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THE AD HOC FEDERAL CRIME OF TERRORISM: WHY CONGRESS NEEDS TO AMEND THE STATUTE TO ADEQUATELY ADDRESS DOMESTIC EXTREMISM

NATHAN CARPENTER[†]

INTRODUCTION

On August 11, 2017, hundreds of white nationalists, carrying torches and chanting racist epithets, violently engaged with counter-protesters in Charlottesville, Virginia.¹ The next day, many of those same individuals marched throughout Charlottesville and clashed with counter-demonstrators again.² During this “extremist demonstration turned violent,” one individual killed a counter-protester and injured nineteen others by driving his vehicle into a crowd.³

On September 6, 2017, Congress issued Senate Joint Resolution 49 (“Joint Resolution”), condemning the “racist violence and domestic terror attack” that took place in Charlottesville, expressing concern for similar extremism in other cities and “the growing and open display of hate and violence being perpetrated by [white nationalist] groups.”⁴ The Joint Resolution also called on the Trump Administration to curtail the threat posed by domestic extremist groups.⁵ Finally, the Joint Resolution called on the Attorney General “to investigate thoroughly all acts of violence, intimidation, and domestic terrorism by White supremacists . . . and associated groups[,] . . . to improve the reporting of hate crimes and to emphasize the importance of the collection, and the reporting . . . of hate crime data by State and local agencies.”⁶

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¹ S.J. Res. 49, 105th Cong. (2017).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

However, what many do not realize is that the act carried out by the neo-Nazi sympathizer in Charlottesville does not constitute terrorism under federal law.⁷ Terrorism is not an explicit charge under federal law,⁸ but a specific act can constitute the federal crime of terrorism if it is “intended to help bring about, encourage, or contribute to” an offense specifically listed in § 2332b(g)(5) (“the federal crime of terrorism statute”).⁹ These offenses include providing material support to terrorists,¹⁰ bombing public places,¹¹ and various crimes relating to government property, air travel, and naval equipment, among other things.¹² The act also must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”¹³ in order to expose a defendant to various investigatory and legal mechanisms meant to deter such actions and prevent future harms.¹⁴ The alleged

⁷ The defendant was charged with second degree murder, three counts of malicious wounding, and one count of hit and run. *Id.* None of these charges are listed in acts that may constitute the federal crime of terrorism. See 18 U.S.C.A. § 2332b(g)(5) (West 2015).

⁸ Greg Myre, *Why the Government Can't Bring Terrorism Charges in Charlottesville*, NPR (Aug. 14, 2017), <https://www.npr.org/2017/08/14/543462676/why-the-govt-cant-bring-terrorism-charges-in-charlottesville>.

⁹ See *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010); see also *United States v. Fidse*, 778 F.3d 477, 481 (5th Cir. 2015) (holding that the defendant must have “one purpose of his substantive count of conviction or his relevant conduct the intent to promote a federal crime of terrorism”) (citation omitted). An act must transcend national boundaries in order to be charged under 18 U.S.C.A. § 2332b, but an offense specified in 18 U.S.C.A. § 2332b(g)(5) does not have to transcend boundaries for the investigatory and deterrence purposes discussed in this Note. See U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 18 (2008) [hereinafter ATTORNEY GENERAL'S GUIDELINES]; U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.4 (U.S. SENTENCING COMM'N 2002) [hereinafter SENTENCING GUIDELINES MANUAL].

¹⁰ 18 U.S.C. § 2339A (2012); 18 U.S.C.A. § 2339B (West 2015).

¹¹ 18 U.S.C. § 2332f (2012).

¹² 18 U.S.C.A. § 2332b(g)(5).

¹³ *United States v. Harris*, 434 F.3d 767, 773 (5th Cir. 2005) (quoting 18 U.S.C. § 2332b(g)(5)).

¹⁴ See ATTORNEY GENERAL'S GUIDELINES, *supra* note 9, at 23. A federal crime of terrorism charge allows for an enterprise investigation into “any relationship of the group to a foreign power, its size and composition, its geographic dimensions and finances, its past acts and goals, and its capacity for harm.” *Id.* at 18; see also 18 U.S.C. § 3286(b) (2012) (providing that there is no statute of limitations if a federal crime of terrorism results in death); 18 U.S.C.A. § 3583(j) (West 2015) (providing that there is also no limitation on the supervised release period of a person convicted of a federal crime of terrorism). “If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.” SENTENCING GUIDELINES MANUAL, *supra* note 9, at § 3A1.4(a). “In each such case,

murder in Charlottesville does not fall within any of the specific crimes because the statute does not list murder or hate crimes as acts that may constitute terrorism.¹⁵ This means that the event will not trigger mechanisms available for terrorism-related cases.

This Note argues that Congress should add such crimes to the list specified in the federal crime of terrorism statute and amend the statute's intent requirement. This will allow the Department of Justice to more adequately use its resources to address the growing prevalence of hate groups, increase investigatory capabilities, and emphasize the threat posed by such groups. Part I explores the current federal crime of terrorism and analyzes how various terrorism-related cases are adjudicated. Part II introduces the prevailing threat of political extremists operating within the United States and shows that they should no longer be placed in a separate legal framework. Part III looks at state terrorism laws as a guideline for possible changes to federal terrorism law. Finally, Part IV introduces amendments to domestic terrorism statutes and addresses any perceived issues with the recommended changes.

I. TERRORISM IN THE UNITED STATES: AN ARBITRARY DISTINCTION

This section explores the legal framework surrounding domestic terrorism and examines acts that fall within the federal crime of terrorism and acts that do not. All of these acts are outlawed by current federal law but not all of them elicit the legal mechanisms that accompany a terrorism charge. Amending the federal crime of terrorism to include murder and hate crimes will allow all of these acts to be eligible for the terrorism designation.

A. *Murder Is Not Enough To Bring a Crime Within the Legal Terrorism Framework*

The United States Code defines domestic terrorism as “activities that involve acts dangerous to human life that . . . appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government

the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.” *Id.* at § 3A1.4(b).

¹⁵ See 18 U.S.C. § 2332b(g)(5).

by mass destruction, assassination, or kidnapping”¹⁶ This definition was created to strengthen “surveillance powers and government authority to conduct intelligence-gathering operations in matters of suspected terrorism, as well as [to allow] for the civil seizure of assets based only on probable cause, and heightened punishments for any of the underlying crimes”¹⁷ A defendant cannot be charged with terrorism under federal law.¹⁸ Instead, specific offenses when paired with the requisite intent are designated to constitute the federal crime of terrorism for sentencing and investigatory purposes.¹⁹ When a defendant performs or attempts a federal crime of terrorism, the FBI initiates an enterprise investigation that looks into possible co-conspirators or groups with which the defendant may be involved, as well as any capacity for future harm from the defendant’s associates.²⁰ If Congress expands the federal crime of terrorism, the law will properly encompass crimes by domestic extremists, such as the one in Charlottesville.

Currently, the only way that a wholly domestic extremist, such as the alleged murderer in Charlottesville, can be subject to the various investigatory and legal mechanisms provided by the domestic terrorism framework is if he “intended to help bring about, encourage, or contribute to a federal crime of terrorism as that term is defined” by statute.²¹ This expands the statutory definition slightly to include offenses such as obstructing an investigation of a federal crime of terrorism²² and criminal contempt,²³ but if the defendant is convicted of an offense that is not specifically enumerated in the statute, the district court “must identify which enumerated federal crime of terrorism the defendant intended to promote, satisfy the elements of [the federal crime of terrorism statute], and support its conclusions by a preponderance of the evidence with facts from the record.”²⁴ The defendant’s conduct also must be found to be “calculated to

¹⁶ 18 U.S.C. § 2331(5) (2012).

¹⁷ Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 23–24 (2011).

¹⁸ Myre, *supra* note 8.

¹⁹ See SENTENCING GUIDELINES MANUAL, *supra* note 9, at § 3A1.4.

²⁰ See ATTORNEY GENERAL'S GUIDELINES, *supra* note 9.

²¹ See *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010); see also *United States v. Fidse*, 778 F.3d 477, 481 (5th Cir. 2015).

²² See *United States v. Benkahla*, 530 F.3d 300, 311 (4th Cir. 2008).

²³ See *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009).

²⁴ *Fidse*, 778 F.3d at 481 (quoting *United States v. Arnaout* 431 F.3d 994, 1002 (7th Cir. 2005)).

influence or affect the government's conduct by intimidation or coercion, or to retaliate against government conduct."²⁵ This narrow definition leaves many violent acts by domestic extremists outside of the federal terrorism framework.

Although violent crime rates in the United States have dropped since the 1990s,²⁶ there is no shortage of high profile crimes covered by the national media and condemned by the federal government.²⁷ Some of these crimes are immediately categorized as terrorism,²⁸ while other similar crimes are never given the designation.²⁹ The current ad hoc approach to what can and cannot constitute the federal crime of terrorism creates a discrepancy that leaves many Americans wondering why certain horrific events, with multiple casualties, are categorized as terrorism while others are not.

B. Acts Considered Terrorism Under Current Law

The federal crime of terrorism encompasses the use of explosives, attempts to recruit individuals to carry out acts in the name of a foreign terrorist organization, and acting in accordance with a doctrine of self-radicalization promoted by an extremist group.³⁰ The commission of a crime under the federal crime of terrorism statute allows the FBI to engage in a special investigation.³¹ The investigation examines the activity of the group involved in order to determine "any relationship of the group to a foreign power, its size and composition, its geographic dimensions and finances, its past acts and goals, and its capacity

²⁵ *United States v. Harris*, 434 F.3d 767, 773 (5th Cir. 2005).

²⁶ John Gramlich, *5 Facts About Crime in the U.S.*, PEW RES. CTR. (Jan. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/01/30/5-facts-about-crime-in-the-u-s/>.

²⁷ See *Transcript and Video: President Trump Speaks About Charlottesville*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/politics/transcript-and-video-president-trump-speaks-about-charlottesville.html?_r=0; President Barack Obama, Remarks by the President in Closing of the Summit on Countering Violent Extremism (Feb. 18, 2015) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism>).

²⁸ See President Barack Obama, Address to the Nation by the President (Dec. 6, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/06/address-nation-president>.

²⁹ See *Transcript and Video: President Trump Speaks About Charlottesville*, *supra* note 27.

³⁰ 18 U.S.C.A. § 2332b(g)(5)(B) (West 2015).

³¹ See ATTORNEY GENERAL'S GUIDELINES, *supra* note 9.

for harm.”³² The investigation also determines “the identity and relationship of its members, employees, or other persons who may be acting in furtherance of its objectives.”³³

An act can trigger these investigatory mechanisms when the defendant chooses to use a specific method or weapon listed in the federal crime of terrorism statute.³⁴ On October 14, 2016, the Department of Justice filed a criminal complaint against Curtis Wayne Allen, Patrick Eugene Stein, and Gavin Wayne Wright, alleging that the defendants conspired to use a weapon of mass destruction.³⁵ The defendants were members of an organization known as the Crusaders, which has “anti-government, anti-Muslim, and anti-immigrant extremist beliefs,” and were planning an attack on a Muslim community in Kansas.³⁶ Fortunately, authorities were able to apprehend these men before they were able to carry out their attack. Use of a weapon of mass destruction or conspiracy to do so is outlawed by federal law and constitutes the federal crime of terrorism,³⁷ so this charge triggered investigatory mechanisms by the FBI allowing the Crusaders to be investigated further.³⁸ If the defendants were not planning to use a bomb to carry out their attack, the conduct would not have been considered a federal crime of terrorism.

A terrorism-related charge can also apply if a defendant attempts to recruit others to commit acts of terror.³⁹ On August 17, 2016, Erick Jamal Hendricks was indicted on conspiracy to provide material support to a foreign terrorist organization.⁴⁰ The Government monitored Hendricks’ social media profiles and used confidential informants to build a case against Hendricks.⁴¹ Using this evidence, the Government alleged that Hendricks “has some connection to the attempted terrorist attack in Garland, Texas on May 3, 2015 . . . [and] recruited other individuals to join

³² *Id.*

³³ *Id.* at 23.

³⁴ *Id.*

³⁵ See Sealed Criminal Complaint, United States v. Allen, No. 16-M-6151-GEB (D. Kan. Oct. 14, 2016).

³⁶ *Id.*

³⁷ 18 U.S.C.A. § 2332b(g)(5)(B) (West 2015).

³⁸ ATTORNEY GENERAL’S GUIDELINES, *supra* note 9, at 23.

³⁹ *Id.*

⁴⁰ United States v. Hendricks, No. 1:16CR265, 2016 WL 4708631, at *1 (N.D. Ohio Sept. 17, 2016); see 18 U.S.C.A. § 2339B(a)–(b) (West 2015); *id.* § 2332b(g)(5)(B)(i) (West 2015).

⁴¹ *Hendricks*, 2016 WL 4708631, at *3.

together in coordinated terrorist attacks.”⁴² Hendricks claimed to “have ten operatives in the United States and hoped to raid military depots for weapons.”⁴³ Hendricks also told FBI informants that “he worked full-time as a recruiter.”⁴⁴ Providing material support to terrorists is a crime enumerated in the federal crime of terrorism statute,⁴⁵ so all of Hendricks’ contacts and possible affiliates were likely investigated as well.

A crime can fall within the federal crime of terrorism if the defendant is inspired by Islamic extremist groups.⁴⁶ On October 31, 2017, Sayfullo Saipov allegedly killed eight people when he drove a vehicle down a crowded bike path.⁴⁷ The defendant told law enforcement that “[h]e was inspired by 90 graphic and violent propaganda videos found on his phone—in particular, one in which [Islamic State] leader Abu Bakr al-Baghdadi asks what Muslims are doing to avenge deaths in Iraq.”⁴⁸ The defendant was said to have “followed almost exactly to a ‘T’ [Islamic State] instructions on how to carry out such an attack.”⁴⁹ Since he was charged with providing material support which constitutes the federal crime of terrorism,⁵⁰ the FBI will investigate whether Saipov was connected to any groups or individuals that may be planning similar attacks or attempting to radicalize other individuals. If the defendant was motivated by the neo-Nazi ideology of a domestic extremist group, like the alleged murderer in Charlottesville, the conduct would not fall within the current federal terrorism law.

Bringing charges specified in the federal crime of terrorism statute allows the FBI to investigate any individual or group connected to a given defendant’s activity.⁵¹ This helps curtail any

⁴² *Id.*; see Holly Yan, *Texas Attack: What We Know About Elton Simpson and Nadir Soofi*, CNN (May 5, 2015), <http://www.cnn.com/2015/05/05/us/texas-shooting-gunmen/index.html>.

⁴³ Mark Washburn & Tim Funk, *Man in Charlotte Accused of Recruiting for Islamic State, Planning Training Compound*, CHARLOTTE OBSERVER (Aug. 4, 2016), <http://www.charlotteobserver.com/news/local/crime/article93679667.html>.

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. § 2332b(g)(5)(B)(i).

⁴⁶ *Id.*

⁴⁷ *New York Truck Attack Suspect ‘Spent a Year Planning’*, BBC NEWS (Nov. 2, 2017), <http://www.bbc.com/news/world-us-canada-41835266>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; 18 U.S.C. § 2332b(g)(5)(B)(i).

⁵¹ See ATTORNEY GENERAL’S GUIDELINES, *supra* note 9, at 23.

future threats posed by people connected to the defendant. These charges also are eligible for a sentencing enhancement⁵² and carry a greater societal significance than other charges.

C. Acts Ineligible for the Federal Crime of Terrorism

Not all federal crimes can constitute the federal crime of terrorism, even if the defendant intended to intimidate or coerce a civilian population or the government.⁵³ There is no doubt that the American public and the government want to deter acts of this nature.⁵⁴ Law enforcement acknowledges that crimes of this nature are a danger to the American public,⁵⁵ and the government has mechanisms in place for addressing such threats.⁵⁶ However, many violent acts by domestic extremists do not trigger the more extensive measures that exist within the federal terrorism framework to deter crimes of terrorism and allow for more effective investigations.⁵⁷ The statutory framework needs to be amended to ensure that violent acts by domestic extremists can be adjudicated within it, thus triggering antiterrorism investigatory procedures when necessary.

Under the current statutory framework, a defendant with a long history of participation in domestic hate groups was not eligible for a charge specified in the federal crime of terrorism statute when he shot and killed three individuals based on his anti-Semitic views.⁵⁸ On April 13, 2014, Frazier Glenn Cross, Jr., also known as Frazier Glenn Miller, killed two people at a Jewish community center and another woman in the parking lot of a

⁵² See SENTENCING GUIDELINES MANUAL, *supra* note 9, at § 3A1.4.

⁵³ See 18 U.S.C. § 2332b(g)(5)(B)(i).

⁵⁴ See Letter from U.S. Senate, to Elaine Duke, Acting Sec'y of the U.S. Dep't of Homeland Sec. (Aug. 18, 2017), available at <https://www.leahy.senate.gov/imo/media/doc/081817%20Letter%20to%20Acting%20Secretary%20Duke.pdf>; S.J. Res. 49, 105th Cong. (2017).

⁵⁵ Charles Kurzman & David Schanzer, *Law Enforcement Assessment of the Violent Extremism Threat*, TRIANGLE CTR. ON TERRORISM AND HOMELAND SEC. 3 (June 25, 2015), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf.

⁵⁶ See generally U.S. DEP'T OF HOMELAND SEC., STRATEGY FOR COUNTERING VIOLENT EXTREMISM (2016)

⁵⁷ See ATTORNEY GENERAL'S GUIDELINES, *supra* note 9, at 23; 18 U.S.C. § 3286(b) (2012) (noting that there is no statute of limitations if a federal crime of terrorism results in death); 18 U.S.C.A. § 3583(j) (West 2015) (noting that there is also no limitation on supervised release period following the conviction of a federal crime of terrorism).

⁵⁸ Second Amended Complaint, *State v. Cross*, No. 14CR853 (Kan. Dist. Ct. Oct. 17, 2014).

nearby Jewish retirement home in Overland Park, Kansas.⁵⁹ Cross had a history of white supremacist views and was described as a “pioneer[] in the modern hate world.”⁶⁰ Cross targeted these individuals because of their presence at the community center, for he claimed that he wanted to prevent “a genocide by Jews.”⁶¹ Although Cross intended to intimidate or coerce a civilian population, his slaying of three people did not constitute terrorism because he chose to use a gun instead of a bomb.⁶² Instead, Cross was convicted of capital murder,⁶³ which made him eligible for the death penalty, but did not trigger the legal mechanisms that accompany a terrorism-related charge.⁶⁴ If Cross were charged with a crime specified in the federal crime of terrorism statute, the FBI would have easily been able to investigate any existing ties to hate groups, including the structure of those groups, and the likelihood of further violence by members of those groups.⁶⁵

The need for statutory amendment also was illustrated when a defendant that targeted a health clinic based on his political or religious views similarly fell outside of the federal crime of terrorism. On November 27, 2015, Robert Lewis Dear, Jr. killed three people and injured nine more at a Planned Parenthood clinic in Colorado Springs, Colorado.⁶⁶ The defendant was found to be a supporter of a group known as the Army of God, which “has claimed responsibility for a number of killings and bombings.”⁶⁷ Dear was said to have developed his hatred for abortion based on his “religious views.”⁶⁸ However, before Dear

⁵⁹ *Id.*

⁶⁰ Ed Payne, *Frazier Glenn Cross ‘Entrenched in the Hate World’*, CNN (Aug. 31, 2015), <https://www.cnn.com/2014/04/14/us/kansas-shooting-suspect-profile/index.html>.

⁶¹ *Jury To Begin Penalty Phase of Frazier Glenn Cross Trial Tuesday*, KMBC NEWS (Aug. 31, 2015), <http://www.kmbc.com/article/jury-to-begin-penalty-phase-of-frazier-glenn-cross-trial-tuesday/3690250>.

⁶² *Id.*

⁶³ *Id.* Capital murder is not a crime specifically enumerated under 18 U.S.C.A. § 2332b(g)(5)(B)(i). See 18 U.S.C.A. § 2332b(g)(5) (West 2015).

⁶⁴ ATTORNEY GENERAL’S GUIDELINES, *supra* note 9, at 23.

⁶⁵ *Id.*

⁶⁶ See Sadie Gurman, *Suspect in Colorado Clinic Attack Will Face Murder Charges*, MIAMI HERALD (Nov. 30, 2015), <http://www.miamiherald.com/latest-news/article47206975.html>.

⁶⁷ Richard Fausset, *For Robert Dear, Religion and Rage Before Planned Parenthood Attack*, N.Y. TIMES (Dec. 1, 2015), <https://www.nytimes.com/2015/12/02/us/robert-dear-planned-parenthood-shooting.html>.

⁶⁸ *Id.*

was deemed mentally incompetent to stand trial, he was charged only with first degree murder, so the investigative and retributive mechanisms accompanied by a federal terrorism charge did not apply to Dear.⁶⁹ If the FBI charged Dear with a federal crime of terrorism, it could further investigate his connections to the Army of God, including any attacks that the group may be planning.

Finally, a defendant self-radicalized by white supremacist propaganda who killed nine people based on their race yet did not come within the federal terrorism framework is another example of why the framework needs to be changed. On June 17, 2015, Dylann Roof killed nine people and injured another at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.⁷⁰ Roof intentionally targeted the historic African-American church due to his white supremacist beliefs and motivation to start a “race war.”⁷¹ Although some would argue that Roof committed an act of terrorism, he was found guilty on federal hate crime charges.⁷² Even though Roof was described as “self-radicalized,” and government officials said that his actions were “consistent with the concept of leaderless resistance and martyrdom advocated by white supremacy extremist groups and self-radicalization leading to violence,”⁷³ he was not eligible for a charge under the current federal crime of terrorism statute.

The legal mechanisms established by the terrorism framework should be activated when the defendant intends to intimidate or coerce a civilian population or the government. The inquiry should not hinge on the weapon used or the target chosen. Each of these acts should fall within the federal terrorism framework. This would not only initiate legal mechanisms, but it would also achieve much of what Congress

⁶⁹ Gurman, *supra* note 66; see SENTENCING GUIDELINES MANUAL, *supra* note 9, at § 3A1.4.

⁷⁰ Ray Sanchez & Ed Payne, *Charleston Church Shooting: Who is Dylann Roof?*, CNN (Dec. 16, 2016), <https://www.cnn.com/2015/06/19/us/charleston-church-shooting-suspect/index.html>.

⁷¹ *Id.*

⁷² See generally Jesse J. Norris, *Why Dylann Roof is a Terrorist under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259 (2017).

⁷³ Associated Press, *Church Shooting Suspect Dylann Roof Was ‘Self-Radicalized,’ Authorities Say*, L.A. TIMES (Aug. 23, 2016), <http://www.latimes.com/nation/nationnow/la-na-dylann-roof-church-shooter-20160823-snap-story.html#>.

sought in the Joint Resolution by signaling to law enforcement and the public that domestic extremists are a considerable threat to public safety that should not be viewed in isolation.

II. CURRENT FEDERAL LAW DOES NOT APPRECIATE THE THREAT POSED BY DOMESTIC EXTREMISM

This section explores the threat of domestic extremists operating within the United States. For the purposes of this Note, extremist ideologies are broken down into three groups: Islamic extremism, far-left extremism, and far-right extremism. The University of Maryland Consortium for the Study of Terrorism and Responses to Terrorism (“START”) defines Islamic extremists generally as “those who profess[] some form of belief in or allegiance to the Islamic State of Iraq and Syria (ISIS), al-Qa’ida, or other (radical) Islamist-associated terrorist entities.”⁷⁴ START defines leftist extremists as those holding “extremist environmental beliefs, extremist ‘animal liberation’ beliefs, or extremist far left beliefs.”⁷⁵ Further, right-wing extremism is defined as “that which is motivated by a variety of far right ideologies and beliefs, generally favoring social hierarchy and seeking an idealized future favoring a particular group” including “white supremacists and antigovernment militias.”⁷⁶ The federal government focuses heavily on the threat posed by Islamic extremists.

Since the attacks on September 11, 2001, Islamic extremism continues to be the primary focus of foreign policy and counter-terrorism efforts.⁷⁷ Due to the prevalence of foreign terrorist organizations, the actions of Islamic extremists have an inherently transnational nature that brings them within the statutory framework.⁷⁸ There is no doubt that the threat posed

⁷⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ASSESS PROGRESS OF FEDERAL EFFORTS 29 (2017), <https://www.gao.gov/assets/690/683984.pdf>.

⁷⁵ *Id.* at 28.

⁷⁶ *Id.* at 1.

⁷⁷ See *Operation Inherent Resolve: Targeted Operations to Defeat ISIS*, U.S. DEPT OF DEF., <https://www.defense.gov/OIR/> (last visited Aug. 18, 2018). The United States and its allies have conducted 24,566 airstrikes in its effort to defeat ISIS. *Id.* Former FBI Director James Comey told Congress that there are “about a thousand open investigations on” Islamic State-related extremism. Charles Kurzman, *Muslim-American Involvement with Violent Extremism, 2016*, TRIANGLE CTR. ON TERRORISM AND HOMELAND SEC. 3 (January 26, 2017), https://sites.duke.edu/tcths/files/2018/01/Kurzman_Muslim-American_Involvement_with_Violent_Extremism_2017.pdf.

⁷⁸ See 18 U.S.C.A. § 2332b (West 2015).

by Islamic extremists must be taken very seriously; however, that does not mean that these groups and individuals should be the sole concentration of counterterrorism efforts.

Domestic extremists present a threat that is comparable to, if not greater than, the Islamic extremist groups that seem to dominate the rhetoric surrounding terrorism. Between 2000 and 2011, violence from far-right groups increased by 400 percent.⁷⁹ During the period following September 11th, Islamic extremists have killed only seven more individuals than right-wing extremists.⁸⁰ In fact, since September 12, 2001, right-wing extremist groups have accounted for seventy-three percent of “violent extremist incidents that resulted in death.”⁸¹ According to the United States Extremist Crime Database, there were no attacks since 1990 by persons associated with extreme leftist ideologies that resulted in fatalities to non-perpetrators;⁸² however, left-wing extremists are still present in the United States and said to “engage in crimes such as vandalism, theft, the destruction of property, and arson.”⁸³

A. *Violence by Domestic Extremists Is Often Charged as a Hate Crime*

It is not illegal to be a member of one of these extremist groups,⁸⁴ and a law that attempted to criminalize such membership would be unconstitutional.⁸⁵ Therefore, there is no statute outlawing material support for a domestic terrorist group.⁸⁶ In fact, the federal government does not designate or establish official lists of domestic terrorist groups.⁸⁷ This does

⁷⁹ Arie Perliger, *Challenges from the Sidelines: Understanding America's Violent Far-Right*, COMBATING TERRORISM CTR. 87 (November 2012), <https://ctc.usma.edu/app/uploads/2013/01/ChallengersFromtheSidelines.pdf>.

⁸⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 74, at 5. The report notes that “41 percent of the deaths attributable to radical Islamist violent extremists occurred” during the Orlando night club shooting. *Id.*

⁸¹ *Id.* at 4.

⁸² *Id.*

⁸³ JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42536, THE DOMESTIC THREAT: BACKGROUND AND ISSUES FOR CONGRESS 11 (2013), <https://fas.org/sgp/crs/terror/R42536.pdf>. This Note regularly references right-wing extremists, but the suggested changes to the terrorism framework would apply to left-wing extremists as well.

⁸⁴ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); *United States v. Stewart*, 65 F.3d 918, 928 (11th Cir. 1995).

⁸⁵ *Stewart*, 65 F.3d at 928.

⁸⁶ BJELOPERA, *supra* note 83, at 9.

⁸⁷ *Id.*

not mean that members of these groups cannot commit acts of terrorism; it simply means that a member of one of these groups must commit an act or conspire to commit an act specifically codified in the federal crime of terrorism statute in order to be legally deemed a terrorist.⁸⁸ If a white supremacist shoots nine people because of his belief that minorities are inferior, he likely will be charged with a hate crime.⁸⁹

A hate crime occurs when an individual “attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, . . . national origin, gender, sexual orientation, gender identity, or disability of any person.”⁹⁰ This broad statute can sometimes encompass activity that many would view as terrorism.⁹¹ In fact, former Attorney General Loretta Lynch described hate crimes as “the original terrorism.”⁹² The Dylann Roof case is not the only instance in which a perceived terrorist act was ultimately charged as a hate crime.

In 2011, a white supremacist named Kevin Harpham attempted to bomb a parade honoring Dr. Martin Luther King, Jr.⁹³ The FBI initially referred to the incident as an act of domestic terrorism, but the bureau later shifted the rhetoric when Harpham ultimately “pled guilty to committing a federal hate crime and attempting to use a weapon of mass destruction.”⁹⁴ It is unclear why the government did not pursue a sentencing enhancement under § 3A1.4 when attempting to use a weapon of mass destruction is an act specifically codified as a federal crime of terrorism.⁹⁵ Perhaps Harpham’s alleged membership in “the neo-Nazi National Alliance,” contact with a “leader of a white supremacist group,” and “postings on white supremacist websites” made it easier to pursue a charge under the hate crime statute, instead of a terrorism enhancement.⁹⁶ It is hard to imagine that a Muslim defendant would have been charged with a hate crime under similar circumstances.

⁸⁸ See *United States v. Graham*, 275 F.3d 490, 517 (6th Cir. 2001).

⁸⁹ See Norris, *supra* note 72, at 266–67.

⁹⁰ 18 U.S.C. § 249 (2012).

⁹¹ BJELOPERA, *supra* note 83, at 6.

⁹² Norris, *supra* note 72, at 267 (quoting Kevin Johnson, *Attorney General Lynch: ‘Hate Crimes Are the Original Domestic Terrorism’*, USA TODAY (June 24, 2015), <https://www.usatoday.com/story/news/nation/2015/06/24/loretta-lynch-baptist-church-birmingham/29238615/>).

⁹³ BJELOPERA, *supra* note 83, at 7.

⁹⁴ *Id.*

⁹⁵ 18 U.S.C.A. § 2332b (West 2015).

⁹⁶ BJELOPERA, *supra* note 83, at 57.

B. *A Hate Crime Charge Is Inadequate in Some Cases*

A hate crime conviction brings forth a significant increase in sentencing,⁹⁷ but designating an act of terrorism as a hate crime does not send the same message or activate the same investigatory mechanisms.⁹⁸ Former Attorney General Loretta Lynch acknowledged that a hate crime charge “may give the impression that the government ‘[does]n’t consider those crimes as serious.’”⁹⁹ It is important for the public to appreciate the seriousness and threat posed by extremists who are willing to commit hate crimes. Perpetrators of hate crimes are often viewed as acting entirely on their own,¹⁰⁰ but this ignores the systematic underground that exists to influence and recruit domestic extremists.¹⁰¹ Federal agencies have acknowledged the systematic threat presented by domestic extremist groups.¹⁰² Congress has called for these groups to be included within the framework and discussion regarding terrorism.¹⁰³ Adding hate crimes to the list of acts specified in the federal crime of terrorism statute will trigger investigative procedures by the FBI that allow the government to analyze how the defendant was radicalized, whether the radicalization is connected to any group or individual, and the potential for future harm posed by those groups or individuals.¹⁰⁴ If a person who commits a hate crime can be radicalized in a similar way and commit a similar act, the designation given to that act should be no different. Current

⁹⁷ 18 U.S.C. § 249 (2012).

⁹⁸ See Norris, *supra* note 72, at 267.

⁹⁹ *Id.* (quoting Timothy M. Phelps, *Dylann Roof Indicted on Federal Hate-Crime Charges in Charleston Church Shooting*, L.A. TIMES (July 22, 2015), <http://www.latimes.com/nation/la-na-roof-hate-crimes-20150722-story.html>) (alteration in original).

¹⁰⁰ Noah Bierman et al., *Charleston Shooting Suspect Dylann Roof Said to be a ‘Classic Lone Wolf’*, L.A. TIMES (June 20, 2015), <http://www.latimes.com/nation/la-na-charleston-lone-wolf-20150620-story.html>; Mike Brunner et al., *Kansas Jewish Center Shootings Reveal New Dangers of ‘Lone Wolves’*, NBC NEWS (Apr. 16, 2014), <https://www.nbcnews.com/storyline/jewish-center-shootings/kansas-jewish-center-shootings-reveal-new-dangers-lone-wolves-n81331>.

¹⁰¹ J.M. BERGER, GEORGE WASH. UNIV. PROGRAM ON EXTREMISM, NAZIS VS. ISIS ON TWITTER: A COMPARATIVE STUDY OF WHITE NATIONALISTS AND ISIS ONLINE SOCIAL MEDIA NETWORKS 20 (2016), https://cchs.gwu.edu/sites/g/files/zaxdzs2371/f/downloads/Nazis%20v.%20ISIS%20Final_0.pdf.

¹⁰² See generally U.S. DEPT OF HOMELAND SEC., RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT (2009), <https://fas.org/irp/eprint/rightwing.pdf>.

¹⁰³ See *supra* note 54.

¹⁰⁴ See ATTORNEY GENERAL’S GUIDELINES, *supra* note 9, at 23.

federal law categorizes terrorism based on the methods used to carry out the killings or the target chosen, leaving out some violent acts by domestic extremists, while some state laws categorize terrorism based on the intention of the defendant to intimidate the civilian population or the government, which allows for a more comprehensive definition of terrorism.¹⁰⁵

III. STATE TERRORISM LAWS INCLUDE MURDER AS A SPECIFIC ACT

This section examines state laws that include murder as a specific act that may constitute terrorism. Adding murder as a specifically enumerated act allows wholly domestic extremists to be included within the terrorism framework without requiring a specific method or target as the pivotal factor. The inquiry focuses on the intent of the defendant who committed the act. Conversely, adding murder to the federal crime of terrorism statute will not indiscriminately expand the definition. Only murders that are intended to intimidate or coerce a civilian population or a unit of government will constitute terrorism. Thus, the amendment will not bring common crime within the terrorism framework.

A. *If Murder Constitutes an Act of Terrorism, Then Acts of Domestic Extremists Will Be More Adequately Addressed*

The District of Columbia's ("D.C.") terrorism statute includes murder and manslaughter as specific acts that may constitute terrorism, which allows law enforcement to charge domestic extremists with terrorism instead of being prevented from doing so by the method used or target chosen by the defendant. The Anti-Terrorism Act of 2002 ("D.C. statute") is structured similarly to federal law, for the D.C. statute specifies certain acts that are eligible for the terrorism definition, but the D.C. statute includes murder and manslaughter as specific acts that may constitute a crime of terrorism.¹⁰⁶ The act must also be intended to "[i]ntimidate or coerce a significant portion of the civilian population . . . ; or [i]nfluence the policy or conduct of a unit of government."¹⁰⁷

¹⁰⁵ 18 U.S.C.A. § 2332b (West 2015).

¹⁰⁶ D.C. Code Ann. § 22-3152(8) (West 2001). The statute was a response to the attacks on September 11th in which state and local governments felt that they needed their own legislation to confront terrorism. *Id.*

¹⁰⁷ *Id.* § 22-3152(1).

The D.C. statute allows the inquiry to focus on the defendant's intent without the charge hinging on whether his or her actions were specifically enumerated in the statute. In August 2012, Floyd Lee Corkins opened fire on an unarmed security guard at the Family Research Council.¹⁰⁸ Corkins pled guilty to terrorism charges and signed a statement saying that he "targeted the Family Research Council because of its views, including its advocacy against recognition of gay marriage."¹⁰⁹ The United States Attorney assigned to the case stated that "[t]oday's guilty plea makes clear that using violence to terrorize political opponents will not be tolerated."¹¹⁰ The Corkins case shows that an attempted murder intended to send a political message is an example of terrorism under these statutes.

A similar case likely would not be eligible for a charge that falls within the federal crime of terrorism. Corkins did not target a unit of government, use a weapon of mass destruction, or have a connection to a foreign entity.¹¹¹ The nexus to terrorism was established because Corkins' actions were an attempt to coerce a civilian population or a unit of government.¹¹² A conviction under the D.C. statute allows for up to thirty years in prison, which brings forth strong condemnation of acts that are intended to intimidate or coerce civilians or the government.¹¹³

There may be some concerns that the D.C. statute encompasses too much activity, which will dilute the crime of terrorism and encompass protected activity. Congress does not want to indiscriminately expand the definition of terrorism to include activity that it should not.¹¹⁴ It is unclear if the D.C. statute would encompass such activity, but case law shows that New York's similar terrorism statute does not encompass ordinary criminal behavior.

¹⁰⁸ Press Release, U.S. Dep't of Justice, Virginia Man Pleads Guilty to Charges in Shooting of Security Guard at Family Research Council—Defendant Targeted Organization in Planned Attack (Feb. 6, 2013), <https://www.justice.gov/usao-dc/pr/virginia-man-pleads-guilty-charges-shooting-security-guard-family-research-council>. Corkins' conviction was the first under the statute. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ D.C. Code Ann. § 22-3152(8) (West 2001).

¹¹⁴ Deborah F. Buckman, Annotation, *Construction and Application of Federal Domestic Terrorism Sentencing Enhancement*, *U.S.S.G. § 3A1.4*, 186 A.L.R. Fed. 147, at § 2(a) (2003).

B. Murder in the Definition of Terrorism Does Not Indiscriminately Expand the Designation

New York State's terrorism law allows murder to be prosecuted as a crime of terrorism without encompassing common crimes such as gang violence. New York Penal Law § 490 ("New York statute") defines the crime of terrorism as "murder, assassination or kidnapping" done "with intent to intimidate or coerce a civilian population; influence the policy of a unit of government by intimidation or coercion; or affect the conduct of a unit of government."¹¹⁵

The law was designed to condemn large terror attacks, but it was also created to address and prosecute events like the 1994 murder on the Brooklyn Bridge.¹¹⁶ In that case, a gunman who attacked a van transporting young Jewish students across the Brooklyn Bridge was thought to be acting in retaliation for a recent attack on Muslims by a Brooklyn-born Jewish man in the West Bank.¹¹⁷ The shooting was viewed as an act of terrorism by many,¹¹⁸ and the New York Supreme Court alluded to the shooting as a means for extending the meaning of the New York statute to include "acts of a much smaller scale" than the September 11 attacks.¹¹⁹

However, the New York statute does not extend to more common criminal acts such as gang violence. The New York Court of Appeals has found that charging a gang member under the terrorism statute was inappropriate because the defendant did not intend to intimidate or coerce a civilian population.¹²⁰ Although the court stated that "residents of a single apartment building to a neighborhood, city, county, state or even a country" could constitute a civilian population, the term could not apply when the "objective [was] to intimidate or coerce other Mexican-

¹¹⁵ N.Y. PENAL LAW § 490.05 (McKinney 2018). The federal terrorism legislation is mentioned in the text of the code, but the legislature felt that "[a] comprehensive state law is urgently needed." *Id.* § 490.00 (McKinney 2018).

¹¹⁶ *Id.* The section states that the "attack[s] on the World Trade Center and the Pentagon underscore the compelling need for legislation," but also mentions the attack that occurred on the Brooklyn Bridge. *Id.*

¹¹⁷ Sam Roberts, *How to Find the Bridge? First, Pay Your Respects*, N.Y. TIMES (Dec. 27, 2009), <https://www.nytimes.com/2009/12/28/nyregion/28signs.html>.

¹¹⁸ *Id.*

¹¹⁹ *People v. Ferhani*, No. 2461/11, 37 Misc. 3d 1232(A), 2012 WL 6554892, at *2 (Sup. Ct. N.Y. Cnty. June 25, 2012).

¹²⁰ *People v. Morales*, 20 N.Y.3d 240, 247, 982 N.E.2d 580, 584–85, 958 N.Y.S.2d 660, 664–65 (2012).

American gangs.”¹²¹ This decision was based on the idea that the terrorism statute was not intended to reach “‘street crime’ and ‘ordinary violent crime.’”¹²² The New York statute includes murder but does not indiscriminately extend the definition of terrorism to include every violent felony.¹²³

The New York statute effectively reaches crime that should be categorized as terrorism. The wording of the statute allows the inquiry to focus on the intent of the defendant.¹²⁴ Congress limited the federal statute to specific acts in fear that the definition of terrorism would be used indiscriminately,¹²⁵ but the New York case law shows that expanding the actions that may constitute a crime of terrorism will not improperly encompass common criminal acts such as gang activity.¹²⁶ Congress should expand the federal definition in order to allow the federal crime of terrorism to focus on the intent of the defendant because state laws cannot adequately address national security concerns.

IV. THE FEDERAL CRIME OF TERRORISM STATUE NEEDS TO BE CHANGED

This section suggests changing the intent requirement as well as adding both murder and hate crimes to the list of offenses under the current federal crime of terrorism. State law enforcement cannot adequately address the threat posed by domestic extremists. Although state laws may encompass extremist activity in ways that the federal code does not, state laws do not trigger the same investigatory mechanisms or send the same message.¹²⁷ Federal agencies engage in information sharing and have investigatory powers that cross borders and allow for more cohesive and effective enforcement. In addition, federal law often signals to states and citizens that a given policy is important and should be recognized broadly.

The federal statute should allow the inquiry to focus on the intent of the defendant in determining whether the act constitutes a crime of terrorism; adding murder and hate crimes

¹²¹ *Id.* at 246–47, 982 N.E.2d at 584, 958 N.Y.S.2d at 664.

¹²² *Id.* at 249, 982 N.E.2d at 585–86, 958 N.Y.S.2d at 665–66 (quoting *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 581 n.7 (E.D.N.Y. 2005)).

¹²³ *Id.*, 982 N.E.2d at 586, 958 N.Y.S.2d at 666.

¹²⁴ *Ferhani*, 2012 WL 6554892, at *3.

¹²⁵ Buckman, *supra* note 114.

¹²⁶ *Morales*, 20 N.Y.3d at 249, 982 N.E.2d at 586, 958 N.Y.S.2d at 666.

¹²⁷ ATTORNEY GENERAL'S GUIDELINES, *supra* note 9, at 23.

would allow this to be the case. The federal terrorism statutes need to target acts of violence intended to coerce or intimidate a civilian population or the government without an arbitrary distinction that leaves some mass murders being designated as terrorism while some are not even considered eligible for the designation.¹²⁸

A. *Categorization of Terrorism Should be Based on Intent, Not Target or Method*

Categorizing an act as domestic terrorism should not hinge on whether the behavior or attempted action was in furtherance of one of the specific crimes listed in the statute.¹²⁹ The inquiry should focus on whether or not the group or individual intended to intimidate or coerce a civilian population or unit of government. Congress has reasons to deter the targeting of systems of transportation and government buildings, which the law will continue to do; however, the current manifestation of the statute leaves other vital institutions unprotected. Targeting of schools is not listed in the federal crime of terrorism, nor are churches or places of public performances such as theaters.¹³⁰

The current categorization of terrorism focuses on a list of facilities that were brainstormed at the time of drafting. The same can be said for the methods specified in the statute. Nuclear, biological, and chemical weapons can bring forth a catastrophic event, but the two most deadly terrorist attacks on United States soil since September 11, 2001 were carried out using means not listed under the federal crime of terrorism and that took place at locations not specifically listed in the statute.¹³¹ The crime of terrorism should be an act intended “to intimidate

¹²⁸ United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001).

¹²⁹ See United States v. Fidse, 778 F.3d 477, 481 (5th Cir. 2015); United States v. Awan, 607 F.3d 306, 314 (2d Cir. 2010); United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009); United States v. Benkahla, 530 F.3d 300, 311 (4th Cir. 2008).

¹³⁰ See 18 U.S.C.A. § 2332b(g)(5) (West 2015).

¹³¹ See Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Arrack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), <https://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html>; *US Terrorist Attacks Fast Facts*, CNN, <http://www.cnn.com/2013/04/18/us/u-s-terrorist-attacks-fast-facts/index.html> (last updated Mar. 1, 2018).

or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government” no matter what means are used.¹³²

B. Intent To Intimidate or Coerce a Civilian Population Should Be Included Within the Federal Crime of Terrorism

The definition of both international terrorism and domestic terrorism include acts intended “to intimidate or coerce a civilian population.”¹³³ This shows that terrorism does not necessarily have to target the government. The federal crime of terrorism statute does not currently apply to acts that are intended to intimidate or coerce a civilian population.¹³⁴ However, district courts are authorized to apply the domestic terrorism sentencing enhancement if the defendant commits a specified offense with the intent “to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹³⁵ The federal crime of terrorism should not be limited to acts against the government. Limiting the definition of the federal crime of terrorism to government targets creates confusion and incongruent definitions within the code.

C. Including Murder in the Statute Will Shift the Inquiry to Focus on Intent

Amending the statute to include murder as a specific act that may constitute the federal crime of terrorism to allow the inquiry to focus on whether or not the act was carried out with the intention to coerce or intimidate a civilian population or the government will eliminate the confusion associated with categorizing crimes as terrorism, and allow counterterrorism measures to be applied more thoroughly to domestic extremist groups. This amendment would not target any group based on beliefs nor would it unreasonably expand the scope of the definition.

¹³² See N.Y. PENAL LAW § 490.25 (McKinney 2018). See generally D.C. Code Ann. § 22-3152 (West 2001).

¹³³ See 18 U.S.C. § 2331 (2012).

¹³⁴ See 18 U.S.C.A. § 2332b(g)(5).

¹³⁵ United States v. Jordi, 418 F.3d 1212, 1216 (11th Cir. 2005) (quoting SENTENCING GUIDELINES MANUAL, *supra* note 9, at § 3A1.4 cmt. n.4).

Adding murder as a specific act that may constitute the federal crime of terrorism allows the categorization of terrorism to hinge on the intent of the defendant. As seen under the D.C. terrorism statute, if an individual or group attacks innocent people in order to further his or her ideology, including murder as an offense will catch everything that truly falls within the definition.¹³⁶ This includes the leftist extremists in D.C. as well as the right-wing extremist in Charlottesville.¹³⁷ This amendment should not bring forth concern that the definition of terrorism will be unreasonably expanded either.

The amendment will bring forth a more comprehensive definition of terrorism that does not leave the country debating over whether or not an act constitutes terrorism.¹³⁸ The inquiry will focus on the intent of the defendant and not include acts that should not fall within the definition. As seen under the New York statute, violence that is not intended to achieve one of the two specific outcomes associated with terrorism will not fall within the definition.¹³⁹ Although gang activity and other senseless forms of violence are problems that need to be addressed, this amendment will not confer the label of domestic terrorism to every murder. Terrorism should not become a phrase that is used “indiscriminately.”¹⁴⁰ Notably, Professor Jesse J. Norris also suggested that murder should be included in the definition of terrorism in order to expand its application.¹⁴¹

Although Norris offers respectable, intelligent changes to domestic terrorism law, if Congress changes the inquiry to whether the defendant had “the intent to advance, publicize or express an ideology” the courts will be left with more questions regarding what constitutes terrorism.¹⁴² The definition of terrorism should focus on whether the defendant intended to intimidate or coerce a civilian population or unit of government.¹⁴³ This is a standard that courts are familiar with

¹³⁶ See D.C. Code Ann. § 22-3152(8) (West 2001); Press Release, U.S. Dep’t of Justice, *supra* note 108.

¹³⁷ See Press Release, U.S. Dep’t of Justice, *supra* note 108; S.J. Res. 49, 105th Cong. (2017).

¹³⁸ Norris, *supra* note 72, at 292.

¹³⁹ *People v. Morales*, 20 N.Y.3d 240, 247–48, 982 N.E.2d 580, 584–85, 958 N.Y.S.2d 660, 664–65 (2012).

¹⁴⁰ Buckman, *supra* note 114.

¹⁴¹ See Norris, *supra* note 72, at 291.

¹⁴² *Id.* at 292.

¹⁴³ See 18 U.S.C. § 2331(5) (2012).

and apply today. It is also important to specify certain acts as federal crimes of terrorism in order to signal that certain entities and institutions need to be protected. Furthermore, it is important for law enforcement to strongly monitor the purchase, sale, and development of explosives specified in the statute. Norris is right to say that murder needs to be included within the terrorism framework in order to “encompass an even larger proportion of terrorists,” but the changes suggested in this Note allow the existing framework to remain intact while accomplishing a similar goal.¹⁴⁴ The current federal crime of terrorism reaches domestic acts, but adding murder as a specified act will bring forth a more evenhanded application of the framework.

The term “terrorism” is disproportionately associated with Muslims, and Muslim communities feel the impact of that association.¹⁴⁵ This has led to an egregious assumption that Islam is a religion filled with terrorists.¹⁴⁶ Federal law should never apply disproportionately to any sect of the population whether it be based on religion, ideology, or race. Members of Congress, federal agencies, and local law enforcement have acknowledged the risk presented by domestic extremists,¹⁴⁷ but including murder specifically within the definition of the federal crime of terrorism will allow the threat to be addressed.

Focusing the categorization of terrorism on the intent of the actor may be difficult because intent is hard to prove; however, the current statute already requires the intent to be present for an act to be considered a federal crime of terrorism.¹⁴⁸ The current statute limits the application to certain acts specified in the statute, but commission of the act does not automatically categorize the act as a federal crime of terrorism.¹⁴⁹ Under the

¹⁴⁴ *Id.*; see Norris, *supra* note 72, at 292.

¹⁴⁵ See Daniel Burke, *The Secret Costs of Islamophobia*, CNN (Nov. 15, 2016), <http://www.cnn.com/2016/09/23/us/islamerica-secret-costs-islamophobia/index.html>. “From 2001 to 2015, there were 2,545 anti-Islamic incidents targeting 3,052 Muslims.” *Id.* (citing *2015 Hate Crime Statistics*, FBI, <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf> (last visited Aug. 18, 2018)).

¹⁴⁶ See Burke, *supra* note 145. “Politicians have claimed that 85% of mosques are controlled by Islamic extremists and that Islam is a political system, not a religion, and thus not protected by the First Amendment.” *Id.*

¹⁴⁷ See generally S.J. Res. 49, 105th Cong. (2017); U.S. DEP’T OF HOMELAND SEC., *supra* note 102; KURZMAN & SCHANZER, *supra* note 55.

¹⁴⁸ 18 U.S.C.A. § 2332b(g)(5) (West 2015).

¹⁴⁹ *Id.*

suggested changes, murder will be added to the list so that, when carried out or attempted with the intent to intimidate or coerce a civilian population or the government, it will be eligible for the terrorism designation. The intent requirement works as a safeguard to ensure this designation is not expanded indiscriminately.¹⁵⁰

D. Adding Hate Crimes to the Statute Will More Adequately Cover Extremist Activity

Adding hate crimes as a specific act listed in the federal crime of terrorism statute will allow more acts perpetrated by domestic extremists to be categorized as terrorism and reinforce the notion that hate crimes are taken seriously by the federal government without eroding the need for hate crime statutes or indiscriminately expanding the federal terrorism framework. Hate crime statutes are an important part of the United States federal and state penal laws. These statutes send a strong message that crimes motivated by bigotry will not be tolerated.¹⁵¹ As discussed earlier, many violent acts by political extremists may constitute hate crimes because extremist violence often targets a specific group.¹⁵² Currently, the only groups whose conduct is adequately addressed by the terrorism framework are Islamic or anti-government extremists.¹⁵³

Adding hate crimes as a specific act listed in the federal crime of terrorism statute will bring racial, religious, and gender-based violence within the terrorism framework when the requisite intent is also present. This will allow for greater information sharing and investigations throughout the law enforcement community. Currently, a hate crime can only be considered a federal crime of terrorism if it is carried out with a weapon of mass destruction or carried out at a particular facility.¹⁵⁴ This is inadequate because hate crimes that are

¹⁵⁰ See *People v. Morales*, 20 N.Y.3d 240, 247, 982 N.E.2d 580, 585, 958 N.Y.S.2d 660, 665 (2012).

¹⁵¹ Harpreet Singh Saini, *There Ought to be a Law Against Hate*, N.Y. TIMES (July 27, 2015), <https://www.nytimes.com/2015/07/27/opinion/there-ought-to-be-a-law-against-hate.html>.

¹⁵² See BJELOPERA, *supra* note 83, at 7; Norris, *supra* note 72, at 262.

¹⁵³ Islamic extremists are often found to be “radicalized” by a foreign terrorist group thus giving their crime a transnational component, and anti-government extremists are likely to target government buildings which falls within the specified acts listed in 18 U.S.C.A § 2332b(g)(5). See 18 U.S.C.A. § 2332b(g)(5).

¹⁵⁴ See *id.* § 2332b.

intended to intimidate or coerce a civilian population or the government can be carried out in a wide range of ways not listed in the statute. When this intent is present, a hate crime should be considered terrorism under federal law.

Placing hate crimes within the framework of terrorism will reinforce the idea that hate crimes are offenses that are equally as serious as terrorism. As mentioned above, former Attorney General Loretta Lynch called hate crimes the “original terrorism” but acknowledged that a hate crime charge “may give the impression that the government ‘[does]n’t consider those crimes as serious.’”¹⁵⁵ This impression is likely derived from the idea that “‘terrorism’ is a phrase that carries far-reaching connotations,”¹⁵⁶ so when the Department of Justice seeks a hate crime conviction as opposed to a terrorist conviction, the public perceives the crime differently.¹⁵⁷ Hate crimes should be viewed as incredibly serious offenses, especially when they are carried out with the intent required to be considered federal crimes of terrorism.

Not all hate crimes will be considered acts of terrorism if these changes are implemented. A hate crime can be carried out against an individual with no intent to target a population as a whole. The act will not be considered a federal crime of terrorism if this intent is lacking. There will still be a need for a robust hate crime statute that addresses and deters isolated incidents that do not reach the level of terrorism.

Adding hate crimes as a specific act listed in the federal crime of terrorism statute will not indiscriminately expand the federal terrorism framework either. As mentioned, the terrorism categorization will only be given when the requisite intent is found.¹⁵⁸ Furthermore, hate crimes only prohibit willfully caused bodily harm.¹⁵⁹ This “does not include solely emotional or psychological harm to the victim,”¹⁶⁰ nor does it encompass thoughts, beliefs, or speech by the defendant.¹⁶¹ Placing hate crimes within the framework will only encompass willful bodily harm that includes the intent required under both the hate crime

¹⁵⁵ See *supra* note 99.

¹⁵⁶ See Buckman, *supra* note 114.

¹⁵⁷ See *supra* note 99.

¹⁵⁸ 18 U.S.C.A. § 2332b.

¹⁵⁹ Glenn v. Holder, 690 F.3d 417, 421–22 (6th Cir. 2012).

¹⁶⁰ *Id.* at 421 (quoting 18 U.S.C. § 249(c)(1) (2012)).

¹⁶¹ *Id.* at 421–22 (quoting H.R. REP. NO. 111-86, at 16 (2009)).

statute as well as the federal crime of terrorism statute, so there is no concern that this will impede constitutionally protected activity.

*E. Outlawing Material Support for Domestic Terror Groups
Would be Unconstitutional*

Outlawing material support for a domestic terror group would be unconstitutional. The federal government does not designate or publicly list domestic terrorist organizations.¹⁶² The federal government designates foreign terrorist organizations and that is the basis for the material support statute.¹⁶³ This statute makes it illegal to provide financial aid or recruit on behalf of groups such as al-Qaeda.¹⁶⁴ Even though creating a material support for domestic terror statute would likely be an effective measure for preventing violence,¹⁶⁵ such a statute would likely be unconstitutional.¹⁶⁶ It is not illegal to hold extremist beliefs or join most extremist groups due to First Amendment protections.¹⁶⁷ It is, of course, illegal to plan or act violently based on those beliefs,¹⁶⁸ but that conduct does not need a material support statute to be reached. Therefore, a material support statute for domestic terrorism may be effective, but it likely would be unconstitutional.

CONCLUSION

Federal terrorism law does not adequately address the threat posed by domestic extremists. The current law creates arbitrary lines that exclude some acts and include others without a focus on the intent of the defendant. Amending the specific acts that constitute the federal crime of terrorism to include murder and hate crimes will sufficiently broaden the framework to reach domestic extremist groups without diluting the designation of terrorism or unconstitutionally limiting freedom of association. Adding the intent to intimidate or coerce a civilian

¹⁶² BJELOPERA, *supra* note 83, at 9.

¹⁶³ 18 U.S.C.A. § 2339B (West 2015).

¹⁶⁴ *Id.* § 2339B; United States v. Hendricks, No. 1:16CR265, 2016 WL 4708631, at *3 (N.D. Ohio Sept. 17, 2016).

¹⁶⁵ See Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 480 (2014) (noting that the ban on providing material support to designated foreign terrorist organizations is the main legal tool in the war on terror).

¹⁶⁶ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

¹⁶⁷ See *United States v. Stewart*, 65 F.3d 918, 928 (11th Cir. 1995).

¹⁶⁸ *Id.* at 929.

population to the definition of the federal crime of terrorism will bring more congruence to the interpretation of the code as well as its enforcement. Congress has called for the Executive Branch to target domestic extremists, but the legislature has the power to enact changes that will truly allow the threats to be addressed. These changes will also bring a more cohesive definition of terrorism and ease the misperceptions regarding Islam. The current federal law surrounding terrorism creates confusion, one-sided enforcement, and does not allow law enforcement to adequately address domestic extremist groups. Congress must make these simple changes for the safety and security of the American public.