See Fields Indictment ¶¶ 9–11, June 27, 2018; see also Charlottesville Car Attack Press Release, *supra* note 162.

¹⁶⁷ Fields Indictment ¶ 11; see also Charlottesville Car Attack Press Release, *supra* note 162.

¹⁶⁸ Charlottesville Car Attack Press Release, *supra* note 162.

¹⁶⁹ 18 U.S.C. § 2332a(a)(2) (“perpetrator travel[ed] in . . . interstate or foreign commerce in furtherance of the offense”).

¹⁷⁰ Fields Indictment ¶ 6; see also Charlottesville Car Attack Press Release, *supra* note 162.

¹⁷¹ U.S. SENT’G GUIDELINES MANUAL § 3A1.4.

B. Mass Shootings

Second, the definition of “weapon of mass destruction” should be revised to specifically include use of a firearm which causes the death, or serious injury, of five or more persons. While the definition of “weapon of mass destruction,” through its inclusion of any “destructive device,” does not entirely eliminate its applicability to gun-related attacks,¹⁷² it limits the applicability to type of weapon¹⁷³ rather than the actual destructive nature of the incident. The current definition specifically excludes shotguns and firearms that have a barrel with a bore less than one-half inch in diameter.¹⁷⁴ This has the effect of excluding many instances of extremist-related mass shootings that occur, which tend to use assault rifles.¹⁷⁵

Accordingly, an update to the definition of “weapon of mass destruction” to specifically include the use of a firearm which causes the death, or serious injury, of five or more persons, would, for example, have enabled the perpetrator of the 2019 El Paso Walmart shooting to be charged as a terrorist. Defendant satisfies the first element, that he used a weapon of mass destruction, because he used a firearm (semi-automatic rifle) which caused the death or serious injury of more than five persons (forty-five people were killed or injured).¹⁷⁶ Defendant next satisfies the second element, that he used his weapon against persons within the United States, because his attack, which occurred in El Paso, Texas, led to the deaths of twenty-two people and injury of

¹⁷² See Robert Chesney, *Should We Create a Federal Crime of ‘Domestic Terrorism’*, LAWFARE (Aug. 8, 2018, 11:31 AM), <https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism> (quoting 18 U.S.C. § 921(c)(2)(A)) (although 2332a does not reach most gun-based scenarios, it does come into play for weapons that “expel a projectile by the action of an explosive or other propellant . . . [if it has a] barrel with a bore of more than one-half inch in diameter.”).

¹⁷³ See 18 U.S.C. § 921(c)(2)(B).

¹⁷⁴ *Id.*

¹⁷⁵ Chris Canipe & Lazara Gamio, *What the Deadliest Mass Shootings Have in Common*, AXIOS (Sept. 7, 2019), <https://www.axios.com/deadliest-mass-shootings-common-4211bafd-da85-41d4-b3b2-b51ff61e7c86.html>.

¹⁷⁶ Press Release, Dep’t of Just. Off. Of Pub. Aff., Tex. Man Charged with Fed. Hate Crimes and Firearm Offenses Related to Aug. 2, 2019, Mass-Shooting in El Paso (Feb. 6, 2020) (on file with author) [hereinafter El Paso Mass-Shooting Press Release].

twenty-three others.¹⁷⁷ Lastly, defendant satisfies the third element, that his conduct involved the use of interstate commerce,¹⁷⁸ because defendant purchased a Romanian firearm, in addition to ammunition, via the Internet, and defendant's conduct interfered with the commercial and economic activity in which the victims were engaged in at Walmart.¹⁷⁹ Therefore, under similar facts, a future extreme-right attacker who uses a firearm to cause the death or serious injury of five or more persons will be able to be prosecuted as a terrorist under 18 U.S.C. §§ 2332a, 2339A, or be eligible for the terrorism sentencing enhancement.¹⁸⁰

V. CONCLUSION

At this point, many academics, politicians, and citizens are aware of the threat of the violent extreme-right in our society. However, there is significant divergence on how to approach the problem, none of which are likely to gain the congressional support needed to effectuate change. The first group suggest the current statutory framework is sufficient.¹⁸¹ While the current statutory framework may be, in its literal sense, sufficient to capture the crimes, it fails to account for the importance of using correct terminology in identifying these attacks as terrorism. A second group proposes a new statute specific to domestic terrorism, mirrored after 18 U.S.C. § 2332b.¹⁸² But this is disfavored by politicians on both sides; some are concerned with possible First Amendment implications and others are concerned a domestic terrorism charge would have significant adverse effects on minority communities, many of which are the very targets of extreme-right

¹⁷⁷ *Id.*

¹⁷⁸ 18 U.S.C. § 2332a(a)(2) (“the mail or any facility of interstate or foreign commerce is used in furtherance of the offense; the offense, or the results of the offense, affect interstate or foreign commerce”).

¹⁷⁹ *Crusius Indictment* ¶¶ 1, 6.

¹⁸⁰ U.S. SENT'G GUIDELINES MANUAL § 3A1.4.

¹⁸¹ GERMAN & ROBINSON, *supra* note 49.

¹⁸² *See, e.g.,* McCord, *supra* note 59; McQuade, *supra* note 147; *see also* H.R. 4192, 116th Cong. (2019) (as introduced by Rep. Schiff and referred to the Comm. on the Judiciary, Aug. 16, 2019).

perpetrators.¹⁸³ A third group proposes a more robust and long-term solution by eliminating the distinction in the statutes between domestic and international terrorism.¹⁸⁴

The gaps in the statutes are evident today and need to be closed immediately to prevent future domestic terrorists from exploiting them. Therefore, the most efficient way to effectively close this gap is to meet the terrorists where they are—pivoting from airplanes and explosives to vehicles and firearms. Updating the statutory definition of “weapon of mass destruction” to include (1) use of a vehicle as a weapon and (2) mass shootings, would provide prosecutors with the tools necessary to charge, prosecute, and sentence the most violent extreme-right perpetrators as terrorists. The Charlottesville car attack was terrorism; the Charleston Church shooting was terrorism; the El Paso Walmart shooting was terrorism. The perpetrators of these incidents are terrorists. And the victims of these attacks died as the result of terrorism. We can no longer fail to acknowledge such truths.

¹⁸³ See Masood Farviar, *Why Domestic Terrorism Is Not Specifically Designated a Crime in US*, VOA (Feb. 10, 2021, 8:51 AM), https://www.voanews.com/a/usa_why-domestic-terrorism-not-specifically-designated-crime-us/6201836.html; *Politicians Pushing for Laws to Address Domestic Terrorism*, CBS NEWS (Aug. 29, 2019, 10:04 AM), <https://www.cbsnews.com/news/politicians-pushing-for-laws-to-address-domestic-terrorism/>; *135 Civil Rights Organizations Oppose a New Domestic Terrorism Charge*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Jan. 19, 2021), <https://civilrights.org/resource/135-civil-rights-organizations-oppose-a-new-domestic-terrorism-charge/>.

¹⁸⁴ Courtney Kurz, Comment, *Closing the Gap: Eliminating the Distinction Between Domestic and International Terrorism Under Federal Law*, 93 TEMP. L. REV. 115 (2020).

APPENDIX A: VIOLENT EXTREMISM CASE EXAMPLES

Charleston Church Shooting: On June 17, 2015, a shooter entered Emanuel African Methodist Church in Charleston, South Carolina, a historic Black church, and proceeded to kill nine African-American individuals during their Bible study.¹⁸⁵ Before the attack, the perpetrator had posted a racist manifesto online, supporting the shooting death of Trayvon Martin and posting photos with Confederate flags.¹⁸⁶ The perpetrator was convicted of federal hate crimes, for which he was sentenced to death.¹⁸⁷

Chattanooga Shooting: On July 16, 2015, a Kuwaiti-born gunman opened fire on a military site in Chattanooga, Tennessee, where he killed four United States Marines and one U.S. Navy sailor, prompting a federal domestic terrorism investigation.¹⁸⁸ Following an investigation into the incident, the FBI determined that the perpetrator was a self-radicalized violent extremist and “motivated by foreign terrorist organization propaganda.”¹⁸⁹

San Bernardino Shooting: On December 2, 2015, a heavily armed husband and wife couple killed fourteen people and wounded twenty-two others at a social services center in San Bernardino, California.¹⁹⁰ After leading the police on a manhunt, the perpetrators were later killed in a shootout.¹⁹¹ The incident was investigated as an act of terrorism in part because one of the perpetrators had posted on Facebook—on behalf of himself and his wife—a pledge of allegiance to the leader of the Islamic State.¹⁹² Investigators do not believe, however, that the perpetrators were

¹⁸⁵ *Charleston Church Shooting*, HISTORY (June 8, 2020), <https://www.history.com/this-day-in-history/charleston-ame-church-shooting>.

¹⁸⁶ Elliott, *supra* note 13.

¹⁸⁷ *Id.*

¹⁸⁸ Richard Fausset, Alan Blinder, & Michael S. Schmidt, *Gunman Kills 4 Marines at Military Site in Chattanooga*, N.Y. TIMES (July 16, 2015), <https://www.nytimes.com/2015/07/17/us/chattanooga-tennessee-shooting.html>.

¹⁸⁹ Kristina Sgueglia, *Chattanooga Shootings ‘Inspired’ by Terrorists, FBI Chief Says*, CNN (Dec. 16, 2015), <https://www.cnn.com/2015/12/16/us/chattanooga-shooting-terrorist-inspiration/>.

¹⁹⁰ Adam Nagourney, Ian Lovett, & Richard Perez-Pena, *San Bernardino Shooting Kills at Least 14; Two Suspects Are Dead*, N.Y. TIMES (Dec. 2, 2015), <https://www.nytimes.com/2015/12/03/us/san-bernardino-shooting.html>.

¹⁹¹ *Id.*

¹⁹² Berman, *supra* note 115.

actually directed by a foreign terrorist group.¹⁹³ A co-conspirator, the perpetrators' friend and neighbor, was found guilty of conspiring to provide material support to terrorists and sentenced to twenty years imprisonment.¹⁹⁴

Charlottesville Car Attack: On August 12, 2017, a white supremacist deliberately drove his car into a crowd of anti-racism protesters in Charlottesville, Virginia, causing the death of one woman and injuring dozens.¹⁹⁵ The perpetrator pleaded guilty to twenty-nine hate crimes in connection with the attack, and was subsequently sentenced to two life sentences plus 419 years.¹⁹⁶

Germantown Car Attack Plot: In March 2019, a perpetrator was arrested in Germantown, Maryland, and told investigators he had planned to carry out a truck attack like the one that killed dozens of people in Nice, France, in 2016.¹⁹⁷ The perpetrator stole a U-Haul van in Alexandria, Virginia, and drove it to Maryland with the intention of using it as a weapon against pedestrians.¹⁹⁸ The perpetrator was self-radicalized by watching ISIS propaganda videos of foreign terrorists and had images of the ISIS flag and armed ISIS fighters on his phone.¹⁹⁹ The perpetrator is charged with attempting to provide material support to a foreign terrorist organization.²⁰⁰

El Paso Walmart Shooting: On August 3, 2019, a gunman opened fire at a Walmart in El Paso, Texas, killing twenty-two people and injuring twenty-three others.²⁰¹ The perpetrator had written and published a manifesto prior to launching his attack, espousing anti-immigrant views and admiration for the gunman who killed fifty-one people at two mosques in Christchurch, New

¹⁹³ *Id.*

¹⁹⁴ Nathan Solis, *Friend of San Bernardino Terrorists Gets 20 Years for Role in Attack*, COURTHOUSE NEWS (Oct. 23, 2020), <https://www.courthousenews.com/friend-of-san-bernardino-terrorists-gets-20-years-for-role-in-attack/>.

¹⁹⁵ Lavoie, *supra* note 2.

¹⁹⁶ *Id.*; see also Lavoie, *supra* note 3.

¹⁹⁷ *National Harbor Truck Plot*, *supra* note 142; see also *Nice Attack: What We Know About the Bastille Day Killings*, BBC (Aug. 19, 2016) (truck attack, claimed by ISIS, which killed eighty-six people).

¹⁹⁸ *National Harbor Truck Plot*, *supra* note 142.

¹⁹⁹ *National Harbor Truck Plot*, *supra* note 142.

²⁰⁰ Maryland Attempted Truck Attack Press Release, *supra* note 163; *National Harbor Truck Plot*, *supra* note 142.

²⁰¹ El Paso Mass-Shooting Press Release, *supra* note 176.

Zealand.²⁰² The perpetrator's manifesto also cited a 2011 French book that gave rise to a conspiracy theory that white people and culture are being replaced by non-whites.²⁰³ The perpetrator has since been indicted on twenty-two counts of hate crimes resulting in death, twenty-three counts of hate crimes involving an attempt to kill, and forty-five counts of discharging a firearm in relation to the hate crimes.²⁰⁴

²⁰² Romero, Fernandez, & Padilla, *supra* note 94. *See generally* Diaz, *supra* note 118. On March 15, 2019, a gunman opened fire at two mosques in Christchurch, New Zealand, killing fifty-one people and wounding dozens of others. *Id.* The perpetrator livestreamed this brutal attack on Facebook and was online for seventeen minutes before finally being taken down. *Id.* According to a finding by the New Zealand Royal Commission, the country's highest level of inquiry, the perpetrator had a long history of racist, extremist, and white nationalistic views. *Id.* The perpetrator has since been convicted of terrorism, for the murder of fifty-one people, and the attempted murder of forty others. *Id.* The perpetrator is serving a life sentence without parole. *Id.*

²⁰³ Villagran, *supra* note 122.

²⁰⁴ El Paso Mass-Shooting Press Release, *supra* note 176.

APPENDIX B: NOTABLE RECENT DOMESTIC EXTREMIST INCIDENTS

Congressional Baseball Shooting: On June 14, 2017, a shooter opened fire on a group of Republican politicians who were practicing for the annual Congressional Baseball Game for Charity.²⁰⁵ The shooter wounded five individuals, including then-House GOP Whip, Steve Scalise.²⁰⁶ Police arrived at the scene and killed the perpetrator.²⁰⁷ It was learned that the perpetrator specifically targeted Republicans and had many social media posts criticizing President Trump.²⁰⁸ The perpetrator had also volunteered on Senator Bernie Sanders' 2016 Presidential Campaign.²⁰⁹ The FBI concluded that the perpetrator's motivations were "suicide by cop."²¹⁰ However, the clear entanglement of political ideologies have led to many calls for a renewed investigation into whether the motivation was actually caused by extreme-left ideology.²¹¹

Plot to Kidnap Michigan Governor Gretchen Whitmer: In October 2020, the FBI and Michigan State Police thwarted a conspiracy to kidnap Governor Gretchen Whitmer by members of a local militia group known as the Wolverine Watchmen.²¹² Many of the members were supporters of the Boogaloo Movement,²¹³ but there was a degree of political and ideological diversity.²¹⁴ Starting in April 2020, in response to their beliefs that the COVID-19 restrictions were infringing on their

²⁰⁵ *Five People Shot, Including Republican Congressman, at Baseball Practice*, HISTORY (Sept. 7, 2018), <https://www.history.com/this-day-in-history/james-hodgkinson-shooting-republicans-baseball-game>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Luke Mullins, *The Terrifying Story of the Congressional Baseball Shooting*, WASH. POST (May 28, 2018), <https://www.washingtonian.com/2018/05/28/terrifying-story-of-the-congressional-baseball-shooting-steve-scalise/>.

²⁰⁹ *Id.*

²¹⁰ Rebecca Shabad, *Rep. Scalise, Survivors of 2017 Baseball Shooting Call for FBI to Review Investigation*, NBC NEWS (May 11, 2021, 1:38 PM), <https://www.nbcnews.com/politics/congress/rep-scalise-survivors-2017-baseball-shooting-call-fbi-review-investigation-n1266986>.

²¹¹ *Id.*

²¹² Graham Macklin, *The Conspiracy to Kidnap Governor Gretchen Whitmer*, 14 CTC SENTINEL 1, 1 (2021), <https://ctc.usma.edu/wp-content/uploads/2021/07/CTC-SENTINEL-062021.pdf>

²¹³ The Boogaloo Movement is an anti-government extremist movement made up primarily of individuals associated with various right-wing extremist movements. *See* Anti-Defamation League, *The Boogaloo Movement*, <https://www.adl.org/boogaloo>.

²¹⁴ Macklin *supra* note 212 at 4.

constitutional rights, the group began devising a plan to target the Michigan State government. Before settling on their plan to kidnap Governor Whitmer, the group considered storming the Michigan State Capitol building while Congress was in session and “tak[ing] hostages [and] execut[ing] tyrants” or setting the Capitol on fire and barricading the exits to prevent escape.²¹⁵

The group ultimately devised their plan to attack and kidnap Governor Whitmer on her way to or from her official summer residence or private vacation home.²¹⁶ In preparation for the “[s]natch and grab” the group performed months-long surveillance and tactical training.²¹⁷ The perpetrators intended to kidnap Governor Whitmer and put her on trial for treason prior to the 2020 Presidential Election.²¹⁸

Assault on U.S. District Judge Esther Salas’ Family: On July 19, 2020, a self-described “anti-feminist” who was a part of the male supremacy movement²¹⁹ attacked the family of Judge Esther Salas of the U.S. District Court for the District of New Jersey.²²⁰ The perpetrator—a Manhattan lawyer who had appeared before Judge Salas—disguised himself as a FedEx worker to gain access to the family home.²²¹ The perpetrator shot and killed Judge Salas’ son and critically wounded Judge Salas’ husband; Judge Salas was not injured.²²²

January 6 Attack on the U.S. Capitol: On January 6, 2021, Congress met at the United States Capitol building in Washington, DC, to certify the 2020 Presidential election results declaring

²¹⁵ *Id.* at 4–5.

²¹⁶ *Id.* at 6–7.

²¹⁷ *Id.* at 6–8.

²¹⁸ *Id.* at 5.

²¹⁹ The male supremacy movement targets women and characterizes women as “genetically inferior, manipulative and stupid,” whose sole purposes are sexual and reproductive. It is considered to be a part of, or at least overlap significantly with, the extreme-right movement. *See* Southern Poverty Law Center, *Male Supremacy*, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/male-supremacy>.

²²⁰ *See* Josh Margolin et al., ‘Anti-Feminist’ Lawyer Identified as Shooter Who Killed Judge Esther Salas’ Son Then Self, ABC News (July 20, 2020, 6:58 PM), <https://abcnews.go.com/US/federal-judges-son-shot-killed-husband-injured-attack/story?id=71871708>; Safia Samee Ali, Roy Den Hollander Was Entrenched in “Anti-Feminist” Male Supremacy Movement, US News (July 22, 2020, 2:21 PM), <https://www.nbcnews.com/news/us-news/roy-den-hollander-was-entrenched-anti-feminist-male-supremacy-movement-n1234558>.

²²¹ Margolin et al., *supra* note 219.

²²² *Id.*

President Biden the next President of the United States.²²³ In the months since the election on November 3, 2020, and the reported results declaring President Biden the winner of the 2020 Presidential election, President Trump and multiple members of Congress furthered the baseless theory that there was widespread voter fraud and that President Trump had actually won the 2020 Presidential election.²²⁴ In continuing to espouse this view that the election had been stolen, President Trump encouraged his supporters to attend a rally and march from the White House to the Capitol to protest the Congressional session certifying the election results.²²⁵ Thousands of protesters showed up, some of which included members of paramilitary organizations and other right-wing extremists.²²⁶

Just as the Congressional session was being convened, a mob pushed through fences surrounding the Capitol grounds, forcing Capitol police officers to retreat.²²⁷ The mob continued to grow larger and overwhelm the police presence.²²⁸ Officers were attacked, beaten, and trampled by the surging crowd.²²⁹ Within an hour of the assault beginning, the mob had breached the last barrier and began running into the Capitol building.²³⁰ The mob shattered windows, vandalized, looted, and ransacked the Capitol.²³¹ Some rioters attempted to seek out members of Congress and Vice President Mike Pence, whom they deemed to be their enemies and traitors.²³² Federal prosecutors have alleged that some of the rioters intended “to capture and assassinate elected officials,” including at least one who brought “plastic zip-tie handcuffs because he intended ‘to take

²²³ Brian Duignan, *United States Capitol Attack of 2021*, ENCYCLOPEDIA BRITANNICA (Aug. 5, 2021), <https://www.britannica.com/event/United-States-Capitol-attack-of-2021>.

²²⁴ *The January 6 Attack on the U.S. Capitol*, AMERICAN OVERSIGHT (June 24, 2021), <https://www.americanoversight.org/investigation/the-january-6-attack-on-the-u-s-capitol>.

²²⁵ Duignan, *supra* note 222.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

hostages.”²³³ The investigation into the attack is still ongoing; many prosecutions are underway and charges continue to be filed.²³⁴

Inauguration Day Protest in Portland: On January 20, 2021, the day President Biden was sworn in as President, hundreds of anti-Biden protesters gathered in Portland, Oregon.²³⁵ Some of the group included “far-left and anarchist demonstrators” who vandalized the Democratic Party headquarters, the ICE federal building, and threw rocks at federal officers.²³⁶ Several of the rioters were arrested, and one of which was arrested with four molotov cocktail explosives.²³⁷ The defendants have been charged with a variety of offenses, including participation in a riot, disorderly conduct, criminal mischief, and unlawful possession of a destructive device.²³⁸

²³³ *Capitol Rioters Planned to Capture and Kill Politicians, Say Prosecutors*, THE GUARDIAN (Jan. 15, 2021, 4:50 PM), <https://www.theguardian.com/us-news/2021/jan/15/capitol-rioters-planned-capture-kill-officials-say-prosecutors>; Jake Bleiberg, *Prosecutor: Retired Air Force Officer Involved in US Capitol Riot Wanted 'To Take Hostages'*, USA TODAY (Jan. 14, 2021, 8:31 PM), <https://www.usatoday.com/story/news/nation/2021/01/14/prosecutor-us-capitol-rioter-zip-ties-meant-to-take-hostages/4168195001/>.

²³⁴ See generally Federal Bureau of Investigation, U.S. *Capitol Violence*, <https://www.fbi.gov/wanted/capitol-violence>.

²³⁵ Marissa J. Lang & Kimberly Kindy, *Destructive Protests by Anarchists and Extremists Signal Divided Left as Biden Inauguration Begins*, WASH. POST (Jan. 23, 2021, 8:05 PM), https://www.washingtonpost.com/politics/destructive-protests-by-anarchists-and-extremists-signal-divided-left-as-biden-administration-begins/2021/01/23/70f93610-5d8c-11eb-a976-bad6431e03e2_story.html.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*