St. John's Law Review

Volume 96, 2022, Number 2 Article 4

Activist Extremist Terrorist Traitor

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ACTIVIST EXTREMIST TERRORIST TRAITOR

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INTRODUCTION

Abraham Lincoln had a way of capturing, rhetorically, the national ethos. The "house divided."[1] "Right makes might" at Cooper Union.[2] Gettysburg's "last full measure of devotion" and the "new birth of freedom."[3] The "mystic chords of memory" and the "better angels of our nature."[4] "[M]alice toward none," "charity for all," and "firmness in the right."[5] But Lincoln not only evaluated America's character; he also understood the fragility of those things upon which the success of the American constitutional experiment depended, and the consequences when the national ethos was in crisis. Perhaps no Lincoln speech better examines the threats to civil order and American constitutional government than his 1838 address to the Young Men's Lyceum of Springfield, Illinois: "The Perpetuation of Our

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[1] Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 62, 62 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, House Divided].

[2] Abraham Lincoln, Address at the Cooper Institute, New York City (Feb. 27, 1860), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 108, 130 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, Cooper Institute].

[3] Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 279, 279–80 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, Gettysberg].

[4] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 145, 155 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, First Inaugural Address].

[5] Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 319, 321 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, Second Inaugural Address].

Political Institutions."[6] Indeed, perhaps no speech is better suited to the dangers that American government and politics now face in our time.

The Lyceum speech first critiques mob violence and lawlessness, then addresses threats to institutions and order from political leaders themselves.[7] Lincoln first extols the virtues of American political institutions, but acknowledges that if danger "ever reach us, it must spring up amongst us."[8] The omen America then faced, Lincoln says, citing mob violence, was the "increasing disregard for law which pervades the country."[9] He laments "the growing disposition to substitute the wild and furious passions" for the authority of courts, and "the worse than savage mobs" for executive authority.[10] A "mobocratic spirit" takes hold when government is unable, or unwilling, to protect the citizenry from lawlessness and violence—and breaks the attachment of people to their government.[11] These mobs regard "Government as their deadliest bane," and "make a jubilee of the suspension of its operations; and pray for nothing so much, as its total annihilation."[12] Lincoln confessed that bad laws exist and that legal remedies for legitimate grievances sometimes do not.[13] But "[t]here is no grievance that is a fit object [for] mob law."[14]

Lincoln's answer: to make reverence for the law the Nation's "*political religion*,"[15] upon the altars of which Americans should "sacrifice unceasingly."[16]

Lincoln then asks why this state of affairs would pose a danger now to our political institutions; why is the risk now greater than before?[17] As the American experiment has succeeded, the chase for national success feels concluded: "This

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[6] Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois: The Perpetuation of our Political Institutions (Jan. 27, 1838), *reprinted in* SELECTED WRITINGS OF ABRAHAM LINCOLN 10, 10 (Herbert Mitgang ed., 1992) [hereinafter Lincoln, Young Men's].

[7] *Id.* at 11–13.

[8] *Id.* at 11.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 14.

[12] *Id.* at 13.

[13] *Id.* at 15.

[14] *Id.* at 16.

[15] *Id.* at 15.

[16] *Id.*

[17] *Id.* at 16.

field of glory is harvested, and the crop is already appropriated."[18] But, he says, "new reapers will arise, and *they*, too, will seek a field."[19] New political leaders—tyrants and demagogues, really—will not be satisfied to carry on the political institutions and traditions that the founding generation created.[20] "Towering genius," he says, "disdains a beaten path."[21] These new leaders will seek distinction of their own, possessing not only genius but "ambition sufficient to push it to its utmost stretch."[22] And in doing so, they may seek to tear down those solid institutions and traditions that have been built.[23]

Connecting parts one and two, Lincoln says the people will have to be "united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate his designs."[24] Moreover, during the Revolution, the people directed their passions against the British and toward liberty, but those feelings have now faded.[25] The Revolution may not be entirely forgotten, but the basest passions of the people are now more likely to be directed at one another, and to their government and their laws.[26] The passions, then, are what links the dangers of mob violence and lawlessness to the dangers that our political institutions face from ambitious political leaders.[27] If the people are divided, impassioned, warring with one another, and disobedient to the laws and to good order, the new reaper may more easily find success in his efforts, pull down what has been established and harvest something anew to satisfy his

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[18] *Id.* at 17.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* David Herbert Donald expresses confidence that Lincoln is here referring to someone like himself. *See* DAVID HERBERT DONALD, LINCOLN 81 (1995).

[23] Lincoln, Young Men's, *supra* note 6, at 17–18.

[24] *Id.* at 17.

[25] *Id.* at 18.

[26] *Id.*

[27] Donald notes that Lincoln failed to mention by name the one incident of mob violence that would have been most familiar to his Springfield audience: the mob attack in Alton, Illinois on Elijah Lovejoy, editor of an abolitionist newspaper. *See* DONALD, *supra* note 22, at 82. Donald notes that although Lincoln "deplored the Alton riot, he also implicitly censured Lovejoy's abolitionist agitation; both resulted from unbridled passions, which could lead to the overthrow of popular government." *Id.* Donald further explains that what Lincoln consistently feared was "uncontrolled emotion," and this extended to abolitionism as well as other political and social movements. *Id.*

ambitions.[28] In sum, passions—borne of political grievances and resentments—will break the bonds that attach the people to their laws and institutions, inspire violence, and create a breeding ground for a despot who will vanquish those institutions, satisfying his own appetites as well as the mob's.

Reason, then, "cold, calculating, unimpassioned reason, must furnish all the materials for our future support and defence."[29]

The Lyceum Address provides ample cause to reflect on America's current situation. Dangers to constitutional government arise when political passions produce lawlessness and violence, creating a more hospitable environment for tyrants and demagogues to thrive.[30] As it has in the past, and as it did in Lincoln's time, American government and political institutions today now face grave dangers posed by political grievances that turn violent, and by political leaders who seize upon a culture of impassioned grievance to gain and sustain power.[31]

Of course, as the Lyceum speech reminds us, domestic political violence is not new in American life. The early days of the Republic were marred by significant episodes of violence motivated by political protest, dissent, and accusations of disloyalty.[32] Indeed, Lincoln was, at least in substantial part, reacting to a long-running phenomenon in American political life, one that today we would often describe as domestic terrorism: domestic violent activity that is intended to coerce or intimidate the political community, or influence public governance.[33]

Unlike those that Lincoln addresses in the Lyceum speech, however, the current dangers come not just from mobs. They come, instead, from a vicious combination of organized groups,

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[28] Lincoln, Young Men's, *supra* note 6, at 19.

[29] *Id.*

[30] *See id.* at 16–17.

[31] For comprehensive assessments of the current threat environment, *see infra* Part II.

[32] *See generally* CARLTON F.W. LARSON, THE TRIALS OF ALLEGIANCE: TREASON, JURIES, AND THE AMERICAN REVOLUTION (2019) (providing a historical account of treasonous acts committed during the American Revolution, specifically in Pennsylvania, to show that the early days of the Republic often dealt with violent episodes).

[33] Though terrorism definitions are subject to debate, precise and authoritative definitions of terrorism—and specifically of domestic terrorism—are found in federal law. *See, e.g.*, 18 U.S.C. § 2331(5) (2018) (defining domestic terrorism). For more on the definitional debate, *see generally* Michal Buchhandler-Raphael, *What's Terrorism Got to Do With It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807 (2012).

small cells, and—perhaps most concerning—lone actors. These dangers are enhanced because larger extremist events are now sometimes comprised of loose elements of smaller extremist groups, many of which are not ordinarily ideological or philosophical mates, but have combined around a common goal that they will achieve through violent means.[34] Moreover, the resulting violence tends to be inspired and motivated by political grievances and resentments.[35] Consequently, the violence that today's extremists have perpetrated, and are prepared to perpetrate, on American soil is as much terrorism as the violence perpetrated by radical Islamic jihadists and their homegrown brethren who have brought violence and death to the American skies, to our political and financial centers, and even to our beloved sporting events.[36] It is as much terrorism as the hate-fueled racial violence that marked the mid-to-late nineteenth century and that continued into the twentieth.[37] And it is as much terrorism as the vengeful resentment toward the federal government that produced a massive explosion, and massive loss of life, at a federal building in Oklahoma City on an April morning nearly thirty years ago.[38]

Today's domestic terrorism often dominates our news. Robert Bowers awaits trial in federal court for allegedly entering the Tree of Life Synagogue in Pittsburgh in October 2018 during Sabbath services and killing eleven people.[39] According to Bowers' superseding federal indictment, Bowers had used a social media platform to post anti-Semitic slurs, such as "jews are the children of satan," and stated his desire to "kill Jews" while

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[34] *See* Cynthia Miller-Idriss & Brian Hughes, *Blurry Ideologies and Strange Coalitions: The Evolving Landscape of Domestic Extremism*, LAWFARE (Dec. 19, 2021, 10:01 AM), https://www.lawfareblog.com/blurry-ideologies-and-strange-coalitions-evolving-landscape-domestic-extremism [https://perma.cc/2SGB-MBPR].

[35] *See* BENNETT CLIFFORD & JON LEWIS, "THIS IS THE AFTERMATH": ASSESSING DOMESTIC VIOLENT EXTREMISM ONE YEAR AFTER THE CAPITOL SIEGE 33–34 (2002), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/This%20is%20the%20Aftermath.pdf [https://perma.cc/5RLD-4RQL].

[36] *See* Dennis Dworkin, *Terrorism: An American Story, in* THE CAMBRIDGE HISTORY OF TERRORISM 361, 382 (Richard English ed., 2021); *see also* United States v. Tsarnaev, 968 F.3d 24, 36–37 (1st Cir. 2020) (detailing Boston Marathon Bombing).

[37] *See* Dworkin, *supra* note 36, at 375.

[38] *See id.* at 380–81.

[39] *See generally* Superseding Indictment, United States v. Bowers, No. 18-292 (W.D. Pa. Jan. 29, 2019).

inside the Synagogue.[40] Patrick Crusius recently pleaded guilty to federal charges arising from a shooting spree at a Wal-Mart in El Paso, Texas in 2019, killing twenty-three people and injuring two dozen others.[41] Crusius' plea admitted that he is a white supremacist, that he posted a document online in which he complained about Hispanic immigration into Texas, and that he intended to kill Hispanics to deter them from entering the United States.[42] Multiple men, who are linked to a militia group in Michigan, were recently convicted and sentenced on federal charges arising from a plot to kidnap Governor Gretchen Whitmer in 2020.[43] Federal prosecutors described the case as one of domestic terrorism,[44] and multiple other State defendants have been convicted and sentenced for their roles in the plot, pursuant to Michigan's state terrorism law .[45] Additionally, on January 6, 2021, hundreds of protestors stormed the United States Capitol Building during the congressional certification of Joe Biden's electoral victory over Donald Trump in the 2020 presidential contest.[46] Many of the protestors used violent means to overwhelm Capitol security forces, assaulted law enforcement

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[40] *Id.* at 1–2. The superseding indictment further alleges that Bowers accused the Hebrew Immigrant Aid Society (HIAS) of bringing "hostile invaders to dwell among us." *Id.* at 1. Bowers also allegedly posted on gab.com, "HIAS likes to bring invaders in that kill our people. I can't sit by and watch my people get slaughtered. Screw your optics, I'm going in." *Id.*

[41] *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Texas Man Pleads Guilty to 90 Federal Hate Crimes and Firearms Violations for August 2019 Mass Shooting at Walmart in El Paso, Texas (Feb. 8, 2023), https://www.justice.gov/opa/pr/texas-man-pleads-guilty-90-federal-hate-crimes-and-firearms-violations-august-2019-mass [https://perma.cc/QBQ6-M4AV].

[42] *See id.*

[43] *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Final Defendant in Michigan Governor Kidnapping Plot Sentenced to Over 19 Years in Prison (Dec. 28, 2022), https://www.justice.gov/opa/pr/final-defendant-michigan-governor-kidnapping-plot-sentenced-over-19-years-prison [https://perma.cc/XS28-J926].

[44] *See* Superseding Indictment at 2, United States v. Fox, 520 F. Supp. 904 (W.D. Mich. 2021) (No. 1:20-CR-183).

[45] *See Men Convicted of Supporting Gretchen Whitmer Kidnapping Plot Given Lengthy Prison Sentences*, CBS NEWS (Dec. 15, 2022, 3:21 PM), https://www.cbsnews.com/news/gretchen-whitmer-kidnapping-plot-sentencing-joe-morrison-pete-musico-paul-bellar/ [https://perma.cc/2MUT-K5N8] (noting convictions for material support of terrorism under state law).

[46] *See* Merrick B. Garland, U.S. Att'y Gen., Remarks on the First Anniversary of the Attack on the Capitol (Jan. 5, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-first-anniversary-attack-capitol [https://perma.cc/RSU6-43NT].

officers, and took or destroyed property inside the Capitol.[47] As of January 2022, over 700 people connected to the incident had been charged criminally, with charges ranging from more serious felonies (such as seditious conspiracy, assaulting law enforcement officers, and obstructing an official proceeding) to lesser offenses of unlawfully entering the Capitol.[48] Other examples are unfortunately plentiful. But it suffices here to observe that experts assessing domestic terrorism have given us every reason to believe that these types of incidents could reoccur,[49] perhaps with even greater damage to our institutions.

Importantly, recognizing and condemning domestic terrorism is not an indictment of partisanship, of dissent, or even of the provocative in political discourse. Mere political dissent or opposition is not terrorism, and punishing it is contrary to our law and national values. Nor is it to condemn any particular viewpoint—domestic violent extremism runs the gamut of fanaticism on both the political Left *and* Right.[50] Nor is it to champion some vague notion of the "mainstream" in politics, such that competing views are always and unthinkingly

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[47] *Id.*

[48] *Id.*; The Justice Department has developed and regularly updates a website that tracks the individual cases. *See Capitol Breach Cases*, U.S. DEP'T OF JUST., U.S. ATT'Y'S OFF. D.C., https://www.justice.gov/usao-dc/capitol-breach-cases [https://perma.cc/4F3E-8DFN].

[49] *See infra* Part I. Indeed, in recent months, both New York and federal grand juries indicted Payton Gendron on a range of serious charges arising out of an incident in May 2022 in which Gendron opened fire in a Buffalo grocery store, killing ten people and injuring three others. *See* Jesse McKinley & Glenn Thrush, *Buffalo Shooting Suspect Is Charged with Federal Hate Crimes*, N.Y. TIMES (June 15, 2022), https://www.nytimes.com/2022/06/15/nyregion/buffalo-shooting-hate-crime-charges.html [https://perma.cc/SVW3-2WG8]. New York charged Gendron using its own domestic terrorism, hate crimes, and homicide law. *See* Press Release, Erie Cnty. Dist. Att'y's Off., Broome County Teen Indicted for Committing Domestic Act of Terrorism Motivated by Hate in Rampage Shooting at Buffalo Grocery Store (June 3, 2022), https://www2.erie.gov/da/index.php?q=press/broome-county-teen-indicted-committing-domestic-act-terrorism-motivated-hate-rampage-shooting- [https://perma.cc/FH3Z-5PX3]. The United States indicted Gendron on federal hate crimes and firearms offenses. *See* Indictment at 2–7, United States v. Gendron, No. 22-cr-0109 (W.D.N.Y. July 14, 2022). Gendron pleaded guilty in state court and received a life sentence. *See* Mark Morales, et al., *Buffalo Grocery Store Mass Shooter Apologizes for Racist Attack and Receives Sentence of Life in Prison*, CNN, https://www.cnn.com/2023/02/15/us/buffalo-tops-grocery-shooting-payton-gendron-state-sentencing/index.html [https://perma.cc/6J3N-GD6J] (Feb. 15, 2023, 6:56 PM).

[50] *See* FED. BUREAU OF INVESTIGATION & U.S. DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM 5 (2021) [hereinafter STRATEGIC INTELLIGENCE ASSESSMENT].

condemned as "extremism" or "terrorism." Thankfully, it may be rare that those in opposition to, in protest of, or even with monumental grievances against the current political order can be properly labeled terrorists. It may be similarly rare that even those at the fringes of political thought and rhetoric encourage or turn to violence to achieve their objectives. Not every activist is an extremist, and not everyone with extremist beliefs or sympathies will resort to violence, so as to become a terrorist. But many will. That is the reality that America has long had to endure, but that now seems as complex and challenging as ever. The criminal law must therefore be sufficient to meet the challenges to our social order and political institutions that this reality brings.

This Article thus addresses the intersection of violent crime and politics. The object of this Article is to evaluate the criminal law's response when the political activist becomes a violent extremist. When, then, is he a terrorist? When, if ever, is he a traitor? Beginning with existing assessments about the dangers posed by domestic violent extremism, this Article explores the centrality of criminal law enforcement as a domestic counterterrorism weapon. With attention to the violent extremist's unique mental state—the purpose, object, or goal that distinguishes both the terrorist and the traitor—the Article explores the possibility of new substantive criminal law tools to address these specific threats. The Article then examines our long-dormant, and strictly circumscribed, American treason law, with special attention given to treason's concept of Levying War. Under this rubric, domestic terror cases offer an opportunity—though a quite limited one, owing chiefly to the difficult treason mens rea—for reviving Levying War Treason and for achieving important goals in treating domestic extremists through the criminal justice system. Ultimately, this Article contends, prosecutors and legislators should rely on a comprehensive, rather than singular, approach—one that employs a full range of criminal law tools, accounts for the special purpose or motive of the actor, and that safeguards the institutions of government and protects against other harms that are specific to the domestic terrorism context—so as to make the criminal law an effective domestic counterterrorism weapon.

I. DOMESTIC TERRORISM THREAT ASSESSMENTS

Recent high-profile extremist activity and political violence—most notably, the events of January 6—has generated increased attention to domestic terrorism by American national security and law enforcement communities.[51] Multiple federal law enforcement and intelligence agencies—including the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS), and Office of the Director of National Intelligence (ODNI)—conduct research on domestic terrorism and assess domestic terror threats in the United States. This work has been amplified in light of the domestic terror activity in the United States in recent years, and the growing threat that it poses. The most recent conclusions, which are consistent with those of private groups and academics that track domestic extremism, are ominous and suggest real concern over the continuing prospect of political extremism and attending political violence in the country.[52] Moreover, these threats cut across a wide range of groups, political issues, and specific grievances, thus revealing the factual basis for the kinds of purposes and motivations that inform the use of the "terrorism" label.[53]

A. Law Enforcement and Intelligence Community Assessments

In March 2021, ODNI released an unclassified report stating that the American Intelligence Community "assesses that domestic violent extremists (DVEs) who are motivated by a range of ideologies and galvanized by recent political and societal events in the United States pose an elevated threat to the Homeland in 2021."[54] ODNI stated that the DVEs would be motivated by racial and ethnic biases and "perceived government overreach," as well as by "[n]ewer sociopolitical developments," including election fraud, the "emboldening impact" of the Capitol breach, COVID-19, and "conspiracy theories promoting violence."[55] According to the Intelligence Community, lone actors

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[51] *See* CLIFFORD & LEWIS, *supra* note 35, at 35.

[52] *See infra* Part I.

[53] *See* STRATEGIC INTELLIGENCE ASSESSMENT, *supra* note 50, at 5.

[54] OFF. OF THE DIR. OF NAT'L INTEL., DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 2 (2021) [hereinafter ODNI DVE THREAT ASSESSMENT].

[55] *Id.*

or small cells pose a greater threat than organizational action.[56] Lone actors and small cells, moreover, are especially difficult to detect because they can be independently radicalized, "mobilize discretely," and have "access to firearms."[57] Among DVEs, the "most lethal . . . threats" are those that come from racially-motivated violent extremists (RMVEs) and militia extremists.[58] And among RMVEs, white supremacists possess the "most persistent and concerning transnational connections" because they communicate with like-minded people outside of the United States, including foreign travel to network with other white supremacists.[59]

In May 2021, the DHS and the FBI released a strategic intelligence assessment that was consistent with ODNI's report, indicating that the biggest threat to the homeland comes from lone offenders, who are often radicalized online and develop a variety of socio-political views and goals that they hope to carry out through violent means.[60] These include racially or ethnically motivated violent extremists, anti-government violent extremists, animal rights and environmental violent extremists, abortion-related violent extremists, and others.[61]

In August 2021, the National Terrorism Advisory System at DHS issued a Bulletin focused on threats posed by "grievance-based violence," specifically citing grievances related to COVID-19-based public health measures.[62] It also cited threats that

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[56] *Id.*

[57] *Id.*

[58] *Id.* For analysis of the white supremacist threat as a transnational one, see Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059, 1059 (2021); Jason J. Sullivan-Halpern, *The Globalization of Hate: Are Domestic Terrorism Laws Sufficient to Quell New Threats From Alt-Right Lone-Wolf Extremists?*, 9 PA. ST. J.L. & INT'L AFFS. 133, 138 (2020).

[59] *See* ODNI DVE THREAT ASSESSMENT, *supra* note 54, at 2; *see also* Johnson, *supra* note 58, at 1070 (stating that white supremacist groups "are now motivated by a common global ideology shared by white supremacists around the world.").

[60] *See* STRATEGIC INTELLIGENCE ASSESSMENT, *supra* note 50, at 2.

[61] *Id.* at 5. Shortly after the release of the ODNI report and the FBI/DHS report, the Biden White House released its National Strategy for Countering Domestic Terrorism. *See generally* NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021), https://int.nyt.com/data/documenttools/biden-s-strategy-for-combating-domestic-extremism/22ddf1f2f328e688/full.pdf [https://perma.cc/QTR5-TJCP]. The National Security Council's report relies on some of the assessments included in this Article. *See id.* at 6.

[62] U.S. DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN 1 (Aug. 13, 2021), https://www.dhs.gov/sites/default/files/ntas/alerts/21_0813_ntas_bulletin_all-sectors.pdf [https://perma.cc/6TM5-U5BF].

could be inspired by foreign terrorists or influences, noting the upcoming September 11 anniversary and the recent release by al Qaeda in the Arabian Peninsula (AQAP) of an English-language version of its jihadist magazine, *Inspire*,[63] as these could influence Americans who are "susceptible" to violent extremism.[64] The Bulletin warned of the increased use of online spaces in which political extremism spreads and which helps to promote political violence.[65]

Then, in November 2021, the DHS warned yet again of the risk of political violence arising from domestic extremism, although it cited no credible, imminent threat at the time.[66] This Bulletin stated that from the end of 2021 into 2022, RMVEs and anti-government/anti-authority violent extremists "will continue to pose a threat to the United States."[67] The Bulletin again cited COVID-19 "stressors" and the possibility of additional public health restrictions to accompany new COVID-19 variants as factors in assessing these extremist threats.[68] The Bulletin further cited increased public gatherings and re-openings as potential targets of extremist violence, as well as political outrage over the influx of Afghan nationals into the country as a result of America's military withdrawal from Afghanistan.[69] Moreover, the Internet continues to serve as a place of both inspiration and instruction for domestic terrorism.[70] According to DHS, fueled by these political grievances related to COVID-19 restrictions, immigration, and religion, violent extremists will "continue to derive inspiration from and obtain operational guidance . . . through the consumption of information shared in online forums."[71]

While these most recent threat assessments have been issued after the events of January 6 and the inauguration of President Joe Biden, the Government's attention to domestic

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] U.S. DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN 1 (Nov. 10, 2021) [hereinafter NTAS BULLETIN OF NOV. 10, 2021], https://www.dhs.gov/sites/default/files/ntas/alerts/21_1110_ntas-bulletin.pdf [https://perma.cc/FD9U-PHJL].
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1–2.

terror threats also took some shape in previous years, and thus under both Democratic and Republican presidential administrations.[72]

In October 2020, before the presidential election, the Trump Administration's Department of Homeland Security issued a threat assessment in which it stated that, "Ideologically motivated lone offenders and small groups pose the most likely terrorist threat to the Homeland, with Domestic Violent Extremists presenting the most persistent and lethal threat."[73] DHS assessed that the country's "political tensions" would continue to "drive an elevated threat environment" into 2021.[74] Domestic extremists would continue to be motivated by grievances based on party affiliation and policy preferences, and the domestic situation surrounding COVID-19 would create an environment in which extremist grievances—especially those of anti-government extremists—could grow and present opportunities for mobilization.[75] "Among DVEs," DHS assessed, RMVEs, especially white supremacists, "will remain the most persistent and lethal threat in the Homeland."[76] The report noted that between 2018 and 2019, the incidents of attacks and deaths perpetrated by Homegrown Violent Extremists (HVEs) were lower than that of DVEs generally, and far lower than that of white supremacists, who perpetrated half of all attacks and caused the majority of extremist-inspired deaths.[77]

FBI Director Christopher Wray articulated these same concerns before the House Committee on Homeland Security in September 2020.[78] "The greatest threat we face in the Homeland is that posed by lone actors . . . who look to attack soft targets

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[72] *See generally* STRATEGIC INTELLIGENCE ASSESSMENT, *supra* note 50. From 2017 to 2019, the FBI was conducting about 1,000 domestic terrorism investigations each year, and from 2015 to 2019, 846 persons were arrested for domestic terrorism-related activity, by the FBI or in coordination with the FBI. *Id.* at 21–22; *see also* NAT'L SEC. COUNCIL, *supra* note 61, at 5–6 (identifying previous efforts by the federal government to respond to domestic terror).

[73] U.S. DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 17 (2020).

[74] *Id.*

[75] *Id.* at 17–18.

[76] *Id.* at 18.

[77] *Id.*

[78] *Worldwide Threats*: *Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 2–3 (2020) [hereinafter *Worldwide Threats*] (statement of Christopher A. Wray, Director, Federal Bureau of Investigation).

with easily accessible weapons," Wray said,[79] citing both DVEs and HVEs and noting that 2019 was the deadliest year for domestic extremism since 1995, the year of the bombing of the Murrah Federal Building in Oklahoma City.[80] Director Wray told the Committee that "DVEs pose a steady and evolving threat of violence and economic harm" to the country.[81] "Trends may shift," he said, "but the underlying drivers for domestic violent extremism—such as perceptions of government or law enforcement overreach, socio-political conditions, racism, anti-Semitism, Islamophobia, misogyny, and reactions to legislative actions—remain constant."[82] Again, as Wray explained, the primary DVE threat comes from RMVEs, who "were the primary source of ideologically-motivated lethal incidents and violence in 2018 and 2019 and have been considered the most lethal of all domestic extremists since 2001."[83]

Director Wray offered a similar evaluation to the Senate Judiciary Committee in March 2021, though he noted the rise of anti-government/anti-authority extremists, including militia groups and anarchists.[84] White supremacist DVEs were the most lethal threats in 2018 and 2019, but three of the four DVE attacks in 2020 were perpetrated by anti-government/anti-authority extremists, he explained.[85] By the time of his testimony to the Senate Committee on Homeland Security and Governmental Affairs in September 2021, Wray's assessment had evolved even further.[86] He explicitly referred to the January 6 attacks as domestic terrorism, and noted that the primary threats now came from RMVEs and anti-government/anti-authority extremists.[87] Wray also noted that the FBI had

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[79] *Id.* at 2.

[80] *Id.* at 3.

[81] *Id.*

[82] *Id.*; *see also* Johnson, *supra* note 58, at 1078–98 (describing the various crises of 2020 that further fueled white supremacist extremism).

[83] *Worldwide Threats*, *supra* note 78, at 3 (statement of Christopher A. Wray).

[84] *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats*: *Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 3 (2021) (statement of Christopher A. Wray, Director, Federal Bureau of Investigation).

[85] *Id.*

[86] *See Worldwide Threats*: *Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 116th Cong. 3–4 (2021) (statement of Christopher A. Wray, Director, Federal Bureau of Investigation).

[87] *Id.*

"surged resources to our domestic terrorism" since 2020, increasing personnel by 260 percent, while still focusing on international terror threats like al Qaeda and the Islamic State.[88]

The danger has become even more complicated. New domestic extremist coalitions are emerging, comprised of groups that might ordinarily exist at opposing ends of the ideological spectrum but can act in concert when they share a common grievance or goal, even if only temporarily.[89] Imagine a neo-Nazi group combining with environmental extremists, or a militia group joining forces with animal rights extremists; all with the shared goal of overthrowing the government. According to Cynthia Miller-Idriss and Brian Hughes, this fragmenting and reassembling of extremist groups presents new challenges for counterextremism policy.[90] These experts account for the "muddling of ideological beliefs" among extremists by focusing on four factors: mobilization around concepts (e.g., a second civil war, or threats to Western values), rather than ideologies; opportunities for convergence at events that may produce political violence (e.g., state capitol and United States Capitol protests); "tactical convergence," which allows seemingly opposing ideologies to act together to achieve common goals like the overthrow of the existing social order; and communication infrastructure, notably online and social media platforms which allow people to move easily from one extremist ideology to another.[91] Miller-Idriss and Hughes assert that existing counterextremism tools are "woefully inadequate" to meet the challenges posed by this phenomenon.[92]

Also troubling is the "insider threat," notably the prevalence among today's domestic violent extremists of those with current or prior military or law enforcement service.[93] These individuals

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[88] *Id.* at 2. For a fuller understanding of the FBI's procedures for opening and managing a terrorism investigation, see STRATEGIC INTELLIGENCE ASSESSMENT, *supra* note 50, at 10–12.

[89] *See* Miller-Idriss & Hughes, *supra* note 34.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *See* Mary McCord, *Combating Domestic Extremism Means Combating the Insider Threat in Law Enforcement*, ATL. COUNCIL (Sept. 7, 2021) (emphasis omitted), https://www.atlanticcouncil.org/commentary/article/combating-domestic-extremism-means-combating-the-insider-threat-in-law-enforcement/ [https://perma.cc/E5QQ-9LRK] (stating that "[d]ozens of law enforcement officers have been investigated or charged" for participation in the January 6 Capitol breach); Seth G.

are of particular concern because of their specialized tactical and weapons training and experience, their public positions of authority and respect, and because they have special obligations to support the Constitution and rule of law. As regards the military, specifically, the recently-authorized Counter Extremist Activity Working Group at the Defense Department issued a report in December 2021 describing its findings and suggesting new efforts to address extremism among servicemembers and civilian personnel.[94] The Working Group stated that although prohibited extremist activity among servicemembers was relatively rare, the small number of cases nonetheless pose problems for safety and unit cohesion.[95] It is also, as Secretary Austin stated in a Stand Down memorandum in February 2021, incompatible with a servicemember's constitutional oath.[96] The report describes several mitigation measures to be taken within the Defense Department.[97]

Jones, et al., *The Military, Police, and the Rise of Terrorism in the United States*, CTR. FOR STRATEGIC & INT'L STUD. 1 (2021), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210412_Jones_Military_Police_Rise_of_Terrorism_United_States_1.pdf [https://perma.cc/FL9J-MZUL] (noting that percentage of active duty and reserve military personnel involved in domestic terror incidents rose from 1.5% in 2019 to 6.4% in 2020, with similar increases in law enforcement involvement); Josh Margolin, *White Supremacists 'Seek Affiliation' With Law Enforcement to Further Their Goals, Internal FBI Report Warns*, ABC NEWS (Mar. 8, 2021, 5:05 AM), https://abcnews.go.com/US/white-supremacists-seek-affiliation-law-enforcement-goals-internal/story?id=76309051 [https://perma.cc/FAD5-UDMU] (citing FBI report showing that right-wing extremist groups want to affiliate with law enforcement and military personnel to further extremist goals).

[94] *See* U.S. DEP'T OF DEF., REPORT ON COUNTERING EXTREMIST ACTIVITY WITHIN THE DEPARTMENT OF DEFENSE 3 (2021).

[95] *See id.* at 8.

[96] *See id.* at 6; *see also* Memorandum from Lloyd Austin, U.S. Sec'y of Def., to Senior Pentagon Leadership Def. Agency & Dep't of Def. Field Activity Dirs. (Feb. 5, 2021), https://media.defense.gov/2021/Feb/05/2002577485/-1/-1/0/stand-down-to-address-extremism-in-the-ranks.pdf [https://perma.cc/22NS-M5ZU] (directing commanders and supervisors to conduct one-day stand down on extremism).

[97] U.S. DEP'T OF DEF., *supra* note 94, at 9, 12–14. The Working Group has, among other actions, adopted revisions to the Department of Defense's definition of prohibited activities; updated checklists for servicemembers who are transitioning out of active service (via separation or retirement) that focus on training and recruiting by extremist groups; updated screening questionnaires to obtain information about current and previous extremist activity; and commissioned a study on extremist activity in the Defense Department's Total Force. *Id.*

B. Concluding Thoughts on Addressing the Threats

These assessments reveal a palpable and growing threat to Americans, and their political institutions, from domestic extremism and terrorism. The threat is diverse. It comes from groups as well as lone actors, from viewpoints and ideologies across a wide range of issues, and from combinations of actors with varied ideologies and grievances, as well as those with military and law enforcement backgrounds. The threat is exacerbated by online and social media outlets that provide inspiration, and a forum, for political activism that can originate as, or transform into, extremism that can then transform into violence. Finally, the threat is also political, driven by a culture of grievance and resentment, based substantially on partisanship, ideology, and public policy. It is this latter component of the assessments, once combined with violent action, that transforms mere political grievance or activism into a genuine *terrorism* threat.

Moreover, it is not simply that the threat is fueled by politics; it is also that political institutions, as well as political and administrative leaders, are now special targets of interest. As the National Strategy on Countering Domestic Terrorism from June 2021 asserts, "Domestic terrorist attacks in the United States also have been committed frequently by those opposing our government institutions."[98] The clearest recent examples are the January 6 Capitol breach—recall the chants of "Hang Mike Pence!"[99]—and the alleged plot to kidnap Governor Whitmer (a plot that also included a second Democratic Governor).[100] But the NTAS Bulletin from November 2021 indicates that government actors generally, including public health officials, may be future targets, especially if COVID-19 restrictions persist or are

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[98] *See* NAT'L SEC. COUNCIL, *supra* note 61, at 5.

[99] *See* Rashika Jaipuriar, *Trump Said It Was 'Common Sense' for Capitol Rioters to Chant 'Hang Mike Pence'*, USA TODAY (Nov. 12, 2021, 7:39 PM), https://www.usatoday.com/story/news/politics/2021/11/12/donald-trump-rioters-chanting-hang-mike-pence-common-sense/8594353002/ [https://perma.cc/HY67-8MEU].

[100] Press Release, Mich. Dep't of Att'y Gen., *supra* note 43. The White House also notes the killing of five police officers by an anti-government extremist in Dallas in 2016, the lone gunman who shot multiple victims at a congressional baseball practice in Virginia in 2017, and the 1995 Oklahoma City bombing. *See* NAT'L SEC. COUNCIL, *supra* note 61, at 5.

enhanced.[101] This risk to institutions and specific officials follows naturally from the rise of anti-government extremist activity (notably among militia groups), which recent threat assessments have identified with special interest.[102] So while not every attack will target government institutions or officials, those that do raise unique concerns about the health and stability of our institutions, the rule of law, and our capacity for protecting both.

Are there, then, new criminal law tools or approaches that can meaningfully address terror threats of this kind? The kinds of non-criminal approaches that may have dominated the response to the international terrorism of the last two decades—military action, foreign intelligence gathering, and even diplomatic work—are ill-fitted to the domestic terror context. Although foreign intelligence gathering, terrorist financing structures, and other international efforts will help to better understand how foreign actors may influence domestic extremism,[103] those efforts must support a prominent criminal law enforcement approach, rather than a military one. Of course, many terrorism and extremism experts agree that mitigation efforts that focus on prevention and deradicalization, and the pernicious effects of online and social media inspiration, are necessary to effectively combat the threat.[104] While criminal law cannot do *all* of the work against domestic extremism, criminal law must nonetheless be taken seriously as a counterterrorism tool, particularly where mitigation efforts are ineffective, or fail, and violence occurs.

II. DOMESTIC TERRORISM AND FEDERAL CRIMINAL LAW

In addition to the increased attention to domestic extremism and terrorism in the security, intelligence, and law enforcement

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[101] *See* NTAS BULLETIN OF NOV. 10, 2021, *supra* note 66, at 1.

[102] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., *supra* note 73, at 3–4; NTAS BULLETIN OF NOV. 10, 2021, *supra* note 66, at 1; ODNI DVE THREAT ASSESSMENT, *supra* note 54, at 2. For a discussion of militia groups and the evolution of their anti-government activities, *see generally* Catrina Doxsee, *Examining Extremism: The Militia Movement*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 12, 2021), https://www.csis.org/blogs/examining-extremism/examining-extremism-militia-movement [https://perma.cc/8Z7N-WV2Q].

[103] *See* NAT'L SEC. COUNCIL, *supra* note 61, at 17–18 (discussing the need to "illuminate transnational aspects of domestic terrorism").

[104] *See generally* RYAN ANDREW BROWN ET AL., VIOLENT EXTREMISM IN AMERICA: INTERVIEWS WITH FORMER EXTREMISTS AND THEIR FAMILIES ON RADICALIZATION AND DERADICALIZATION (2021) (describing mitigation strategies).

apparatus of the United States, the growth and threat of domestic political extremism has produced a second notable effect: increased calls for new criminal legislation.[105] There is robust debate about this in the existing literature and commentary on domestic extremism. That material reflects a range of investigative, prosecutorial, and penal reforms. The gravity of the threat suggests that all of these reforms, rather than any single approach, would make the criminal law a more effective counterterrorism tool. But any new criminal legislation that relies upon a formal definition of terrorism will require careful attention not simply to the actions of violent extremists, but to their underlying and distinguishing purposes, goals, and even motivations.

A. Existing Definitions and Criminal Statutes Applicable to Domestic Terrorism

The threat assessments notwithstanding, there is no federal criminal offense of domestic terrorism. Instead, federal criminal law includes *definitions* of both international terrorism and domestic terrorism,[106] and then supplies a constellation of criminal offenses that are conventionally applied in terrorism's context (some of them with elements explicitly linking the offense to terrorism).[107] Federal criminal law also punishes domestic terrorism specifically, using the existing definitions,[108] and also contains provisions for enhancing punishments for terrorism through the Federal Sentencing Guidelines.[109] But "domestic terrorism," as such, is not an offense. Should it be?

Under Section 2331(5) of Title 18, [110] domestic terrorism requires acts "dangerous to human life that are a violation of the criminal laws of the United States or of any State."[111] Note that the act requirement for domestic terrorism is narrower from that

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[105] *See generally* H.R. 350, 117th Cong. (2022).

[106] *See* 18 U.S.C. § 2331(1), (5) (2018).

[107] For a helpful and comprehensive analysis of the substantive criminal laws that are typically used in domestic terrorism cases, PETER G. BERRIS ET AL., DOMESTIC TERRORISM: OVERVIEW OF FEDERAL CRIMINAL LAW AND CONSTITUTIONAL ISSUES 2–44 (July 2, 2021).

[108] *See, e.g.*, 18 U.S.C. § 1505 (enhancing punishment where offense involves domestic terrorism); *id.* § 1001 (enhancing punishment from five years to eight years where offense involves domestic terrorism).

[109] *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2021).

[110] 18 U.S.C. § 2331(5).

[111] *Id.* § 2331(5)(A).

of international terrorism, defined in section 2331(1).[112] There, an act of international terrorism includes any violent act *or* act dangerous to human life.[113] So, one may commit an act of violence that is not dangerous to human life—say, an aggravated battery—and it may still be called *international* terrorism.[114] But an act must be dangerous to human life to qualify as *domestic* terrorism.[115] This seems an odd incongruity, lending further support to the criticism that international and domestic terrorism are treated differently in federal criminal law without much justification.[116]

Beyond the acts that could qualify as domestic terrorism, the key to distinguishing the terrorist is the relevant mental state driving the acts. Definitionally, this distinguishes the domestic terrorist from the perpetrator of a non-terrorism crime.[117] In Section 2331(5), the relevant acts must appear to be intended to (1) "intimidate or coerce a civilian population"; or (2) "influence the policy of a government by intimidation or coercion"; or (3) "affect the conduct of government by mass destruction, assassination, or kidnapping."[118] Finally, the acts must "occur primarily *within* the territorial jurisdiction of the United States," thus distinguishing domestic from international terrorism.[119]

Another statute—the definition section of the statute criminalizing terrorism transcending national boundaries, 18 U.S.C. section 2332b(g)(5)—also defines a "[f]ederal crime of terrorism."[120] This provision is drafted so as to encompass either

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[112] *Id.* § 2331(1).

[113] *Id.* § 2331(1)(A); *see also* 6 U.S.C. § 101(18) (2018) (defining terrorism for homeland security purposes). The definition of terrorism there (including the mens rea) is identical to section 2331(5), except that it adds the following to the act requirement: "or [is] potentially destructive of critical infrastructure or key resources." *Id*. The inclusion of this language broadens the prohibited act to cover, for example, attacks perpetrated through cyberspace, and that are neither violent nor necessarily dangerous to human life.

[114] *See* 18 U.S.C. § 2331(1).

[115] *Id.* § 2331(5)(A).

[116] *See* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism,* 117 MICH. L. REV. 1333, 1337 (2019).

[117] *See* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 53–54 (5th ed. 2018). Abrams discusses the terrorism purpose or motive in the existing definitions, but also notes that many "terrorism" offenses do not rely on these definitions, and thus do not rely on the unique terrorism purpose or motive.

[118] 18 U.S.C. § 2331(5)(B).

[119] *Id.* § 2331(5)(C) (emphasis added).

[120] *Id.* § 2332b(g)(5).

international or domestic terrorism. It states that a federal crime of terrorism is an "offense that . . . is *calculated* to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and is a violation of any of over fifty distinct criminal statutes with a presumed nexus to terrorism.[121] Notice that in this statute, the relevant mens rea—the unique term "calculated," meaning specifically intended, or with conscious object[122]—is narrower than that of Section 2331(5). Rather, whereas in Section 2331(5) mere *appearance* of a relevant intent, and mere intent to intimidate or coerce a civilian population, suffice, in Section 2332b influence and coercion must be coupled with influencing or affecting government conduct.[123]

Congress should resolve the inconsistency between these two definitions with respect to the terrorism purpose or object. The inconsistency means not only that federal criminal law contains conflicting understandings of how terrorism is defined, and what mental state distinguishes the terrorist, but also that Congress would be forced to choose between these two conflicting understandings when crafting new terrorism legislation.[124] Defining terrorism is hardly easy, of course, but for purposes of federal criminal law, Congress could authoritatively create uniformity and eliminate confusion about the distinctive purpose that makes one a domestic terrorist.

Notwithstanding these definitions, absent a specific statute making domestic terrorism a criminal offense, federal prosecutors today rely on an array of existing statutes, some of which contain a specific nexus to terrorism but many of which do not. The menu is substantial, including the so-called "boom" crimes, which allow criminal prosecution after a terror incident has occurred,[125] and the so-called "[l]eft of boom" crimes, those inchoate or precursor offenses that allow law enforcement to

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[121] *Id.* (emphasis added).

[122] *See* United States v. Ansberry, 976 F.3d 1108, 1127 (10th Cir. 2020) (discussing cases interpreting "calculated" for purposes of applying Section 2332b(g)(5)).

[123] *Id*. at 1127–28.

[124] *See infra* Section III.C.

[125] *See* BERRIS ET AL., *supra* note 107, at 9–19; *See* Barbara McQuade, *Proposed Bills Would Help Combat Domestic Terrorism*, LAWFARE (Aug. 20, 2019, 8:49 AM), https://www.lawfareblog.com/proposed-bills-would-help-combat-domestic-terrorism [https://perma.cc/578G-SFNJ].

thwart a terror plot once it is set in motion but before brought to fruition.[126] Even one of the material support statutes, 18 U.S.C. Section 2339A, while ordinarily used in the context of international terrorism, could be employed in a domestic terror case.[127] But this is not the only pertinent statute.

Other statutes that are not typically understood as "terrorism" offenses may be useful in the terrorism context—for example, the firearm statutes,[128] and the hate crimes and other civil rights statutes.[129] These statutes tend to use conventional mens rea terminology, but none include the specific terrorism mens rea language that characterizes the preceding definitions in federal criminal law.[130] For example, just as the hate crimes enforcement statute incorporates the unique motivation that makes something a hate crime (e.g., animus based on race, or gender, or religion),[131] so, too, does the federal criminal law's definitional understanding of domestic terrorism incorporate language that transforms a domestic criminal act into one of domestic terrorism specifically. This additional and special purpose, then—the unique terrorism mens rea—goes beyond the general mens rea of the offense. It is essential to understanding

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[126] *Id.* These may include conspiracy, 18 U.S.C. § 371 (2018), and attempt provisions of specific offenses. Federal prosecutors also have the advantage of favorable complicity rules: the accomplice liability statute, *id.* § 2, and the *Pinkerton* Doctrine, making any conspirator guilty of any substantive crime that is committed by any member of the conspiracy as long as the crime is within the scope of the conspiracy or is reasonably foreseeable. *See* Pinkerton v. United States, 328 U.S. 640, 643 (1946); *see also* BERRIS, ET AL., *supra* note 107, at 41–44 (discussing conspiracy, solicitation, and attempt).

[127] *See* 18 U.S.C. § 2339A. Distinguish this offense from the other material support statute, 18 U.S.C. § 2339B, which prohibits material support for designated foreign terrorist organizations. 18 U.S.C. § 2339A. Could the Government formally designate domestic organizations as terror groups? *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010). Some believe that designation would raise serious civil liberties concerns. *See* David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 173 (2012). Others argue these concerns are overstated. *See* Jimmy Gurulé, *Criminalizing Material Support to Domestic Terrorist Organizations: A National Security Imperative*, 47 J. LEGIS. 8, 30–35 (2021).

[128] *See* 18 U.S.C. § 924(c).

[129] *Id.* § 249.

[130] *See* ABRAMS, *supra* note 117, at 54–55. Abrams notes the unique feature of administrative decision-making (in the form of Attorney General certification) in applying Section 2332b. *Id.* at 53–54.

[131] *See* 18 U.S.C. § 249; *see also* 18 U.S.C. § 247 (obstructing persons in exercise of religious beliefs); 18 U.S.C. § 248 (obstructing access to reproductive health services).

who is a terrorist for purposes of federal criminal law's terrorism definitions. And yet, it is not essential for the use of the "terrorism" label in federal criminal law more broadly, for that label attaches too many offenses that do not rely on the definitions in Sections 2331(5) and 2332b(g)(5).[132] This, too, is an odd incongruity, one that Norman Abrams characterizes as a "reluctance" to make a terrorism purpose or motive an element of the offense generally, a reluctance he sees as unique to federal terrorism law.[133] Consequently, existing federal criminal law characterizes crimes as "terrorism" contextually, rather than definitionally—that is, it criminalizes conduct that occurs generally in a terrorism context, but relies on no specific definition of terrorism in order to prove the offense.[134]

Should, then, Congress create a crime of domestic terrorism, or is the existing menu of prosecutorial options sufficient? Ordinarily, punishing "terrorism" would account for the actor's mens rea either by creating an offense that occurs generally in the terrorism context, or by relying on the federal criminal law's definitions and specifically identifying the unique state of mind that makes a terrorist a terrorist, as opposed to a criminal of some other kind. Notably, though, the reluctance that Abrams identifies is diminished in the current debate on new domestic terrorism legislation, much of which would rely explicitly on a definitional approach to terrorism mens rea.[135]

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[132] 18 U.S.C. § 2331(5); *id.* § 2332b(g)(5).

[133] *See* ABRAMS, *supra* note 117, at 54. As he notes, state law definitions of terrorism offenses tend to combine the requirement of a violent act with a unique terrorism purpose or motive. *See id.* at 54–55; *cf.* MICH. COMP. LAWS § 750.543b (defining an act of terrorism and criminalizing it, using the definition); c*f.* MICH. COMP. LAWS § 750.543f (defining an act of terrorism and criminalizing it, using the definition). Abrams has also discussed the mens rea provisions of the material support statutes, which also do not require a unique terrorism purpose or motive. *See* Norman Abrams*, The Material Support Terrorism Offenses: Perspectives Derived From the (Early) Model Penal Code*, 1 J. NAT. SEC. L. & POL'Y 5, 11, 18, 24, 30 (2005). For more discussion on the mens rea in terrorism definitions, including discussion of the overlap of hate crimes and terrorism, see Buchhandler-Raphael, *supra* note 33, at 858–59. For criticism of terrorism's definitional breadth, see Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1624 (2004).

[134] *See* ABRAMS, *supra* note 117, at 53–54.

[135] *Id.*

B. The Debate on Criminalizing Domestic Terrorism

Should the formal definition of domestic terrorism simply be an independent, free-standing federal crime? There is a substantial, and growing, literature examining domestic terrorism and debating new statutory authorities, including expanded criminalization that often relies on existing terrorism definitions.[136]

Opponents of a new domestic terrorism offense rely chiefly on two arguments: that existing federal criminal law is sufficient to punish acts of domestic terrorism, and that a new law would create new concerns about enforcement and civil liberties.[137] There are ample existing criminal laws to address domestic terrorism.[138] The major domestic terrorism events that we have

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[136] *See, e.g.*, Gurulé, *supra* note 127, at 10–11 (supporting new statute); Johnson, *supra* note 58, at 1114–17 (supporting intergovernmental coordination and discussing virtues of new statutory authority); Sullivan-Halpern, *supra* note 58, at 160 (questioning sufficiency of existing laws); Sinnar, *supra* note 116, at 1399–403 (opposing new criminalization); Mary McCord, *Filling the Gap in Our Terrorism Statutes*, GEO. WASH. UNIV. PROGRAM ON EXTREMISM 4–5 (2019), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Filling%20The%20Gap%20in%20Our%20Terrorism%20Statutes.pdf [https://perma.cc/29EW-BSDF] (supporting new statute); *see generally* Michael German & Sara Robinson, *Wrong Priorities on Fighting Terrorism*, BRENNAN CTR. FOR JUST. (2018), https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%20%281%29.pdf [https://perma.cc/C8CT-CNSJ] (opposing new criminalization); Amy C. Collins, *The Need for a Specific Law Against Domestic Terrorism*, GEO. WASH. UNIV. PROGRAM ON EXTREMISM 13–17 (2020), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf [https://perma.cc/EUM3-HLSC] (supporting new statute); Nichole Anderson, *Exploring the Viability of a Federal Domestic Terrorism Statute*, 55 GONZ. L. REV. 475, 476–7 (2020) (expressing ambivalence about new criminalization and preferring legislation that assesses federal infrastructure for dealing with domestic terrorism); *see generally* Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. ONLINE 212 (2020) (noting problems with existing proposals); Micah Millsaps, *Terrorism: An Evolving Threat*, 50 U. BALT. L. REV. 335, 349–54 (2021) (supporting new legislation that amends current statutes); Michael Molstad, *Our Inner Demons: Prosecuting Domestic Terrorism*, 61 B.C. L. REV. 339, 344–45 (2020) (supporting new criminalization). The Biden White House's National Strategy on Countering Domestic terrorism does not explicitly call for any specific new legislation. It simply says that, "New criminal laws . . . should be sought only after careful consideration of whether and how they are needed to assist the government," while also "ensuring the protection of civil rights and civil liberties." NAT'L SEC. COUNCIL, *supra* note 61, at 25.

[137] *See* German & Robinson, *supra* note 136, at 1–2; Sinnar, *supra* note 116, at 1400–01.

[138] *See* German & Robinson, *supra* note 136, at 5–14; *see also* Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism Seriously,* JUST SEC. (Dec.

experienced were all violations of one or more existing federal laws, many with substantial punishments.[139] Rather, as Michael German and Sara Robinson argue, federal authorities need better data collection, analysis, and oversight.[140] Absent precise data and improved oversight, expanded criminalization will simply enable the Justice Department to target minorities and political dissidents.[141]

Supporters of a new federal domestic terror offense argue that the existing menu of federal statutes, though substantial, is still inadequate.[142] Gaps exist, and filling those gaps will enable the Government to charge defendants with crimes, and seek punishments, appropriate to the domestic terrorism context—indeed, to call *terrorism* what it is.[143] Mary McCord, for example, focuses on the international/domestic distinction, and says that certain forms of domestic extremism are just as dangerous and insidious as international terrorism, yet the law treats them differently.[144] There is value, she contends, in creating moral equivalency.[145] A unified understanding of terrorism would enable better data collection and analysis, and help address the drivers of terrorism "without singling out any particular group for those efforts."[146] She therefore proposes new statutory authority that is modeled on Section 2332b (including the 2332b mens rea), but treats conduct occurring inside of the United States the same, and another statute that is modeled on Section 2339A (material support), which would incorporate the other new statute as a predicate offense.[147] Jimmy Gurulé, too, has thoughtfully advocated a new statute modeled on material support, though he would use both 2339A *and* 2339B as models, so as to include formal designation for domestic terror groups that threaten national security and lower the mens rea threshold

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14, 2018), https://www.justsecurity.org/61876/laws-needed-domestic-terrorism/ [https://perma.cc/Z2TV-5PBQ] (detailing existing laws).

[139] *See* German & Robinson, *supra* note 136, at 1–3.

[140] *Id.* at 14–18.

[141] *Id.* at 18.

[142] Collins, *supra* note 136, at 9.

[143] *See* McCord, *supra* note 136, at 4–5; Gurulé, *supra* note 127, at 9–10.

[144] *See* McCord, *supra* note 136, at 2; *see also* Laguardia, *supra* note 136, at 226–27 (noting disparities between cases involving FTOs and domestic terror cases).

[145] McCord, *supra* note 136, at 2–4.

[146] *Id.* at 5.

[147] *Id.* at 3–4.

(to "knowledge") for supporting a designated DTO.[148] Barbara McQuade also expresses support for a new law modeled on the material support statute, arguing that having such a statute, along with a conspiracy provision, could better assist federal investigators in stopping domestic terror plots—a new law could therefore be an effective "[l]eft of boom" tool for federal law enforcement.[149] She echoes McCord's claims about moral equivalence, and further argues that existing criminal laws do not give federal law enforcement sufficient tools to initiate investigations and stop domestic terror plots before completion, or at least before the attempt stage.[150]

McQuade also argues that civil liberties concerns, while legitimate, would not be implicated by proposals that focus solely on violent conduct and not on any free speech or expression.[151] McCord, too, argues that civil liberties concerns could be mitigated by congressional oversight and by the Privacy and Civil Liberties Oversight Board.[152] And Gurulé argues that the Government could likely satisfy strict scrutiny if any First Amendment concerns are raised concerning designation of DTOs.[153]

Nonetheless, as Robert Chesney explains, federal criminal law remains substantial in its ability to deal with domestic terrorism.[154] Although America does not need a new statute to ensure that persons who commit acts of domestic terrorism are punished,[155] Chesney notes two gaps. First, he says, acts that involve the use of guns might escape the current "boom" crime statutes if the gun is under a certain size.[156] This gap with respect to "means" could be addressed by a statute akin to Section 2332b, such as McCord suggests.[157] Second, he argues,

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[148] *See* Gurulé, *supra* note 127, at 25–29. Gurulé would use section 2331(5)'s definition. *Id.* at 27.

[149] *See* McQuade, *supra* note 125.

[150] *See id.*

[151] *See id.*

[152] *See* McCord, *supra* note 136, at 6–7.

[153] *See* Gurulé, *supra* note 127, at 34–35.

[154] *See* Robert Chesney*, Should We Create a Federal Crime of "Domestic Terrorism?"*, LAWFARE (Aug. 8, 2019, 11:31 AM), https://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism [https://perma.cc/3845-BMEW].

[155] *See id.*

[156] *See id.*

[157] *See id.*

the material support statute that does not require support for a designated FTO (Section 2339A) is not as helpful as a statute that would designate organizations (like Section 2339B).[158] But such a statute is not being widely contemplated and, as noted already, could create potential constitutional and civil liberties challenges.[159] Chesney also acknowledges that while a new statute could have an important "signaling effect" with respect to the seriousness of domestic terrorism, and help to nudge resources toward federal law enforcement authorities, Congress has other alternatives.[160] And, he says, enhanced federal involvement is not always an unqualified good with respect to narratives and impact.[161]

C. Specific Proposals in Congress

Congressional supporters of new criminal legislation have offered several specific proposals.[162] As supportive commentators have suggested, these proposals follow the models set forth in existing terrorism-related statutes.

The Confronting the Threat of Domestic Terrorism Act of 2019, sponsored by Representative Adam Schiff of California, would have created a new crime of domestic terrorism, relying in part on the existing definition contained in Section 2331(5) and in part on existing Section 2332b.[163] This bill would have fully retained the mens rea provision as described in the 2331(5)—although notably, it would have removed the problematic "appear to be intended" language and instead replaced it with a specific intent provision beginning, "with the intent to"—and would have replaced the act requirement with more specificity, modeled on

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[158] *See id.*

[159] *See id.; cf.* Laguardia, *supra* note 136, at 239 (suggesting retaining designation only of FTOs but broadening the type of organization that could be designated). *But see* Gurulé, *supra* note 127, at 34–35 (explaining why First Amendment concerns under *HLP* are overstated with respect to designating domestic terror organizations).

[160] *See* Chesney, *supra* note 154.

[161] *See id.*

[162] For a comprehensive accounting of domestic terrorism legislation in recent Congresses, some of which is included in this Article, as well, see BERRIS, ET AL., *supra* note 107, at 62–63. For a criticism of the breadth of some early proposals, see Laguardia, *supra* note 136, at 229–33. Laguardia goes on to evaluate several alternatives to the existing criminal offense statute proposals. *See id.* at 233–47.

[163] *See* 18 U.S.C. §§ 2331, 2332b (2018); Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. § 2 (2019).

Section 2332b.[164] Representatives Randy Weber and Michael McCaul of Texas proposed similar, bipartisan legislation, again predicated on both Sections 2331(5) and 2332b.[165] Their bill—the Domestic Terrorism Penalties Act of 2019—would have identified a specific punishment for the various prohibited acts, roughly following the punishments described in Section 2332b.[166] Notably, though, this bill would have incorporated the terrorism mens rea language of Section 2331(5)(B)(i) and (ii), but *not* subsection (iii) (relating to affecting government conduct by mass destruction, assassination, or kidnapping).[167] The conflict between the two approaches to the unique terrorism mental state in these two bills—combined with the same conflict as between Sections 2331(5) and 2332b(g)(5)—once again suggests that Congress could benefit from uniformity in its understanding of the terrorism purpose, at least in crafting federal criminal law.

To date, neither of the proposals for a new law have passed through even a single chamber of Congress.[168] But perhaps these are not the only options. Congress could, for example, expand Executive Branch enforcement tools without a new offense statute.

To this end, pending legislation in the 117th Congress—companions H.R. 350[169] and S. 964,[170] both titled the "Domestic Terrorism Prevention Act of 2021"—authorizes additional law enforcement agencies and resources devoted to domestic terrorism.[171] Rather than create a crime of domestic terrorism, these bills are substantially focused on RMVEs, particularly white supremacist and neo-Nazi groups, and with the intersection of domestic terrorism and hate crimes.[172]

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[164] *See* 18 U.S.C. §§ 2331, 2332b; H.R. 4192 § 2. The bill contained jurisdictional elements grounded in the Commerce Clause and the Property Clause. *See id.*

[165] *See* 18 U.S.C. §§ 2331, 2332b; Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. § 2 (2019).

[166] *See* 18 U.S.C. § 2332b; H.R. 4187 § 2.

[167] *See* 18 U.S.C. § 2331(5)(B); H.R. 4187 § 2.

[168] *See H.R. 4192 - Confronting the Threat of Domestic Terrorism Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/4192 (last visited Oct. 10, 2022); *H.R. 4187 - Domestic Terrorism Penalties Act of 2019*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/4187 (last visited Oct. 10, 2022).

[169] Domestic Terrorism Prevention Act of 2021, H.R. 350, 117th Cong. § 1 (2021).

[170] Domestic Terrorism Prevention Act of 2021, S. 964, 117th Cong. § 1 (2021).

[171] *Id.* §§ 3–6; H.R. 350 §§ 3–6.

[172] H.R. 350 § 3.

These bills would create several new federal offices to focus on domestic terrorism, including a Domestic Terrorism Unit in the Office of Intelligence and Analysis at DHS, a Domestic Terrorism Office within the National Security Division at the Justice Department, and a Domestic Terrorism Section in the FBI.[173] And the bill authorizes an interagency task force between DHS, Justice, FBI, and the Department of Defense.[174] These new offices would report to the Congress.[175] These bills also state that DHS, Justice, and the FBI should ensure that domestic terrorism training programs include training and resources to assist in "understanding, detecting, deterring, and investigating acts of domestic terrorism and White supremacist and neo-Nazi infiltration of law enforcement and corrections agencies."[176]

This legislation would therefore expand the Executive Branch's structural mechanisms for assessing, detecting, collecting data about, and prosecuting domestic terrorism, but would maintain reliance on existing federal criminal law. Such legislation is therefore desirable as a means of enhancing resources, gathering data, and rearranging the federal investigatory and prosecutorial apparatus, but does not resolve questions about the adequacy of substantive federal criminal law that investigators and prosecutors would enforce. It might also be, in part at least, unnecessary. The Department of Justice announced in January 2022 that it has created a new unit in the National Security Division that will be dedicated to domestic terrorism prosecutions.[177] If agencies could create the kinds of domestic terrorism offices that this legislation contemplates but without additional statutory authorization, then this would obviate at least some of the goals of the legislation.

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[173] *Id.*

[174] *Id.* § 5.

[175] *Id.* § 3(b). The reports to Congress would focus on white supremacist and neo-Nazi activity, including infiltration of those groups into law enforcement and the uniformed services, as well as information about any hate crime incident that is also one of domestic terrorism. *See id.* § 3(b)(2)–(3).

[176] *Id.* § 4.

[177] Matthew G. Olsen, Assistant Att'y Gen., Remarks Before U.S. Senate Committee on the Judiciary (Jan. 11, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-opening-remarks-us-senate-committee [https://perma.cc/R8KE-NYDW] (announcing creation of Domestic Terrorism Unit within National Security Division at Justice).

D. An Institutional Defense Approach

The strength of arguments in favor of new legislation notwithstanding, the current literature overlooks another potential rationale for new criminal law on domestic terrorism: institutional defense and preservation.

Recall that Lincoln saw grave dangers to the institutions of our constitutional system when public passion evolved into violence—especially when sparked by political grievance.[178] The events of January 6 demonstrated with special force how vulnerable our political institutions, and those who serve them, are to today's violent extremist threat. Congress possesses institutional weapons of self-defense, such as impeachment and its power to discipline its own Members.[179] The second impeachment of President Trump demonstrated how the House can use its impeachment power as a form of self-defense against a President who has threatened legislative institutions.[180] But, albeit with the aid of the Executive Branch, Congress also possesses the ability to defend itself through creation—and Executive enforcement of—the criminal law.[181]

In light of the January 6 attack at the Capitol and recent threat assessments that indicate dangers to government institutions and specific public officials,[182] new legislation to criminalize domestic terrorism could serve not only to fill gaps in existing law but also to signal the seriousness of protecting governmental institutions. This rationale also reinforces the importance of identifying the unique terrorism purpose, which not only distinguishes the terrorist definitionally but gives specific attention to the terrorist's desire to undermine government functions.

In this regard, a new domestic terrorism statute would be consistent with other aspects of federal criminal law. Congress has, for example, enacted criminal laws to punish violence

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[178] *See* Lincoln, Young Men's, *supra* note 6, at 11.

[179] *See* U.S. CONST. art. I, §§ 3, 5.

[180] *See* J. Richard Broughton, *The Second Article and Congressional Self-Defense*, 59 HOUS. L. REV. 259, 307 (2021) (arguing that impeachment of President Trump for obstructing Congress was a strong form of congressional self-defense).

[181] *See id.*; *see also* J. Richard Broughton, *Congressional Law Enforcement*, 64 WAYNE L. REV. 95, 98 (2018) (noting importance of Executive Branch cooperation in protecting Congress as an institution through enforcement of criminal laws).

[182] *See* NTAS BULLETIN OF NOV. 10, 2021, *supra* note 66, at 1; NAT'L SEC. COUNCIL, *supra* note 61, at 5.

against its own Members,[183] Supreme Court Justices,[184] the President and Vice President,[185] and other officers and employees of the Government.[186] There are federal criminal laws that punish threats against the President,[187] laws that punish harming witnesses in federal cases,[188] and laws that protect Congress against obstruction[189] and contempt.[190] All of these laws appear to be based generally on the idea of protecting the existence and functioning of our institutions of government, and, for some, of the Legislative Branch in particular.

Therefore, to the extent that domestic violent extremism and terrorism present real threats to the Congress, the President, the courts, or others in the Government, a law criminalizing domestic terrorism would offer yet another investigative and prosecutorial tool for the defense of our political institutions. Indeed, Congress could eschew a more sweeping domestic terror statute and craft one that is uniquely focused on terror attacks specifically against government institutions. So, for example, Congress could use the language of the Schiff bill and revise:

(1) Whoever, with the intent to . . . (thus incorporating mens rea terminology of either Section 2331(5) or 2332b(g)(5), so as to identify terrorism purpose or motive)

(A) Knowingly kills, kidnaps, maims, assaults resulting in serious bodily injury, or assaults with a firearm or any other dangerous weapon,

(i) any Member, officer, or employee of Congress, or

(ii) the President, Vice President, any Head of Department, or any officer or employee of the Executive Branch, or

(iii) any Justice or judge of the United States or any officer or employee of the Judicial Branch, or

(iv) any officer or employee of any other office or agency of the United States . . . .[191]

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[183] *See* 18 U.S.C. § 351 (2018).

[184] *See id.*

[185] *See id.* § 1751.

[186] *See id.* § 1114.

[187] *See id.* § 871.

[188] *See id.* § 1512(a)–(b).

[189] *See id.* §§ 1505, 1512(c).

[190] *See* 2 U.S.C. § 192.

[191] *Cf.* Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. § 2(a) (2019).

Subsection B, regarding harm to property,[192] could also be revised to target harm to federal property. The mens rea provisions,[193] and the provisions regarding true threats, conspiracies, and attempts, would remain intact.[194] And so long as the appropriate jurisdictional elements[195] also remained intact, Congress could even extend the statute to State-level officials and offices, such as Governors, State Legislators, Secretaries of State, and others.

Such a statute would still add to the federal criminal law but would target harms more narrowly. And though such a law might overlap with the existing laws previously enumerated that protect public officials and institutions,[196] those laws are defined in terms that apply outside of the terrorism context. Particularly where the unique terrorism purpose is an element of the offense, Congress can make the terrorism context explicit. Indeed, by crafting a law specifically designed for that context, Congress could signal its desire to distinguish institutional harms done through acts of terror—defined to include the unique terrorism purpose—as a problem worthy of its own statutory treatment.[197]

E. A Penalty Enhancement Approach

The debate and the literature on a new domestic terrorism statute also often overlook another important tool: statutory sentencing enhancements for domestic terrorism offenses.

While it is true that there is no sweeping federal statute that makes domestic terrorism a distinct criminal offense, it is not true that federal criminal law does not *punish* domestic terrorism.[198] Rather, Congress has enacted a few penalty enhancement provisions in criminal statutes that increase the maximum penalty if the offense involves domestic terrorism.[199]

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[192] *Cf. id.* § 2(b)(1)(E).

[193] *See id* § 2.

[194] *See id.*

[195] *See id.* § 2(b).

[196] *See* discussion *supra* notes 179–186.

[197] *See* Chesney, *supra* note 154 (noting that one advantage of a new law would be the "signaling effect" that indicates seriousness of purpose in combatting domestic terrorism).

[198] *See id.*

[199] *See* 18 U.S.C. § 1001 (2018) (prohibiting false statements in federal investigations, and increasing maximum imprisonment from five years to eight years if the offense involves international or domestic terrorism under section 2331); *id.* § 1505 (prohibiting influencing, obstructing, or impeding congressional inquiries

In addition, the United States Sentencing Commission has also adopted a Guideline specifically for federal crimes of terrorism, as defined in Section 2332b(g)(5).[200] Unlike the idea of statutory penalty enhancements, the Guidelines terrorism enhancement has been the subject of considerable commentary.[201]

The terrorism enhancement in the Sentencing Guidelines is broad, though not unlimited.[202] Because it employs the definition of terrorism in Section 2332b(g)(5), it applies only when the offense is one of those (fifty-seven) enumerated there, or where the defendant's conduct was "intended to promote" a federal crime of terrorism as defined in 2332b(g)(5).[203] And though the Justice Department can recommend a sentence pursuant to this Guideline, judges have discretion in whether to apply it.[204] Some commentators have expressed serious criticism of the Guidelines terrorism enhancement, particularly its severity.[205] Rather than revisit those criticisms here, however, it is enough to simply note that the enhancement serves as an additional tool for prosecutors that does not require enactment of a new statute.

Moreover, rather than creating an entirely new statute forged from the existing Section 2331(5) definition, or relying on the discretionary Guidelines enhancement, Congress could add domestic terrorism provisions to existing statutes to enhance

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or federal administrative proceedings, and increasing statutory maximum from five years to eight); *id.* § 1028 (prohibiting identity theft and increasing statutory maximum from twenty years to thirty in cases of terrorism); *id.* §1028A (prohibiting aggravated identity theft and adding five years to imprisonment if the offense is committed during or in relation to felony violations that are federal crimes of terrorism pursuant to section 2332b).

[200] *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2021).

[201] *See, e.g.,* Pinky Wassenberg, *U.S. Circuit Courts & The Application of the Terrorism Enhancement Provision*, 42 S. ILL. U. L.J. 85 (2017); Wadie E. Said, *Sentencing Terrorism Crimes*, 75 OHIO ST. L.J. 477 (2014); George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517 (2014); James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 L. & INEQ. 51 (2010); Stephen Floyd, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify A Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 GEO. L.J. ONLINE 142 (2021).

[202] *See* U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2021).

[203] *See id.*; 18 U.S.C. § 2332b(g)(5).

[204] *See, e.g.*, Said, *supra* note 201, at 479–81.

[205] *See* Brown, *supra* note 201, at 546–47; Said, *supra* note 201, at 501 (describing the enhancement as "quite severe"); Floyd, *supra* note 201, at 144 (summarizing views of terrorism enhancement as too severe).

sentences—notably, including provisions in those statutes that involve offenses against the institutions, offices, or officials of the three branches of the federal Government, or those statutes that are implicated by domestic terrorism concerns where there may be statutory gaps.[206] Congress has already done this in statutes such as 18 U.S.C. § 1505, which criminalizes corruptly influencing, obstructing, or impeding an official proceeding before a department or agency, or a congressional inquiry.[207] The domestic terrorism enhancement increases the statutory maximum from five years to eight, if the offense "involves international or domestic terrorism (as defined in section 2331)."[208] These enhancements serve as aggravating factors embedded in the statute.

Congress could add similar provisions—either increasing the statutory maximum, or, better still, setting or increasing a mandatory minimum—across a range of other statutes that might have special force in the terrorism context. For example, 18 U.S.C. Section 1512 punishes a range of conduct related to tampering with witnesses or documents, and, importantly, corruptly obstructing, influencing, or impeding an "official proceeding."[209] The statutory maximum varies, but the obstruction provision carries a maximum of twenty years in prison.[210] Similarly, 18 U.S.C. Section 1201 punishes kidnapping, subject to certain jurisdictional limitations.[211] The primary statutory punishment is any term of years or for life.[212] Another statute, 18 U.S.C. Section 924(c), already enhances sentences for using or carrying a firearm during or in relation to a federal drug crime or crime of violence, or possessing a firearm in furtherance thereof.[213] The statute adds mandatory minimums for brandishing (seven years) or discharging (ten years) the

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[206] *See* Chesney, *supra* note 154; Laguardia, *supra* note 136, at 241–45.

[207] 18 U.S.C. § 1505.

[208] *Id.* Of course, statutory enhancements, like that in Section 1505, remain subject to comparison against the Guidelines, so the Guidelines adjustment could affect the efficacy of the statutory enhancement. The precise impact of the Guidelines upon the statutory enhancements, and a comparison with outcomes under the Guidelines enhancement, is worthy of consideration, but beyond the scope of this Article.

[209] *Id.* § 1512(c).

[210] *See id.*

[211] *See id.* § 1201(a).

[212] *See id.*

[213] *See id.* § 924(c).

firearm.[214] 18 U.S.C. Section 249, the federal hate crime statute, imposes penalties for the commission of certain violent acts motivated by racial, religious, national origin, gender, sexual orientation, gender identity, or disability animus.[215] The punishments range from a ten-year statutory maximum to life imprisonment if death results or if the offense involves kidnapping, sexual abuse, or an attempt to kill.[216] Even without a specific criminal prohibition on domestic terrorism, Congress could amend any or all of these statutes to increase the statutory maximum or minimum sentence to state, "If the offense constitutes an act of international or domestic terrorism (as defined in section 2331), the offense shall be punished by imprisonment for any term of years, but not less than X, or for life."[217]

Relying on these kinds of aggravators to enhance sentences has multiple advantages. It avoids some of the concerns about crafting a new substantive prohibition that expands an already far-reaching federal criminal law.[218] And at the same time, because the Government must still allege the statutory enhancement facts in the indictment and prove them beyond a reasonable doubt,[219] it enables the Government to label the offender as a domestic terrorist and punish him as such, even without conviction for a specific crime of "domestic terrorism." Importantly, too, none of these four statutes just discussed—Sections 1512, 1201, 924(c), or 249—is among those enumerated in Section 2332b(g)(5)'s definition of terrorism, and thus would not apply under the Guidelines terrorism enhancement.[220] This is a further reason to consider expansion of specific statutory enhancements for conduct that would not otherwise be captured by 2332b(g)(5).[221] Finally—and critically— this approach would

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[214] *See id.* § 924(c)(A)(ii)–(iii).

[215] *See id.* § 249(a)(1)–(2).

[216] *See id.* § 249(a)(1).

[217] *See id.*

[218] *See* Chesney, *supra* note 154 (noting concerns about federalism and expansion of federal criminal law).

[219] *See* United States v. Cotton, 535 U.S. 625, 633–34 (2002).

[220] *See* 18 U.S.C. § 2331(5)(B) (2018); *id.* § 2332b(g).

[221] *Cf.* Laguardia, *supra* note 136, at 241–45 (arguing Congress could add to list of federal crimes of terrorism in Section 2332b(g)(5), described as "outdated"). Laguardia also discusses use of the Guidelines enhancement, but not statutory enhancements. *See id.* at 245–46.

still require proof of the unique terrorism purpose, whether in Section 2331(5) or 2332b(g)(5).

However, for these enhancements to be effective as a counterterrorism tool, the Justice Department must pursue them, and sentencing judges must apply them. In a recent Senate hearing concerning the federal investigation into the January 6 Capitol breach, multiple Senators expressed concern that the Justice Department had not indicated that it was seeking to employ the Guidelines' terrorism enhancement in any of the pending January 6 prosecutions.[222] Matthew Olsen, head of the Department's National Security Division, replied that the terrorism enhancement remained available as an option, depending upon the facts and circumstances, but that it was appropriate to investigate the January 6 attacks as domestic terrorism.[223]

Still, the Fourth Circuit's recent decision in *United States v. Hasson* serves as a reminder that the Guidelines' terrorism enhancement can be a powerful tool in a case that otherwise bears the hallmarks of domestic terrorism, even if the primary charges are non-terrorism offenses, as long as the defendant intends to promote a listed offense.[224] There, Hasson—a Lieutenant in the United States Coast Guard who the Government specifically described as a domestic terrorist—pleaded guilty to firearms and controlled substances offenses.[225] The investigation revealed that he was a White Nationalist who had written about the creation of a white homeland and whose internet search history "showed a similar preoccupation with violence, white nationalism, and anti-government views."[226] The Fourth Circuit held that the terrorism enhancement applied (and

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[222] *See* Josh Gerstein & Kyle Cheney, *Senators Grill Feds Over Jan. 6 Riot Probe*, POLITICO (Jan. 11, 2022, 3:28 PM), https://www.politico.com/news/2022/01/11/senators-feds-jan-6-riot-probe-526899 [https://perma.cc/277C-XTAD] (citing questioning during Senate Judiciary Committee hearing on domestic terrorism).

[223] *Id.*; *See* Josh Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407 [https://perma.cc/2AU2-J25U] (noting that the severity of the sentence enhancement could be making DOJ more cautious about seeking it, and influencing plea negotiations in January 6 cases).

[224] *See generally* United States v. Hasson, 26 F.4th 610 (4th Cir. 2022).

[225] *Id.* at 612–13.

[226] *Id.* at 614.

more than tripled the sentencing range pursuant to the Guidelines)—despite Hasson not being convicted of a listed terrorism offense under Section 2332b(g)(5)—because he intended to promote the offense of killing protected persons under Section 351.[227] *Hasson* followed an earlier Fourth Circuit decision in *United States v. Kobito*, in which the terrorism enhancement applied to a man convicted of possessing an unregistered silencer (an unenumerated offense), after the investigation showed that he was planning a violent attack on the federal building in Raleigh, North Carolina.[228]

Consequently, even without conviction of a "terrorism" offense, the Government was still able to bring Hasson and Kobito within the ambit of federal terrorism law and punish them as such, establishing both the unique terrorism purpose identified in Section 2332b(g)(5) *and* the goal of promoting an offense that requires that purpose.[229] This functions as a kind of compound mens rea requirement, wherein there must be sufficient proof of the intent to promote—which seems tantamount to the mens rea of accomplice liability—*and* that the underlying offense promoted includes the unique terrorism purpose—"calculated" to—under Section 2332b(g)(5).[230] Yet notwithstanding that additional hurdle, cases like these could therefore serve to bolster the Justice Department's fortitude in applying the enhancement in similar future cases.

F. Concluding Observations on Federal Criminal Law as a Domestic Counterterrorism Tool

The debate over federal criminal law reforms that would enhance the prospect of criminal prosecution for domestic terrorism, therefore, considers several factors. Most notably, it

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[227] *Id.* at 621, 624–26.

[228] *See generally* United States v. Kobito, 994 F.3d 696 (4th Cir. 2021). Both *Hasson* and *Kobito* follow other precedent. *See, e.g.*, United States v. Fidse, 778 F.3d 477 (5th Cir. 2015); United States v. Arnaout, 431 F.3d 994 (7th Cir. 2005).

[229] Courts have held that the Government need not prove the unique terrorism purpose with respect to the "intended to promote" clause; rather, the defendant need only intend to promote a predicate offense for which such purpose exists—and is distinct from motive. *See* United States v. Awan, 607 F.3d 306, 314 (2d Cir. 2010); *see also* United States v. Alhaggagi, 978 F.3d 693, 701–03 (9th Cir. 2020) (holding that enhancement did not apply in material support prosecution, distinguishing mens rea for material support).

[230] *Cf.* Brown, *supra* note 201, at 534 (discussing mens rea problems in enhancement and noting three distinct intent requirements).

considers whether the existing criminal law is adequate to treat the problem of domestic terrorism distinctively, with all of the moral condemnation that such a label would bring and accounting for any gaps that exist in current statutes, without discriminatory enforcement or otherwise infringing civil liberties.[231]

One approach, therefore, is to rely on existing criminal laws at the state and federal levels and to eschew new legislation, which, critics say, would add little to the prosecutor's toolbox and could have the effect of undermining important national values.[232] A second approach would be for Congress to craft a new statute, either using the existing definitions or narrowing or expanding them, and providing for specific punishments for those defined acts. The most persuasive literature has advocated using either the material support statutes or the transcending national boundaries statute, or a combination of both, as models, with sensitivity to civil liberties concerns.[233] A third approach is to enhance Executive Branch enforcement tools but without creation of a distinct domestic terrorism offense, relying instead on existing statues. And finally, as advocated here, in addition to amended or new statutes, Congress could expand the list of existing statutory enhancements, particularly where the predicate offense involves harms to government institutions or other conduct—such as obstructing official proceedings, kidnapping, use or carry of a firearm, and hate crimes—that is typically important in the terrorism context. The Justice Department could also seek more robust use of the Guidelines enhancement for terrorism in the domestic context, as it successfully did recently in *Hasson*.[234]

Importantly, the use of terrorism sentencing enhancements, as well as any new offense statute that uses a definitional approach to domestic terrorism must incorporate the unique purposes of the actor that make the act one of domestic terrorism. Because federal criminal law currently uses differing mens rea models, Congress is forced to choose upon which of the models it will rely. Congress should consider creating a uniform

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[231] *See* German & Robinson, *supra* note 136, at 1–2.
[232] *See id.* at 5, 8–9.
[233] *See* Gurulé, *supra* note 127, at 25–29.
[234] *See* United States v. Hasson, 26 F.4th 610, 621–24 (4th Cir. 2022).

understanding of the terrorism mens rea for purposes of federal criminal law.

Still, a further criminal law consideration remains, one underexplored in the domestic terrorism literature: is the domestic terrorist also punishable as a traitor?

III. DOMESTIC TERRORISM AND TREASON

One of the most potent arguments against the creation of a new federal crime of domestic terrorism is that existing criminal law—federal and state—is adequate to investigate, prosecute, and punish acts of domestic terror.[235] And yet, as supporters of a new law suggest, gaps exist and the stigma and moral condemnation that comes with labeling a crime, and accusing an actor of, "terrorism" is difficult to achieve through other criminal laws, particularly if those laws lack an element identifying the unique terrorism purpose.[236] Still, among existing federal crimes, one may rival, if not better, "terrorism" as an accusation worthy of serious moral condemnation: treason. This section, therefore, explores the intersection of treason and domestic terrorism, and evaluates the potential for using our long-dormant treason law against those whose activism progresses to extremism and then to violence. With an eye toward treason, specifically by levying war, this exploration encounters several unresolved aspects of treason law that are critical to making the domestic terrorist also treasonous. Here, too, the unique purpose or motive of the actor is critical as an element that distinguishes the traitor.

A. The Weight and Complexity of American Treason

No security-related crime can match treason in terms of public censure. Treason has long been regarded as the most heinous of crimes.[237] Blackstone noted this.[238] America's leading

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[235] Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), https://www.brennancenter.org/our-work/analysis-opinion/why-new-laws-arent-needed-take-domestic-terrorism-more-seriously [https://perma.cc/26X9-TVV2].

[236] *See* Chesney*, supra* note 154.

[237] *See* J. Richard Broughton, *The Snowden Affair and the Limits of American Treason*, 3 LINCOLN MEM'L U. L. REV. 5, 5–6 (2015); *see also* Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943) ("Treason is the most serious offense that may be committed against the United States."); B. Mitchell Simpson, III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 5 (2018) (describing treason as "a crime of betrayal on the grandest scale possible"); Erin Creegan, *National*

founders understood this.[239] For Dante, even murder did not rate with treason.[240] If one desires a criminal charge that signals the seriousness of the offense, and the utmost moral blameworthiness of the criminal, one need look no further than treason.

The rhetoric of treason has swollen as of late in American political culture.[241] The rhetoric would have us believe there is a treason occurring on every street corner.[242] The rhetoric of treason, though, is usually (and unfortunately) detached from the constitutional law of treason, and from the sound rationales that limit its uses in a republic.[243] That law is complex, obscure, and perhaps even unsatisfying. Nonetheless, however often misguided, the rhetoric of treason demonstrates that it is more than just an epithet (though it is *that*, too); it is an offense of such gravity that it demands identification of, and accountability for, the traitor. Taking treason seriously is appropriate; stirring passions through talk of—or use of—treason is worrisome. Therefore, and remembering that the founders knew the risks that a treason accusation carried, anchoring our discourse and our law to the *constitutional* understanding of treason will enable more responsible rhetoric about, and more responsible uses of, treason in American political life.[244]

American treason consists only of levying war against the United States or in adhering to an enemy of the United States, giving the enemy aid and comfort.[245] As James Willard Hurst reminds us, American treason is restrictive, particularly in

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Security Crime, 3 HARV. NAT'L SEC. J. 373, 376 (2012) (calling treason "the most serious of all offenses against the nation.").

[238] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1st ed. 1769).

[239] *See Ex parte* Bollman, 8 U.S. 75, 125 (1807).

[240] *See* DANTE ALIGHIERI, DANTE'S INFERNO 95–99 (Mark Musa ed. & trans., Indiana Critical ed. 1995) (1308) (placing traitors to country in the Ninth Circle of Hell, but placing murderers in the Seventh Circle).

[241] *See* J. Richard Broughton, *Constitutional Discourse and the Rhetoric of Treason*, 47 HASTINGS CONST. L.Q. 303, 304–08 (2020); *see also* CARLTON F.W. LARSON, ON TREASON: A CITIZEN'S GUIDE TO THE LAW ix–xi (2020) (compiling recent examples); Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1444 (2009) (describing treason as an epithet).

[242] *See* Broughton, *supra* note 241, at 304–08.

[243] *See id.* at 309–10.

[244] *See id.*

[245] *See* U.S. CONST. art. III, § 3, cl. 1.

comparison to the English statute—the Statute of 25 Edward III—upon which it is based.[246] The Framers understood the dangers of a treason law that could be used to suppress mere dissent or political opposition.[247] American treason therefore requires more than a set of beliefs contrary to the prevailing political orthodoxy, more than feelings or even expressions of disloyalty. It requires action—by someone owing allegiance to the United States—to undermine the state, either through levying war or assisting an enemy, with the intent to betray America.[248]

Of course, though we use the word treason often enough,[249] treason's usage in our language far outpaces its use in our criminal justice system. Actual treason prosecutions beyond the indictment stage have been non-existent since the post-World War II era.[250] And even during this earlier era, prosecutors relied exclusively on Adherence Treason, not Levying War Treason.[251]

Though there remains some debate on the question, Adherence Treason arguably applies only in the context of a citizen (or another who owes allegiance) who gives aid and comfort to a foreign state or entity that does *not* owe allegiance *and* that is an enemy.[252] The question of who is an enemy is a particularly thorny one,[253] but it almost surely does not include domestic groups or entities, because they owe allegiance as well. One cannot be both an enemy (who does not owe allegiance) *and*

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[246] *See* JAMES WILLARD HURST, *Treason and The Constitution*, *in* THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 126, 126 (1971); *cf.* Treason Act 1351, 25 Edw. III. c. 2 § 2 (Eng.).

[247] *See* HURST, *supra* note 246, at 143, 154.

[248] *See* Cramer v. United States, 325 U.S. 1, 29 (1945).

[249] *See* LARSON, *supra* note 241, at xi–xii.

[250] *Cf.* First Superseding Indictment, United States v. Gadahn, No. SA CR 05-254(A) (C.D. Cal. Oct. 2005) (alleging treason against al Qaeda spokesman Adam Gadahn, who was indicted but not tried).

[251] *See, e.g.*, *Cramer,* 325 U.S. at 29 (Adherence Treason alleged where defendant met with Nazi saboteur); Haupt v. United States, 330 U.S. 631, 634–35 (1947) (Adherence Treason alleged where defendant, father of a Nazi saboteur, knew of son's sabotage mission and provided personal assistance in the form of shelter, job, and car); Kawakita v. United States, 343 U.S. 717, 720–21 (1952) (Adherence Treason alleged where defendant worked at Japanese nickel company that held American prisoners of war, and participated in keeping POWs in Japanese custody).

[252] *See* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem,* 154 U. PA. L. REV. 863, 873–900 (2006) (discussing legal significance of allegiance and distinguishing treatment of those who owe allegiance).

[253] *See* Broughton, *supra* note 241, at 320–21.

a traitor (who does).[254] An American who, for example, bombs the House office buildings in Washington on behalf of a private militia group based in, say, Michigan might be a terrorist but would not be guilty of Adherence Treason because his cohorts in the militia group owe America allegiance and thus are not enemies. But if our House office building bomber engaged in his action to aid al Qaeda, or the Islamic State, or a country with which we were engaged in open hostilities, with the intent to betray America (which is the mens rea of Adherence Treason), then he is not only a terrorist but is also guilty of Adherence Treason.[255] Indeed, the past twenty or so years have offered numerous scenarios in which Americans provided aid to foreign terror organizations, and seemed to fit the legal framework for Adherence Treason, giving the enemy aid and comfort.[256] Yet none of those were prosecuted—only one was indicted—for treason.[257]

Better, then, for present purposes to dispense with the complex question of who an enemy is. The more direct route to a treason prosecution for the domestic terrorist—for example, the private militia member who acts in concert with his militia cohorts by bombing the House office buildings—is Levying War Treason.

As a matter of text, Levying War Treason requires no enemy.[258] Beyond this, little is certain, and this branch of treason has fallen into a state of obsolescence, essentially dormant since the nineteenth century and with no modern Supreme Court (or even lower federal court) case law to guide our understanding of it in contemporary American life.[259] What

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[254] *See id.* at 308 (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 4–5 (1671)); *see also* United States v. Greathouse, 26 F. Cas. 18, 22 (N.D. Cal. 1863) (No. 15,254) (holding that "enemies" does not "embrace rebels in insurrection against their own government").

[255] *See* Broughton, *supra* note 241, at 321–22 (arguing al Qaeda and Islamic State are enemies, although non-state actors); Larson, *supra* note 252, at 920 (arguing that al Qaeda is an enemy); *see also Cramer*, 325 U.S. at 29 (detailing assistance that qualifies as aid and comfort, with intent to betray).

[256] *See* Broughton, *supra* note 241, at 320–21.

[257] *See id.* at 311.

[258] *See* U.S. CONST. art. III, § 3, cl. 1.

[259] *See* LARSON, *supra* note 241, at 28. Larson also discusses a twentieth century case from West Virginia which arose from the infamous Battle of Blair Mountain. *See id.* at 60–61. About 8,000 coal miners assembled to challenge the declaration of martial law in Mingo County after conflicts between the miners and management. *See id.* at 60. The army of miners sought to free other miners who had been

we know and understand about Levying War Treason therefore does not emerge from any modern cases, but, instead, from commentary, a few noteworthy prosecutions, and legal opinions from the Republic's early days.

B. Understanding Levying War Treason

Many of the leading insights on American treason come from Hurst, writing in the mid-twentieth century, and Larson, who has offered arguably the most valuable legal analyses of treason among contemporary legal scholars.[260] Their insights are essential for understanding Levying War Treason today. And both draw their insights from many of the same historical sources that inevitably guide how we must think about treason law: the late-eighteenth century commentary (which, in turn, drew on the English commentary), the immediate post-constitutional rebellions and insurrections, and the saga of Aaron Burr's infamous treason trial.[261]

In his Lectures on Law, James Wilson provides a view of American treason that is primarily devoted to levying war.[262] Wilson asserts that this part of the Treason Clause is not coextensive with the conventional understanding of "war," or one "carried on between independent powers," he says.[263] Rather, "war" in this context is understood as that which "in the nature of things, citizens can levy," or by those "arrayed in a warlike manner."[264] Wilson further explains that "levying war" precedents require numbers of people, "armed with offensive weapons, or weapons of war."[265] Lacking military arms, or

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imprisoned in Mingo County, but were met with force by law enforcement in Logan County. *See id.* Although 24 miners were prosecuted for treason by levying war against the State, only one—Walter Allen—was convicted. *Id.* at 61–62. Although his case raised important legal questions about a State's power to charge treason by levying war, "Allen skipped bail and was never heard from again, leaving the legal issues unresolved." *Id.* at 62.

[260] *See* Larson, *supra* note 252, at 866; Alexander Gouzoules, *Dual Allegiance: Federal and State Treason Prosecutions, the Treason Clause, and the Fourteenth Amendment*, 53 IND. L. REV. 593, 594 (2020).

[261] *See, e.g.*, Willard Hurst, *English Sources of the American Law of Treason*, 1945 WIS. L. REV. 315, 316 (1945); Willard Hurst, *Treason in the United States: II. The Constitution*, 58 HARV. L. REV. 395, 415–417 (1945).

[262] 2 JAMES WILSON, *Of Crimes Against the Community*, *in* COLLECTED WORKS OF JAMES WILSON 1149, 1152 (Kermit L. Hall & Mark David Hall eds., 2007).

[263] *Id.* at 1153.

[264] *Id.*

[265] *Id.*

lacking a march "in the posture of war," these people may be "great rioters" but they may not be guilty of levying war.[266] "[A]n actual insurrection or rebellion," Wilson says, is the levying of war.[267]

After explaining that the war must be levied against the United States—that is, against the authority or laws of the United States, because that is to what the traitor owes his allegiance[268]—Wilson turns his attention to the treasonous intent. In so doing, he also explains the concept of universality. A "*private* quarrel," or a "rising to maintain a *private* claim of right," is insufficient for Levying War Treason.[269] Rather, levying war requires a purpose to "throw down *all* inclosures, to open *all* prisons, to enhance the price of *all* labour, to expel foreigners in general, or those from any single nation living under the protection of government, to alter the established law, or to render it ineffectual."[270] When done with these sorts of general and public purposes, "by numbers and an open and armed force," there is a levying of war.[271]

It did not take long to put Wilson's understanding to the test. In two famed rebellions, the Washington Administration, and then the Adams Administration, brought treason charges in cases involving mob resistance to the execution of federal law, but no apparent intention to completely overthrow the Government.[272]

First came the Whiskey Rebellion. Farmers in western Pennsylvania launched a revolt, refusing to pay an excise tax on distilled spirits.[273] The revolt became violent by 1794, when protestors set fire to the home of a regional tax collector named John Neville.[274] President Washington then led American troops

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[266] *Id.* at 1154.
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.* at 1155.
[271] *Id.*
[272] *See* LARSON, *supra* note 32, at 235.
[273] *Id.*
[274] *Id.*

into Pennsylvania to squash the revolt.[275] John Mitchell and Philip Vigol were prosecuted and convicted for treason.[276]

The judges in the case validated the view of levying War Treason that Wilson had explicated earlier, and both Attorney General William Bradford and federal prosecutor William Rawle had advocated that armed resistance to execution of a federal law is a levying of war against the United States.[277] Justice William Paterson, charging the grand jury, said that levying war includes rebellions in which people "take up arms against the government" or the violent and forcible resistance to and prevention of "the regular administration of justice, and due execution of the laws."[278] This echoed a similar charge given by Justice William Cushing the previous year.[279] President Washington eventually pardoned Mitchell and Vigol, but his explanation suggests that his pardon was based on a show of mercy and his satisfaction that the two men had admitted their errors.[280] Notably, Washington's pardon does not appear to indicate a view on his part, or of his administration, that treason was inappropriate for these rebels or that the prosecution's theory of levying war was unconstitutional or otherwise legally wrong.

Then came Fries Rebellion in 1799.[281] John Fries led a group of farmers in an apparently non-violent uprising against a direct federal tax on property (there appear to have been threats against the tax assessors, but no actual violence).[282] A group of farmers who resisted the tax had been taken into custody by a federal marshal.[283] Fries led a group who secured the release of the resisters and was later arrested after President Adams sent troops in to quell the revolt.[284] Fries was convicted of treason and

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[275] *Id.* at 235–36. Notably, then-Justice James Wilson declared that ordinary judicial proceedings could not suffice to execute the laws, leading to President Washington's invocation of the Militia Act. *See id.* at 235.

[276] *Id.* at 239.

[277] *Id.* at 241.

[278] *Id*.

[279] *Id.*

[280] *See* George Washington, U.S. President, Seventh Annual Address to Congress (Dec. 8, 1795), https://www.presidency.ucsb.edu/documents/seventh-annual-address-congress [https://perma.cc/N27J-GLQE].

[281] *See* LARSON, *supra* note 32, at 243.

[282] *See id.*

[283] *See id.*

[284] *See id.*

sentenced to death.[285] As in the Whiskey Rebellion, the Fries Rebellion trial court judges—including Justice James Iredell, Justice Samuel Chase, and Judge Richard Peters—favored the Government's approach to the definition of "levying war," charging both the grand and petit juries that the law was satisfied by intentionally opposing the execution of federal law by force.[286]

Adams eventually (and controversially) pardoned Fries, and granted a general amnesty to the rebels.[287] Unlike Washington, Adams thought these particular acts were not treason.[288] Adams's pardon, though, is somewhat ambiguous on this point. On its face, he did not appear to challenge the general understanding of Levying War Treason upon which the prosecution relied (he even refers to the acts in his pardon proclamation as "wicked and treasonable"),[289] but concluded that these defendants may have been guilty of rioting, but not treason.[290]

These early rebellions are thus tied together by the theory of treason advocated by the Government and validated by the courts in each case: that concerted action with the intent to forcibly resist the execution of federal law or the exercise of federal authority amounted to levying war. Indeed, Bradford articulated his view in a letter to President Washington regarding the need to quell the Whiskey Rebellion:

> It has been settled by uniform judicial construction, that all insurrections, risings or armed combinations to withstand the authority or alter the lawful measures of government, to change the established Law—to redress a real or pretended grievance of

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[285] *See id.* at 245.

[286] *Id.* at 243–45.

[287] *See* John Adams, *Proclamation – Granting Pardon to Certain Persons Engaged in Insurrection Against the United States in the Counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania*, AM. PRESIDENCY PROJECT (May 21, 1800), https://www.presidency.ucsb.edu/documents/proclamation-granting-pardon-certain-persons-engaged-insurrection-against-the-united [https://perma.cc/H3HY-KDSD].

[288] *See* LARSON, *supra* note 32, at 248.

[289] *See* Adams, *supra* note 287.

[290] *See* LARSON, *supra* note 32, at 248 (noting that Adams later described the defendants "as ignorant of our language as they were of our laws, and the nature and definition of treason."). Adams's pardon was controversial, particularly within Federalist circles, and drew the ire of Alexander Hamilton, who publicly criticized Adams and thus divided the Federalists, making it easier for Jefferson to defeat Adams in the election of 1800. *See id.*

> a *public* nature, and to effect other innovations of a *general* concern by their own authority & *with force*—are in construction of Law high Treason within the clause of levying war "for such violences have a direct tendency to dissolve all the bonds of society and to destroy all property & all government too by numbers & an armed force."[291]

He further explained that the Whiskey rebels were acting with the purpose of resisting "by force, the execution of the excise laws—to compell by threats & the terror of Death" federal officers who were executing the laws and to have those laws repealed.[292]

Larson's description of the Whiskey Rebellion proceedings also includes an important exchange between Bradford and Mitchell's lawyers, in which Bradford (like Wilson earlier) articulated a view of universality as a requirement for Levying War Treason.[293] Mitchell's lawyers had tried to argue that the Government was trying to extend Levying War Treason too far.[294] The Whiskey Rebellion, they argued, was merely about the obnoxiousness of a single law, and a single federal official, in a single locale.[295] Bradford replied that it was not necessary that the men contemplate "a march from Georgia to New Hampshire."[296] Rather, by using force to compel Congress to repeal the excise law, this would necessarily affect all excise offices in the country.[297] Stating that "the books require" universality, Bradford said it was satisfied here because "it was impossible to contemplate the repeal of the excise law in one survey, or one state, without effecting it in every survey, and in

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[291] Letter from William Bradford, U.S. Att'y Gen., to George Washington, U.S. President (Aug. 5, 1794), https://founders.archives.gov/documents/Washington/05-16-02-0356 [https://perma.cc/B3AW-PBWF]. Bradford's understanding is consistent with that of Pennsylvania federal prosecutor William Rawle, who, in his own treatise on the Constitution, wrote that insurrection with the object of suppression a federal office was treason (citing the prosecutions of Mitchell and Vigol). WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 142 (2d ed., William S. Hein & Co. 2003) (1829). He further said that effecting a conspiracy "to subvert by force the government of the United States, violently to dismember the Union, to coerce repeal of a general law, or to revolutionize a territorial government by force," is an overt act of treason. *Id.*

[292] Letter from William Bradford to George Washington, *supra* note 291.

[293] *See* LARSON, *supra* note 32, at 242.

[294] *See id.*

[295] *See id.*

[296] *Id.* (quoting United States v. Mitchell, 2 U.S. 348, 354 (C.C.D. Pa. 1795).

[297] *Id.*

every state."[298] Justice Paterson gave a jury instruction that took Bradford's view.[299] The "key distinction," Larson writes, "was that the rebels did not attack Neville's house because of private motives or a personal hatred; they rose to address issues of a 'general and public nature.' "[300]

Several years later, the Supreme Court would finally weigh in with an understanding of levying war that is consistent, or at least mostly consistent, with the theories underlying the earlier Constitution-era treason prosecutions.[301] Aaron Burr allegedly tried to separate the western states and Louisiana Territory from the Union.[302] Erick Bollman and Samuel Swartwout had carried letters from Burr to General Wilkinson, who was commander-in-chief of the Army, who then had them arrested.[303] In their case before the Supreme Court, *Ex Parte Bollman*, Chief Justice John Marshall wrote an opinion in which he said that for there to be treason by levying war, "there must be an actual assemblage of men for the purpose of executing a treasonable design."[304] Conspiracy to levy war is not treason; nor is enlisting men without assembling them.[305] Forming an army is not treason without the specific intent to effect a treasonable design.[306] Merely associating with those engaged in levying war is not treason, but if there is an actual assemblage to use force for a treasonable purpose, then "all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[307]

Marshall quotes Chase's legal summary from the Fries trial with approval, agreeing that mere conspiracy to levy war is insufficient to constitute treason, unless it is combined with an attempt to carry the plan into execution with the actual use of force or violence.[308] However, Marshall also agrees with Chase

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[298] *Id.* (quoting *Mitchell*, 2 U.S. at 354).
[299] *See id.*
[300] *Id.* (quoting *Mitchell*, 2 U.S. at 355–56).
[301] *See generally Ex parte* Bollman, 8 U.S. 75 (1807).
[302] *See* Larson, *supra* note 252, at 907.
[303] *See* Simpson, *supra* note 237, at 26.
[304] *Ex parte* Bollman, 8 U.S. at 127.
[305] *See id.* at 126.
[306] *See id.*
[307] *Id.*
[308] *Id.* at 128 (citing Case of Fries, 9 F. Cas. 924, 931, 944 (C.C.D. Pa. 1800)).

that any force or violence will suffice; it need not be such as would actually affect the treasonous design.[309]

Later, Chief Justice Marshall would serve while riding circuit as the trial judge in Burr's own treason prosecution.[310] Quite to the dismay of President Jefferson, who personally oversaw the Burr prosecution, Marshall eventually ruled that Burr's conduct was not treasonous.[311] As in *Bollman*, Marshall focused his attention on the actus reus of treason—stating that an assemblage would be insufficient without some element of force[312]—and reiterated the distinction between a levying of war and conspiracy to do so.[313]

The early cases notwithstanding, treason's limits are most pronounced in the mens rea—the treasonous design or purpose.[314] Here, we see the symmetry between the mens rea of terrorism and of treason: both require a distinctive purpose or motive, lest each be indistinguishable from other violent crimes. As Larson explains, the earlier theories of levying war that encompassed breaches of the peace, and resistance to federal authority and execution of the law, but not an intent to overthrow the government, was met with skepticism from some later authorities.[315] For example, Justice Robert Grier, charging the grand jury in a treason case from 1851, stated that levying war required an intent to overthrow the government.[316] Hurst argued that the earlier theory had fallen out of favor and into disuse, citing Grier approvingly and pointing to the Government's failure to prosecute late-nineteenth century domestic violence as treason.[317] According to Larson, a prosecutor would be unlikely to bring treason charges based merely on facts that allege resistance to federal authority or the

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[309] *See id.*

[310] *See* United States v. Burr, 25 F. Cas. 55, 56 (C.C.D. Va. 1807).

[311] *See id.* at 181; George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 14 (1981) (noting Jefferson's outrage at the *Burr* result).

[312] *Burr*, 25 F. Cas. at 168–69.

[313] *Id.* at 168–69.

[314] *See* United States v. Hoxie, 26 F. Cas. 397, 400–02 (C.C.D. Vt. 1808) (describing intention as the "very essence" of treason).

[315] *See* LARSON, *supra* note 241, at 31–32.

[316] *See* United States v. Hanway, 26 F. Cas. 105, 128 (C.C.E.D. Pa. 1851).

[317] *See* HURST, *supra* note 246, at 198–99.

execution of a federal law, at least where there is no intent to overthrow the government.[318]

Larson's understanding therefore seems to acknowledge that a specific intent to resist lawful authority or to prevent execution of a law would have been sufficient for treason under the original understanding, but not consistent with the evolved understanding of the Treason Clause beyond the early nineteenth century.[319] Hurst is even more emphatic about the way to understand treason.[320] According to Hurst, the restrictive policy of American treason, and the need to avoid presumptuous constructions that would conflate treason with other crimes against the government, requires proof of intent to overthrow the government or to supplant its authority.[321] Hurst therefore ties this higher mens rea threshold to the underlying purposes of treason from the time of the framing, though he cites no framing-era authority that explicitly agrees.[322] In fact, not only did Wilson, the Washington Administration, the Adams Administration, three Supreme Court Justices, and a federal district judge conclude otherwise, Justice Joseph Story later observed that intending the entire subversion or overthrow of the government was unnecessary for treason; he instead relied on the original understanding that a purpose to forcibly resist execution of the law or the sovereign's authority would suffice.[323] And even as late as the Civil War era, Justice Stephen Field charged a grand jury in California that levying war requires a purpose "to overthrow the government, or to coerce its conduct."[324] He then explained that this encompasses force "directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws."[325]

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[318] *See* LARSON, *supra* note 241, at 32–33.

[319] *Id*.

[320] See HURST, *supra* note 246, at 199.

[321] *Id*.; *see also id.* at 197 (citing United States v. Hoxie, 26 F. Cas. 397, 399–402 (C.C.D. Vt. 1808)).

[322] *Id.* at 199.

[323] *See In re* Charge to Grand Jury, 30 F. Cas. 1046, 1047 (C.C.D.R.I. 1842).

[324] United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863).

[325] *Id.*; *see also* Simpson, *supra* note 237, at 32 (stating that the law of levying war treason had become determinate by the time of the civil war).

Synthesizing these authorities is therefore complicated. Nonetheless, the American authorities suggest that the elements of Levying War Treason are reduced to these:

(1) *Plurality*. Marshall's description from *Bollman,* and Wilson's reference to numbers, indicate that multiple actors in concert are necessary for the levying of war.[326] A lone actor will not suffice, unless that actor is part of a larger group, or is acting in concert with an assemblage.

(2) *Force*. The treasonous overt act must involve the use of force. Thus, the assemblage must actually use force, or at least attempt to use force, or there must be an imminent threat of force by those capable of employing it.[327]

(3) *Universality.* There appears to be agreement—reflected in Wilson's writings, in Bradford's arguments in the Whiskey Rebellion proceedings, and in other authorities—that the overt act must target government authority generally and involve some grievance or motive that is public.[328] Acts done only for private motives, against private persons, are insufficient for treason.

(4) *Intent.* This is perhaps the most perplexing of Levying War Treason's elements, as there is little (and conflicting) case law to guide its understanding. Commentary is also divided. Though the Adherence Treason cases speak of the specific "intent to betray,"[329] that is not the mens rea language of Levying War Treason. Instead, some would understand the requisite mens rea as a specific intent to overthrow the government in its entirety or to supplant federal authority.[330] This is a narrower understanding based on select judicial opinions and non-prosecution of certain cases. Others would understand the mens rea to be a specific intent to overthrow, or to prevent execution of federal law, and thus to challenge the government's lawful authority.[331] This is consistent with original understanding of the Clause. In either case, though, there is broad agreement that the treason mens rea is (a) one of specific intent, or purpose, and (b) one that works in conjunction with the universality

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[326] *Ex parte* Bollman, 8 U.S. 75, 127 (1807); WILSON, *supra* 262, at 1153.

[327] *See* United States v. Burr, 25 F. Cas. 55, 168 (C.C.D. Va. 1807).

[328] WILSON, *supra* 262, at 1154–55; Letter from William Bradford to George Washington, *supra* note 291.

[329] *See* Cramer v. United States, 325 U.S. 1, 29 (1945).

[330] *See* Miller-Idriss & Hughes, *supra* note 34.

[331] Buchhandler-Raphael, *supra* note 33, at 854.

requirement—the specific intent or purpose must be general and public, not private.[332]

There appears to be some, though imperfect, overlap between this understanding of levying war and our current (also divergent) approach to understanding domestic terrorism. This state of the law suggests that some of those that we call domestic terrorists may also qualify for a treason prosecution.

C. Applying Levying War Treason to Today's Domestic Terrorists

The seriousness with which the law historically has viewed treason, and the disdain for national betrayal that attends the rhetoric of treason, suggest that treating some of today's domestic terrorists as traitors could serve important public interests. If part of the allure of a new domestic terrorism law is that it allows the political community to attach a label to the offender that carries stigma, weight, and moral condemnation, then treason would serve these interests better than perhaps any other charge. Still, because treason's definition and scope are so circumscribed, there are multiple obstacles to applying the framework of Levying War Treason in this particular context. Some terrorists may also be traitors; some will not be. Often, the mens rea will inform, and perhaps make, the difference.[333]

The intelligence and law enforcement communities have identified lone actors as the most serious among existing domestic terror threats.[334] And yet, the plurality requirement would foreclose a treason prosecution for lone actors.[335] This is consistent not just with Marshall in *Bollman*,[336] but also with Wilson, who described open and armed "numbers."[337] Therefore, even if the lone actor used the utmost force—say, hijacking a plan to crash into the White House, a mass shooting at the Capitol, or detonating a bomb at a federal office building, all with the intent to overthrow the government—Levying War Treason still would not apply.

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[332] *See id.*; *see* Miller-Idriss & Hughes, *supra* note 34.

[333] This is also true in Adherence Treason cases. *See* LARSON, *supra* note 241, at 177–83.

[334] *See* ODNI DVE THREAT ASSESSMENT, *supra* note 54, at 2.

[335] *See Ex parte* Bollman 8 U.S. 75, 127 (1807).

[336] *See id.*

[337] WILSON, *supra* 262, at 1155.

Larson finds this to be something of an absurd outcome in light of modern weaponry and technology.[338] At the time of *Bollman*, the kind of force necessary to levy war required an assemblage, he says.[339] But today, "[a] lone individual can now potentially wield the power of thousands, if not millions, of eighteenth-century soldiers. One person with a suitcase nuke could obliterate an entire city."[340] And, "[w]hy should flying a plane into the Pentagon be an act of levying war against the United States if there are two terrorists in the cockpit, but not if there is only one?"[341] Larson says that the choice is either to follow Marshall and the case law, or to reinterpret the Treason Clause to say that its focus is on force, and that force should be understood in connection with the factual realities of the moment.[342]

There is much sense in this, and it accords with the judicial approach to other provisions of the Constitution that have been interpreted to apply to forms of technology not available—perhaps not even imaginable—at the time of the framing. For example, the Supreme Court has found that the First, Second, and Fourth Amendments offer protection even where modern technology is at issue—a car is an "effect," a thermal imager can "search" a home's interior, a contemporary firearm can be kept and borne, a computer can be used for protected speech and expression.[343] If we followed Larson's critique to say that the force used must be *analogous* to the kind of force that could have been employed by an assemblage in 1787, then at least some acts of domestic terror could qualify.

Nevertheless, perhaps there is reason to respect the original understanding on plurality. Numbers, concerted action, may better reflect capacity to carry out the treasonous design. Though Larson is certainly right about the dangers that one man can pose, in general, combinations of citizens pose greater dangers. An assemblage is more likely to effectively resist the execution of a law, or topple the government, by force.

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[338] *See* LARSON, *supra* note 241, at 34–35.
[339] *Id.* at 34.
[340] *Id.* at 35.
[341] *Id*.
[342] *Id*.
[343] *See* United States v. Jones, 565 U.S. 400, 404 (2012); Kyllo v. United States, 533 U.S. 27, 34–35 (2001); District of Columbia v. Heller, 554 U.S. 570, 582 (2008); Reno v. ACLU, 521 U.S. 844, 853 (1997).

In considering this problem, it is also important to remember Marshall's qualification of the plurality requirement. Anyone who is "leagued" with the assembly, even if they are separate and remote from the actual assemblage, and participates in any way, is guilty of levying war.[344] This is not the same as mere conspiracy to levy war, which Marshall clearly rejects as treasonous.[345] Rather, by forming a part of the assemblage, even if not physically present, the actor is not really a lone actor nor merely agreeable to the plot—he is, rather, providing assistance or encouragement to the forcible acts of the others.[346] This aspect of Marshall's understanding of levying war looks, and functions, much like a form of complicity, at least where the assemblage actually employs or threatens force.[347] In other words, though treason does not encompass mere conspiracy to assemble and employ force, it does encompass giving encouragement or assistance—think, *aid and comfort*—to those who are actually assembled for the employment of force, thus creating a kind of symmetry with Adherence Treason (thus giving aid or comfort to the war leviers, rather than an enemy).[348] And yet, the aider is not a mere accomplice: in treason law, all participants are principals.[349]

Regardless of how we resolve the plurality/force problem, though, the intent/universality problem persists. Do today's domestic terrorists intend to overthrow the government, or entirely supplant its authority? Do they merely intend to violate the law? Indeed, perhaps our application of the treason mens rea better informs our, and the original, understanding of plurality.

As Larson has explained, some January 6 defendants come closest to what is contemplated by these early understandings of

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[344] *See Ex parte* Bollman, 8 U.S. 75, 126 (1807).

[345] *See id.*; United States v. Burr, 25 F. Cas. 55, 158 (C.C.D. Va. 1807).

[346] *Burr*, 25 F. Cas. at 88.

[347] *See* RAWLE, *supra* note 291, at 142 ("[N]ot only those who bear arms, but those who perform the various and essential parts which must be assigned to different persons, for the purpose of prosecuting the war, are guilty of [treason].").

[348] *See* Broughton, *supra* note 237, at 28–30 (describing Adherence Treason as a species of complicity); *see also* United States v. Greathouse, 26 F. Cas. 18, 22 (C.C.N.D. Cal. 1863) ("[A]ll who engage in the rebellion at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform [of levying war].").

[349] *See id.; see also* BLACKSTONE, *supra* note 238, at 20 ("[I]n high treason there are no accessories, but all are principals.").

levying war.[350] As he correctly notes, unlike Mitchell and Vigol, or Fries, these defendants actually engaged in an attack on the national capitol, and for the purpose of stopping the peaceful transfer of power.[351] He concedes that Justice Grier's opinion from 1851 could be problematic, but also says that "an attempt to thwart the certification of President-elect Joe Biden's lawful accession to power through force looks very much like an attempt to overthrow the government itself."[352] If this is correct, then treason would apply here even under the most stringent view of the mens rea.

But most domestic terrorism cases present (even) harder mens rea cases. Imagine a small violent extremist cell, that carries out a violent attack on a mosque.[353] Even assuming this fits a defined federal crime, and arguably an authoritative definition of terrorism, it does not demonstrate universality, nor does it reflect a purpose to overthrow the government, or even to resist execution of a law or to coerce change in policy. But now imagine that the group carries out such attacks to coerce Congress to repeal some law, or to coerce the Biden Administration to change some policy supportive of a Muslim-majority nation. The latter scenario now presents a stronger case for treason. Or suppose that a white supremacist group engages in a bombing or a mass shooting at a historically black

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[350] *See* Carlton F.W. Larson, *The Framers Would Have Seen the Mob at the Capitol as Traitors*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/outlook/2021/01/07/capitol-mob-treason/ [https://perma.cc/76B4-CVB8].

[351] *See id.*

[352] *Id.* Notably, although no one was charged with treason, nine defendants—affiliated with the Oath Keepers and whose cases arose out of the events of January 6—were charged in 2022 with seditious conspiracy, *see* 18 U.S.C. § 2384 (2018), an offense similar to but distinct from treason. *See* Indictment at 1, 6–8, United States v. Rhodes, No. 22-cr-15 (D.D.C. June 28, 2022) [hereinafter Rhodes Indictment]; *see also* United States v. Rhodes, No. 22-cr-15, 2022 WL 2315554, at *1, *3 (D.D.C. June 28, 2022) (comparing and contrasting the charges of treason and seditious conspiracy). Six of the defendants were convicted of seditious conspiracy. *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Four Oath Keepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach (Jan. 23, 2023), https://www.justice.gov/opa/pr/four-oath-keepers-found-guilty-seditious-conspiracy-related-us-capitol-breach [https://perma.cc/N4V5-VX55]. And in June 2022, the Justice Department obtained yet another seditious conspiracy indictment, this time against those affiliated with The Proud Boys. *See* Third Superseding Indictment at 8, United States v. Nordean, No. 21-cr-175 (D.D.C. filed June 6, 2022). That trial is pending.

[353] *Cf.* STRATEGIC INTELLIGENCE ASSESSMENT, *supra* note 50, at 35 (describing 2017 attack on a mosque in Minnesota).

college or university (HBCU), because of personal racial hatred. Again, this would satisfy existing federal criminal law, and authoritative definitions of terrorism.[354] But it would not, without more, be treason (it lacks universality and treasonous intent). But now suppose that the same group carried out the attack with the purpose of coercing the Congress and the Administration to cease all federal financial support for HBCUs. Again, this revised hypothetical now becomes a stronger case for treason (and even stronger if the action was taken against a federal office, say, an attack on the Secretary or Department of Education). Indeed, notice the symmetry of the mens rea across distinctive federal laws: the actor arguably possesses the unique mental state applicable to the hate crimes law, terrorism law, *and* treason law.

Whether a given domestic terrorism scenario is levying war, then, might well depend upon which understanding of treason mens rea—original, or narrow—that prosecutors and courts accept. How we understand the treason mens rea is therefore critical to its application in modern domestic terrorism.

D. Concluding Observations on Treason Law as a Domestic Counterterrorism Tool

This point here is not to identify every active domestic terrorism case, or future one, in which Levying War Treason would or would not apply. The point, rather, has been to simply demonstrate that treason law—which sits at the intersection of constitutional and criminal law—should be taken seriously in the conversation about whether and how to use the criminal law to combat domestic terrorism.

Of course, even if the Government could fit a domestic terrorism scenario into the framework for Levying War that has been outlined here, caution is required. As the early authorities make clear, treason is not a preferred charge in dubious cases, or those in which treason law would have to be unreasonably

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[354] *Cf.* Travis Caldwell & Alisha Ebrahimji, *The FBI Has Identified Suspects Accused of Making Threats to HBCUs This Week, Official Says*, CNN (Feb. 3, 2022, 10:09 AM), https://www.cnn.com/2022/02/03/us/hbcu-bomb-threats-fbi-investigation/index.html [https://perma.cc/UB3T-WGBQ] (reporting recent bomb threats made against HBCUs).

contorted.[355] Prosecutors should also take to care to avoid the use of treason law, as with any domestic terrorism law, to suppress or punish unpopular viewpoints or target persons with undesirable affiliations.[356] Passionate and irrational use of the criminal law can be as dangerous to institutional legitimacy and good order as passionate and irrational violence against the Government. The treason mens rea, in particular, is a critical force for limiting the scope of the crime and would present a thorny problem for prosecutors in most domestic terrorism scenarios.

Yet a carefully circumscribed treason law is not the same as an impotent one. Prosecutors and courts should also be careful not to construe treason so narrowly that its application is practically impossible and its political, social, and constitutional virtues rendered meaningless.[357] Treason is therefore worthy of a revival in American law.[358] The most likely application of treason in modern American law would be the use of Adherence Treason for those with American allegiance who aid foreign terror organizations.[359] But treason prosecutions have not materialized in those situations, with the Government instead using the material support statutes.[360] As the early authorities, and the modern commentary show, reviving treason in the context of domestic terrorism is possible, but also quite complicated.[361] Just as it has done in the cases involving aid or support for international terrorism, the Government is likely to prefer other criminal law tools for the domestic terrorist, as well, avoiding the

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[355] *See* WILSON, *supra* 262, at 1155 (noting the fuzzy line between riot and treason, so "it is safest and most prudent to consider the case in question as lying on the side of the inferiour crime").

[356] *See* HURST, *supra* note 246, at 153–56; *see also* Steve Vladeck, *Americans Have Forgotten What 'Treason' Actually Means – and How it Can Be Abused*, NBC NEWS (Feb. 16, 2018, 12:10 PM), https://www.nbcnews.com/think/opinion/americans-have-forgotten-what-treason-actually-means-how-it-can-ncna848651 [https://perma.cc/AQ45-FYAS] (stating treason is defined narrowly so that "treason [charges] could not . . . be co-opted for political or personal purposes," as had occurred in pre-Revolutionary England).

[357] *See* Broughton, *supra* note 241, at 311–13 (discussing the values of enforceable treason law); *see also* Eichensehr, *supra* note 241, at 1489–95 (enumerating benefits of enforcing treason law).

[358] *See* Broughton, *supra* note 241, at 312–13; Larson, *supra* note 252, at 867, 914; Eichensehr, *supra* note 241, at 1507; Simpson, *supra* note 237, at 53.

[359] *See* Broughton, *supra* note 241, at 312.

[360] *See id.*

[361] *See* WILSON, *supra* 262, at 1153–55; Eichensehr, *supra* note 241, at 1445.

complexities that a prosecution for Levying War Treason would involve.[362] Nonetheless, federal prosecutors should seek to rescue treason from obsolescence, where sensible to do so. Terrorism provides the proper modern context for this. And in narrow circumstances, and with appropriate sensitivity to its limits and to the unique role of the treason mens rea, prosecutors could effectively use treason as another tool in the domestic counterterrorism toolbox.

CONCLUSION

Lincoln's Lyceum Address is a stark but helpful reminder of the insidious dangers that American institutions, and its rule of law, face when they must contend with internal strife, bitter passion, and resulting violence. When we combine known threats from groups and lone actors who harbor grievances that would drive them to extreme measures, the electronic platforms that enable so much mass communication and inspiration for extremism, and public officials that seek to appease the unmitigated passions of violent extremists, a truly dangerous state of affairs emerges. Addressing these threats will require tools that account for and treat the unique moral culpability of the violent extremist, and that enable more robust institutional defenses among the branches of Government. Treason law supplies a powerful, but strictly limited, tool in the terrorism context. Prosecutors should take it seriously (perhaps more seriously than they have), though it will do only limited work. If the federal criminal law is to be adequate to meet the challenges posed by today's domestic terrorism, then, the Government cannot be satisfied with a singular approach. Rather, all criminal law options should be brought to bear, with reach accounting for the unique purposes and goals of the actor. Such a comprehensive strategy is better suited to the current challenge, one that poses grave risks to civil social order, to

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[362] Of course, this could include difficulty of proving the treasonous intent, see LARSON, *supra* note 241, at 32–33; or difficulty satisfying the Constitution's two-witness rule, see *id.* at 37. *Cf.* Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing* Cramer v. United States *and Its Significance,* 36 FLA. ST. U. L. REV. 635, 650, 680 (2009) (discussing Adherence Treason and reasons for the refusal to charge treason since the 1950s). As for the alternatives to treason, see, for example, Rhodes Indictment, *supra* note 352, at 8 (charging seditious conspiracy). *See also* United States v. Rhodes, No. 22-cr-15, 2022 WL 2315554, at *1, *3 (D.D.C. June 28, 2022).

constitutional government, and, as Lincoln feared, to the health and stability of our political institutions.