

COMMENTS

CLOSING THE GAP: ELIMINATING THE DISTINCTION BETWEEN DOMESTIC AND INTERNATIONAL TERRORISM UNDER FEDERAL LAW*

I. INTRODUCTION

On August 3, 2019, Patrick Crusius opened fire in an El Paso Walmart killing twenty-two Americans.¹ Nineteen minutes before this attack, Crusius posted a hate-filled manifesto online detailing his motivations for the killings.² His rampage was merely one attack in a string of mass shootings in the United States that were motivated by white supremacist ideologies.³ Unlike the perpetrators of the 2015 San Bernardino workplace shooting who were quickly labeled terrorists because of their jihadi ideology,⁴ Crusius was not charged as a terrorist and his attack was not considered an act of terrorism.⁵

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1. Michael Davis, *The Manifesto Posted on 8chan by Alleged El Paso Shooter Minutes Before Attack*, MEMRI (Aug. 6, 2019), <http://www.memri.org/reports/manifesto-posted-8chan-alleged-el-paso-shooter-minutes-attack> [https://perma.cc/6GZB-BNRG] [hereinafter, Davis, *The Manifesto Posted*].

2. *Id.*; see also News Division, *Here's the El Paso Shooter's Full Manifesto: Read It Before You Believe the News*, PULPIT & PEN (Aug. 5, 2019), <http://pulpitandpen.org/2019/08/05/heres-the-el-paso-shooters-full-manifesto-read-it-before-you-believe-the-news/> [https://perma.cc/QG3S-PGDT] (providing a full copy of Patrick Crusius's manifesto where he outlined his political and economic reasons for his attack as well as the gear he planned to use, the reaction he hoped to illicit, and his personal thoughts on the matter).

3. See, e.g., Michael Davis, *The Anti-Jewish Manifesto of John T. Earnest, The San Diego Synagogue Shooter*, MEMRI (May 15, 2019), <http://www.memri.org/reports/anti-jewish-manifesto-john-t-earnest-san-diego-synagogue-shooter> [https://perma.cc/EBT2-UK7K] [hereinafter Davis, *The Anti-Jewish Manifesto*]; Michael McLaughlin, *Racist Manifesto Purportedly Written by Dylann Roof Surfaces Online*, HUFFPOST (June 20, 2015, 11:46 AM), http://www.huffpost.com/entry/dylann-roof-manifesto-charleston-shooting_n_7627788 [https://perma.cc/HG4J-LJXS].

4. See Pete Williams, Corky Siemaszko & Tom Winter, *Tashfeen Malik, Mother in San Bernardino Massacre, Pledged Allegiance to ISIS Leader: Sources*, NBC NEWS (Dec. 4, 2015, 5:04 PM), <http://www.nbcnews.com/storyline/san-bernardino-shooting/tashfeen-malik-mother-san-bernardino-massacre-pledged-allegiance-isis-leader-n474246> [https://perma.cc/HZY5-YJLA].

5. See Vanessa Romo, *El Paso Shooting Suspect Indicted on Capital Murder Charge*, NPR (Sept. 12, 2019, 2:56 PM), <http://www.npr.org/2019/09/12/760204851/el-paso-shooting-suspect-is-charged-with-capital-murder> [https://perma.cc/G8VT-Y9SV] (stating that Crusius was charged with capital murder and hate crimes were being considered). Crusius was not charged with hate crimes until February 2020, six months after the attack. *El Paso Walmart Shooting Suspect Charged with Federal Hate Crimes*, AL JAZEERA (Feb. 7, 2020), <http://www.aljazeera.com/news/2020/02/el-paso-walmart-shooting-suspect-charged-federal-hate-crimes-20207202430822.html> [https://perma.cc/RAW7-JVSN]. Friends of the San Bernardino shooters were charged with material support to terrorism less than two weeks after the attack. See *Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES (Dec. 14, 2015, 4:03 PM),

Although both attacks were politically motivated, the perpetrators were treated differently under the law and resulted in widely different charges.⁶ This inconsistent treatment stems from the categorization of the two attacks.⁷ The San Bernardino shooting was treated as an act of international terrorism because it was a jihadi attack perpetrated by individuals associated with an international terrorist organization.⁸ The El Paso Walmart shooting, however, was not treated as an act of international terrorism because it was perpetrated by an American citizen with a white supremacist ideology.⁹ Under federal law, acts of international terrorism are currently treated more seriously and punished more harshly than similar acts of a domestic nature.¹⁰

This Comment seeks to explore the differing treatment of various large-scale violent attacks under the law and suggests that existing distinctions are unnecessary and ultimately harmful to the well-being of Americans. While current federal law offers a broad definition of domestic terrorism,¹¹ this Comment intends to use the phrase more narrowly. Although terrorist actions motivated by a variety of ideologies could fit within the broader definition,¹² this Comment will use the phrase to refer to individuals and acts that have been perpetrated in furtherance of a white supremacist ideology.¹³ By and large,

<http://www.latimes.com/local/california/la-me-san-bernardino-shooting-terror-investigation-htmlstory.html> [https://perma.cc/7L39-7C8N].

6. Compare Andrew Blankstein & Phil Helsel, *Friend Who Bought Guns for San Bernardino Shooter to Plead Guilty*, NBC NEWS (Feb. 14, 2017, 6:52 PM), <http://www.nbcnews.com/storyline/san-bernardino-shooting/friend-who-bought-guns-san-bernardino-shooter-plead-guilty-n721001> [https://perma.cc/JWM4-QNA8] (discussing the San Bernardino attacker's friend's guilty plea for providing material support to terrorists), with Romo, *supra* note 5 (discussing Patrick Crusius's indictment for capital murder).

7. Compare Mark Berman, *One Year After the San Bernardino Attack, Police Offer a Possible Motive as Questions Still Linger*, WASH. POST (Dec. 2, 2016, 5:34 PM), <http://www.washingtonpost.com/news/post-nation/wp/2016/12/02/one-year-after-san-bernardino-police-offer-a-possible-motive-as-questions-still-linger/> [https://perma.cc/23LN-Y2B9] (referring to the San Bernardino attack as a "terrorist attack"), with Cedar Attanasio, *El Paso Mass Shooting Suspect Pleads Not Guilty in 22 Deaths*, AP NEWS (Oct. 10, 2019), <https://apnews.com/3fd473325d17429784e91a3c8c7b3909> [https://perma.cc/9HTK-9Y38] (referring to the El Paso attack as a "mass shooting").

8. See Blankstein & Helsel, *supra* note 6.

9. See Romo, *supra* note 5.

10. Katie Dilts, Comment, *One of These Things Is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711, 713–14 (2019) ("This unequal treatment can also be seen in federal crimes that carry higher penalties if the actor intended to commit or facilitate international terrorism, but not if the actor intended to commit or facilitate domestic terrorism.").

11. See 18 U.S.C. § 2331(5) (2018).

12. See, e.g., Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs To Amend the Statute To Adequately Address Domestic Extremism*, 92 ST. JOHN'S L. REV. 393, 403 (2018) (separating domestic terrorism into three groups: Islamic extremism, far-left extremism, and far-right extremism and defining far-left extremism as "those holding 'extremist environmental beliefs, extremist 'animal liberation' beliefs, or extremist far left beliefs'" (quoting U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-300, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ASSESS PROGRESS OF FEDERAL EFFORTS 28 app. (2017))); James J. Ward, Note, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471, 475 (2008) (using the term domestic terrorism to refer to homegrown terrorists—U.S. citizens who have been recruited to commit acts in the United States by foreign organizations).

13. See Jana Winter, *FBI and DHS Warned of Growing Threat From White Supremacists Months Ago*, FOREIGN POL'Y (Aug. 14, 2017, 11:26 AM), <https://foreignpolicy.com/2017/08/14/fbi-and-dhs-warned-of-growing-threat-from-white-supremacists-months-ago/> [https://perma.cc/3X5X-DMND] ("White supremacists

these attacks have entirely domestic origins; that is, the ideology,¹⁴ radicalization,¹⁵ planning,¹⁶ attack,¹⁷ and individuals involved are all located within the United States.¹⁸ This form of political violence is currently the greatest terrorism threat facing the United States and therefore warrants significant attention.¹⁹

This Comment aims to discuss the varying legal treatment of domestic and international terrorism and ultimately argues that this distinction is unhelpful and prohibits adequate detection, investigation, and prevention of domestic terrorism in the United States. Section II provides essential background on the federal criminal and civil laws involving both domestic and international terrorism,²⁰ details why domestic terrorism is particularly difficult to investigate and prosecute,²¹ and examines the current legal debates surrounding the status of domestic terrorism in the federal criminal code.²² Section III of this Comment argues that the material support statutes, Sections 2339A and 2339B of the United States Code, in particular should be amended to eliminate the distinction between international and domestic terrorism.²³ The Comment further discusses the need to expand the definition of material support to account for the evolution of the terrorism threat and the increased use of the internet, and it suggests a solution to close the gap in terrorism laws.²⁴

II. OVERVIEW

Since September 12, 2001, seventy-three percent of the deaths related to violent extremism in the United States have been attributed to domestic terrorism.²⁵ The government has not only been slow to acknowledge the changing reality of the terrorism

‘were responsible for 49 homicides in 26 attacks from 2000 to 2016 . . . more than any other domestic extremist movement.’” (omission in original) (quoting an FBI and DHS joint bulletin)).

14. See, e.g., Gore Vidal, *The Meaning of Timothy McVeigh*, VANITY FAIR (Nov. 10, 2008), <http://www.vanityfair.com/news/2001/09/mcveigh200109> [https://perma.cc/6G8H-D2D9] (discussing McVeigh’s reasoning for the 1995 Oklahoma City bombing, including his distrust of the U.S. government, particularly after the events in Waco, Texas and his fascination with *The Turner Diaries*).

15. See, e.g., McLaughlin, *supra* note 3 (quoting Dylann Roof’s manifesto in full, where Roof detailed at length his radicalization process).

16. See, e.g., News Division, *supra* note 2 (providing a full copy of Patrick Crusius’s manifesto that details his preparation for the 2019 El Paso shooting, including his choice of weapon, motivation, and intended outcomes for the attack).

17. See, e.g., *id.*

18. See, e.g., Ashley May & Josh Hafner, *Pittsburgh Synagogue Shooting: What We Know, Questions That Remain*, USA TODAY (Oct. 29, 2018, 10:21 AM), <https://www.usatoday.com/story/news/nation-now/2018/10/29/renton-si-synagogue-shooting-what-we-know/1804878002/> [https://perma.cc/3HXS-U9GF].

19. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 12, at 3 (stating that far-right extremism accounted for sixty-two violent incidents since 2001 while Islamist extremism accounted for only twenty-three). While fatalities from Islamic extremism were greater than fatalities from far-right extremism, forty-one percent of these deaths are attributable to one attack, whereas far-right extremist attacks occur on a much more frequent basis. *Id.* at 5.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part II.C.

23. See *infra* Part III.A.

24. See *infra* Part III.B.

25. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 12, at 4.

threat in the United States²⁶ but it has also been hesitant to address the threat as a form of terrorism at all.²⁷ The threat of terrorist acts from individuals within the United States who possess non-jihadi ideologies is much more significant than the likelihood of an attack from a radical Islamic extremist.²⁸ Yet, federal criminal law in the United States is ill-equipped to deal with this reality.²⁹ The stark distinctions in the treatment of international terrorism and domestic terrorism under federal law pose significant problems for seriously addressing the threat in its current form.³⁰

Part II.A outlines the different definitions for terrorism that currently exist under federal law. It also traces the legal distinctions between international and domestic terrorism, specifically with regard to the material support statutes and civil liability for acts of terrorism. Part II.B looks specifically at prosecutions under the material support statutes and the type of actors and activities that have been prosecuted under these laws. It explains how terrorists use the internet and describes attempts to hold internet platforms liable for material support. Additionally, it details the characteristics of a modern domestic terrorist and why this specific type of actor presents difficulties for law enforcement. Part II.C concludes this Section by providing an overview of current proposed legislation in Congress to address the domestic terrorism threat.

A. Defining Terrorism

The word “terrorism” is defined in several places throughout the U.S. Code and the Federal Regulations.³¹ While each of these definitions vary slightly, the prohibited activity described therein is largely the same.³² These variations often result in different legal treatment and gaps in the prosecution of activity falling between the cracks of these

26. See Kimberly Kindy, Sari Horwitz & Devlin Barrett, *Federal Government Has Long Ignored White Supremacist Threats, Critics Say*, WASH. POST (Sept. 2, 2017), http://www.washingtonpost.com/national/federal-government-has-long-ignored-white-supremacist-threats-critics-say/2017/09/02/bf2ed00c-8698-11e7-961d-2f373b3977ee_story.html [https://perma.cc/9X4H-YLHV].

27. Ryan J. Reilly, *There's a Good Reason Feds Don't Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFPOST (Jan. 11, 2018, 9:32 AM), http://www.huffpost.com/entry/white-terrorists-domestic-extremists_n_5a550158e4b003133ecceb74 [https://perma.cc/2U5W-M8DU] [hereinafter Reilly, *Good Reason*].

28. See Peter Bergen, Albert Ford, Alyssa Sims & David Sterman, *Part IV. What Is the Threat to the United States Today?*, NEW AM., <http://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> [https://perma.cc/J4UH-6DWV] (last visited Nov. 1, 2020) (displaying a chart detailing deadly attacks in the United States by ideology and year, which shows there has been a greater number of far-right wing attacks since 2001 than jihadist attacks).

29. See Kindy et al., *supra* note 26 (discussing how the government has neglected far-right extremism for years, resulting in a significant gap in its legal capability to address domestic terrorism).

30. Trevor Aaronson, *Terrorism's Double Standard: Violent Far-Right Extremists Are Rarely Prosecuted as Terrorists*, INTERCEPT (Mar. 23, 2019, 8:34 AM), <http://theintercept.com/2019/03/23/domestic-terrorism-fbi-prosecutions/> [https://perma.cc/K7U6-XRWX] [hereinafter Aaronson, *Terrorism's Double Standard*].

31. See 18 U.S.C. § 2331(1), (5) (2018); 28 C.F.R. § 0.85(l) (2019).

32. Compare 28 C.F.R. § 0.85(l) (defining terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”), with 18 U.S.C. § 2331(1), (5) (defining international and domestic terrorism as “violent acts or acts dangerous to human life that . . . appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping”).

definitions.³³ Part II.A.1 discusses the separate statutory and regulatory definitions of terrorism under federal law and the resulting implications. Part II.A.2 examines the definition of material support and the two statutes that criminalize this activity. Finally, Part II.A.3 discusses civil liability for material support under federal law and how that liability applies to the different definitions of domestic and international terrorism in Title 18 of the U.S. Code.

1. Statutory and Regulatory Definitions

The Code of Federal Regulations defines terrorism generally as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”³⁴ However, Title 18 of the U.S. Code offers separate definitions for acts of international and domestic terrorism.³⁵ While the distinction between these definitions is slight, there are significant implications for how acts categorized under each definition are prosecuted in federal courts.³⁶ Section 2331 provides a definition of domestic terrorism that differs from the definition of international terrorism only in where the attack originates.³⁷ International terrorism charges, however, carry substantial criminal penalties, whereas there are currently neither criminal charges nor criminal penalties for domestic terrorism under federal law.³⁸ While there are several offenses listed as federal crimes of terrorism in the U.S. Code, many of these offenses are limited to acts that transcend national boundaries.³⁹

As a result, individuals such as Charleston church shooter Dylann Roof and Pittsburgh synagogue shooter Robert Gregory Bowers—whose actions clearly meet the definition of terrorism set out in the Code of Federal Regulations⁴⁰—were instead charged with various federal hate crimes and capital murder, among other charges.⁴¹ If these individuals had possessed jihadi ideologies, there would have been very little

33. See *infra* Part II.A.2.

34. 28 C.F.R. § 0.85(l).

35. See 18 U.S.C. § 2331(1), (5).

36. See Reilly, *Good Reason*, *supra* note 27.

37. Compare 18 U.S.C. § 2331(1)(C) (“[T]he term ‘international terrorism’ means activities that . . . occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries. . . .”), with 18 U.S.C. § 2331(5)(C) (“[T]he term ‘domestic terrorism’ means activities that . . . occur primarily within the territorial jurisdiction of the United States. . . .”).

38. JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW 5–6 (2017). But see Robert Chesney, *Should We Create a Federal Crime of ‘Domestic Terrorism?’*, LAWFARE (Aug. 8, 2019, 11:31 AM), <http://www.lawfareblog.com/should-we-create-federal-crime-domestic-terrorism> [<https://perma.cc/VCY4-XLAL>] [hereinafter Chesney, *Domestic Terrorism?*] (arguing that the assertion that there is no criminal charge for domestic terrorism is only partially correct).

39. See 18 U.S.C. § 2332; see also Emily B. Tate, Note, “*Maybe Someone Dies*”: The Dilemma of Domestic Terrorism and Internet Edge Provider Liability, 60 B.C. L. REV. 1731, 1739 (2019) (“[A]lthough Congress provided a definition for domestic terrorism in the Patriot Act at 18 U.S.C. § 2331(5), the criminal offenses in the Act are restricted to acts committed outside the United States against a U.S. national.”).

40. See *supra* note 34 and accompanying text.

41. See Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, Additional Charges Filed in Tree of Life Synagogue Shooting (Jan. 29, 2019), [hereinafter Press Release, Tree of Life Synagogue]; Press Release, U.S. Att’y’s Office, Dist. of S.C., U.S. Dep’t of Justice, Federal Jury Sentences Dylann Storm Roof to Death (Jan. 10, 2017) [hereinafter Press Release, U.S. Att’y’s Office, Dist. of S.C.].

debate about whether they should be charged as terrorists.⁴² When the government charged Dylann Roof, the public and the media called for the FBI to define his acts as terrorism.⁴³ The FBI refused.⁴⁴ As then-FBI Director James Comey repeatedly stated at the time, the FBI did not have enough information to classify Roof's actions as terrorism.⁴⁵ Comey held this view in spite of the fact that the media widely reported Roof's manifesto and published numerous reports of Roof's political and ideological motivation behind the attack.⁴⁶

The absence of criminal penalties for acts of domestic terrorism presents only one obstacle in charging individuals who commit white supremacist attacks as terrorists.⁴⁷ Some officials have been hesitant to characterize these acts as domestic terrorism because of the negative connotations associated with the word "terrorism."⁴⁸ Former FBI agents and federal prosecutors have frequently stated that the word "terrorism" has often been used solely in a political sense to describe violence that was "extremely bad."⁴⁹ In the absence of criminal penalties for domestic terrorism, prosecutors instead apply

42. See Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 266 (2017) (asserting that the Justice Department's hesitation in calling Roof a terrorist is remarkable given how quick it is to classify a jihadi attack as terrorism once it discovers an ideological motive).

43. See, e.g., Christopher C. Cuomo (@ChrisCuomo), TWITTER (June 18, 2015, 8:38 AM), <http://twitter.com/ChrisCuomo/status/611513307653120000> [https://perma.cc/XJB9-XGHS]; James Downie, *The Charleston Shooter Is a Terrorist. The Federal Government Should Charge Him as One.*, WASH. POST (June 26, 2015, 1:31 PM), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/06/26/the-charleston-shooter-is-a-terrorist-the-federal-government-should-charge-him-as-one/> [https://perma.cc/D96D-93TT]; Jenna McLaughlin, *Why Wasn't Dylann Roof Charged with Terrorism?*, INTERCEPT (July 22, 2015, 5:43 PM), <http://theintercept.com/2015/07/22/departments-justice-didnt-charge-dylan-roof-domestic-terrorism/> [https://perma.cc/V455-ZD2V].

44. See Andrew Husband, *FBI Director Says Charleston Shooting Not Terrorism*, MEDIAITE (June 20, 2015, 3:25 PM), <http://www.mediaite.com/tv/fbi-director-says-charleston-shooting-not-terrorism/> [https://perma.cc/6GMH-K672] (displaying a CNN clip of FBI Director Comey's press conference following the Charleston Church shooting where he explains that he "wouldn't [consider the shooting terrorism] because of the way we define terrorism under the law. . . . It's more of a political act, and again, based on what I know so far, I don't see it as a political act.").

45. *Id.*; Ryan J. Reilly, *FBI Director James Comey Still Unsure If White Supremacist's Attack in Charleston Was Terrorism*, HUFFPOST (July 9, 2015, 5:45 PM), http://www.huffpost.com/entry/james-comey-charleston-terrorism-_n_7764614 [https://perma.cc/KMK3-D29W] ("Since then, we're [sic] found the so-called manifesto online, so I know the investigators and prosecutors are looking at it through the lens of hate crime, through the lens, potentially of terrorism. . . . So the answer is I don't know yet, but I know that our folks will look at it from all angles." (quoting an interview with FBI Director Comey)).

46. See, e.g., Meghan Keneally, *Friend of Accused SC Shooter Claims He 'Wanted To Start a Race War,'* ABC NEWS (June 18, 2015, 7:48 PM), <http://abcnews.go.com/US/friend-accused-sc-shooter-claims-wanted-start-race/story?id=31874063> [https://perma.cc/Y99U-3VK9]; McLaughlin, *supra* note 3 (quoting Dylann Roof's manifesto in full where Roof detailed at length his reasons for the attack and the results he hoped to achieve).

47. See Reilly, *Good Reason*, *supra* note 27.

48. Thomas Brzozowski, Counsel for Domestic Terrorism, Dep't of Justice, Address at Program on Extremism at George Washington University Elliot School of Affairs (Dec. 4, 2018), <https://extremism.gwu.edu/event/discussion-doj-domestic-counterterrorism-coordinator2019> [https://perma.cc/P7QQ-TC4A]; see also Reilly, *Good Reason*, *supra* note 27 (discussing Brzozowski's address).

49. Aaronson, *Terrorism's Double Standard*, *supra* note 30.

sentencing enhancements that are prescribed in the Federal Sentencing Guidelines.⁵⁰ The increased penalties set out in section 3A1.4 apply when the conduct in question involves one or more of the acts defined as a federal crime of terrorism under Section 2332b(g).⁵¹ Prosecutors use these guidelines to ensure higher penalties for acts that meet terrorism definitions without requiring officials to label the acts as terrorism or charge the individuals as terrorists.⁵²

2. Material Support to Terrorists

The disparate legal treatment of domestic and international terrorism is even more apparent in Title 18's material support statutes.⁵³ Sections 2339A and 2339B create criminal liability for those who offer assistance to individuals and organizations who are engaged in terrorist activity and commit terrorist attacks.⁵⁴ Under Section 2339A, this assistance, also known as material support, is defined broadly as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel ([one] or more individuals who may be or include oneself), and transportation, except medicine or religious materials.⁵⁵

Section 2339B adopts this definition in full.⁵⁶

Several courts and scholars have debated whether “training” is intended to mean those who receive training from a terrorist organization or only those who provide training.⁵⁷ There have also been arguments regarding whether providing “personnel” includes self-provision⁵⁸ and what constitutes “expert,” “advice,” and “assistance”

50. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2018). See *infra* note 52 for instances where sentencing enhancements have been applied.

51. *Id.*; see also 18 U.S.C. § 2332b(g) (2018).

52. See, e.g., *United States v. Graham*, 275 F.3d 490, 513–19 (6th Cir. 2001) (holding that the sentencing enhancements for terrorism could apply to general charges of conspiracy for Graham’s planning to murder federal officers, intimidate or forcibly assault officers in their official duties, possess machine guns, and maliciously damage property used in interstate commerce); *United States v. Allen*, 364 F. Supp. 3d 1243, 1245–50 (D. Kan. 2019) (applying the terrorism sentencing enhancement to charges of conspiracy to use a weapon of mass destruction).

53. See 18 U.S.C. §§ 2339A–2339B (2018).

54. See *id.*

55. 18 U.S.C. § 2339A(b)(1). The statute clarifies the definitions of “training” and “expert advice or assistance” as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge” and “advice or assistance derived from scientific, technical or other specialized knowledge,” respectively. 18 U.S.C. § 2339A(b)(2)–(3).

56. 18 U.S.C. § 2339B(g)(4).

57. See, e.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000); see also Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 55–56 (2005) [hereinafter Chesney, *Sleeper Scenario*].

58. See *United States v. Sattar*, 272 F. Supp. 2d 348, 358–60 (S.D.N.Y. 2003), *aff’d sub nom.*, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009).

together as one phrase, and as individual words.⁵⁹ Similarly, in *United States v. Sattar*,⁶⁰ the U.S. District Court for the Southern District of New York held that the mere use of communications equipment did not amount to a violation of the material support statutes although the term “communications equipment” is included within the definition of material support in Section 2339A.⁶¹ The court determined the term “communications equipment” is unconstitutionally vague because the defendants were not on notice that mere use of a telephone to further a foreign terrorist organization’s objectives amounted to criminal conduct.⁶² Because the material support definition does not provide sufficient clarity to the meanings of these words, challenges as to their vagueness are often successful.⁶³

Under Section 2339A, individuals and organizations can be charged for providing material support if they possess the knowledge that their support will be used for the perpetration of an attack.⁶⁴ Liability under this statute extends to several terroristic-type crimes and makes no distinction regarding the geographic origin of the attack.⁶⁵ However, Section 2339A demands a high mens rea requirement, requiring that the individual charged must actually know or intend that their support will be used for the furtherance of an attack.⁶⁶ Consequently, this requirement results in prosecutors charging individuals under Section 2339A much less frequently than its counterpart, Section 2339B.⁶⁷

Some scholars describe Section 2339B as being both broader and narrower in its scope than Section 2339A.⁶⁸ These scholars claim Section 2339B is broader because it criminalizes support to organizations associated with terrorism under any circumstance as long as the individual charged is aware that the organization engages in terrorism.⁶⁹ Therefore, those charged do not have to know or intend that their support will be used for the perpetration of a specific attack.⁷⁰ In *Holder v. Humanitarian Law Project*,⁷¹ the

59. See *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1199–201 (C.D. Cal. 2004).

60. 272 F. Supp. 2d 348 (S.D.N.Y. 2003), *aff’d sub nom.*, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009).

61. *Sattar*, 272 F. Supp. 2d at 357–58.

62. *Id.* at 358.

63. See, e.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000); *Ashcroft*, 309 F. Supp. 2d at 1199–201.

64. 18 U.S.C. § 2339A (2018).

65. See *id.*

66. Brandon James Smith, *Protecting Citizens and Their Speech: Balancing National Security and Free Speech When Prosecuting the Material Support of Terrorism*, 59 LOY. L. REV. 89, 92–93 (2013).

67. See Chesney, *Sleeper Scenario*, *supra* note 57, at 20 (“Fifty-six individuals have been charged with violating § 2339B in the three years since 9/11, thirty-six have been charged under § 2339A . . .” (citations omitted)). From 2012 to 2017, the Department of Justice filed 176 material support indictments; only forty-five of these indictments were under Section 2339A. Scott Sullivan, *Prosecuting Domestic Terrorism as Terrorism*, JUST SECURITY (Aug. 18, 2017), <http://www.justsecurity.org/44274/prosecuting-domestic-terrorism-terrorism/> [https://perma.cc/8H42-H3GG].

68. E.g., Chesney, *Sleeper Scenario*, *supra* note 57, at 18.

69. See, e.g., *id.*; see also 18 U.S.C. § 2339B.

70. See Anna Elisabeth Jayne Goodman, Comment, *When You Give a Terrorist a Twitter: Holding Social Media Companies Liable for Their Support of Terrorism*, 46 PEPP. L. REV. 147, 173–74 (2018).

71. 561 U.S. 1 (2010).

Supreme Court held that donations to the lawful, nonviolent branches of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) still violated Section 2339B because this provision did not require intent to further an organization's illegal activities.⁷² Even benign support helps to advance a terrorist organization's illegal acts.⁷³ Conversely, some scholars claim Section 2339B is narrower than Section 2339A because it applies only to material support given to designated foreign terrorist organizations (DFTO).⁷⁴ Because of this narrower scope, prosecutors charging individuals associated with acts of domestic terrorism are limited to Section 2339A and must prove a connection to an actual attack.⁷⁵

3. Civil Liability for Acts of Terror

Civil liability for providing material support to terrorists only exists for international terrorism, not domestic terrorism.⁷⁶ For instance, when a bank provides financial services to an organization known to engage in international terrorism—a violation of Section 2339B⁷⁷—the bank can be held civilly liable for their actions under Section 2333.⁷⁸ This liability attaches regardless of whether the organization uses the bank's services specifically in the commission of acts of terrorism.⁷⁹ However, if this same bank were to provide financial services to a domestic chapter of the Ku Klux Klan (KKK), there would likely be neither a criminal charge nor civil liability.⁸⁰

Congress implemented Section 2333 as part of an effort to create civil liability in an area of federal law that had been lacking.⁸¹ They intended this legislation to disrupt the “causal chain of terrorism” and in particular, to stop the flow of money to foreign organizations.⁸² Although domestic acts are not covered under Section 2333,⁸³ Congress had enacted a similar provision over a century earlier that did address acts of domestic

72. *Holder*, 561 U.S. at 36. The PKK and LTTE are both foreign organizations currently on the U.S. State Department's designated foreign terrorist organizations list. See *Foreign Terrorist Organizations*, U.S. DEP'T State, <http://www.state.gov/foreign-terrorist-organizations/> [<https://perma.cc/9JRE-E9CS>] (last visited Nov. 1, 2020).

73. *Holder*, 561 U.S. at 36.

74. See 18 U.S.C. § 2339B; Tate, *supra* note 39, at 1742.

75. See Tate, *supra* note 39, at 1742–43 (discussing the differences between Section 2339A and Section 2339B, including the difficulties in prosecuting under Section 2339A because of the requirement of a connection to an actual attack as compared to an organization in general).

76. See 18 U.S.C. § 2333.

77. *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 322–23 (E.D.N.Y. 2015), *vacated*, 882 F.3d 314 (2d Cir. 2018); see also 18 U.S.C. § 2339B.

78. *Linde*, 97 F. Supp. 3d at 298–99, 331–35; see also *Boim v. Holy Land. Found. for Relief & Dev.*, 549 F.3d 685, 693–94 (7th Cir. 2008).

79. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 38 (2010) (holding that some organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct” (quoting Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §301(a)(7), 110 Stat. 1214, 1247)).

80. See Tate, *supra* note 39, at 1743 (“Section 2333 may permit bringing suit against violators of either § 2339A or § 2339B, but . . . § 2333 permits suits *only* for victims of international terrorism.”).

81. See S. REP. NO. 102-342, at 22 (1992).

82. *Id.*

83. See 18 U.S.C. § 2333 (2018).

terrorism.⁸⁴ Congress passed the Ku Klux Klan Act of 1871 in response to the formation of the KKK in the Reconstruction South following the Civil War.⁸⁵ Among other things, this Act created civil liability for individuals who conspired to interfere with the civil rights of others as well as third-party liability for those who had knowledge of such conspiracies and failed to prevent them.⁸⁶ Specifically, it aimed at discouraging and penalizing—both criminally and civilly—the KKK’s acts of terror against recently freed African Americans.⁸⁷

Two important sections of the 1871 Act are currently codified in the U.S. Code as Sections 1985 and 1986 and criminalize several actions amounting to conspiracy to interfere with civil rights as well as failing to prevent such conspiracy.⁸⁸ While there is no explicit reference to the KKK or terrorism within these sections, their language closely resembles the definitions that exist in both the Code of Federal Regulations and Title 18 of the U.S. Code.⁸⁹ Similar to the liability created by the material support statutes, Section 1986 created third-party liability for the acts outlined in Section 1985.⁹⁰ While Section 1985 has been used several times to hold various chapters of the KKK civilly liable for their terroristic acts,⁹¹ there is significantly less legal precedent for holding a third party accountable under Section 1986 because this section can only be utilized when there is an underlying Section 1985 claim.⁹²

84. See Ku Klux Klan Act, 17 Stat. 13 (1871) (codified at 42 U.S.C. §§ 1983, 1985–96 (2018)).

85. *Id.*; Rebecca Blackmon Joyner, Note, *An Old Law for a New World? Third-Party Liability for Terrorist Acts – From the Klan to Al Qaeda*, 72 *FORDHAM L. REV.* 427, 428 (2003).

86. Ku Klux Klan Act §§ 1, 6; see also Joyner, *supra* note 85, at 428. This liability differs from that which exists under Section 2333 in that it created civil and criminal liability for organizations such as the KKK themselves and members of the organization. See Ku Klux Klan Act.

87. See *CONG. GLOBE*, 42nd Cong., 1st Sess. 761 (1871) (debating whether to hold third parties responsible in instances where “the wrong is done by a tumultuous assemblage . . . where it is riotous, where it is done with open violence, so as to attract the attention of the whole community and spread fear and terror. . .”).

88. See 42 U.S.C. §§ 1985–86.

89. Compare 42 U.S.C. § 1985(1)–(3) (“If two or more persons in any State or Territory conspire . . . by force, intimidation, or threat . . .”), with 28 C.F.R. § 0.85(l) (2019) (defining terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”), and 18 U.S.C. § 2331(1)(B)(i)–(iii) (2018) (defining terrorism as violent acts that “appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government”).

90. 42 U.S.C. § 1986.

91. See, e.g., *McKinney v. S. White Knights, Knights of the Ku Klux Klan*, No. 1:87-cv-565-CAM (N.D. Ga. 1988), http://www.splcenter.org/sites/default/files/d6_legacy_files/mckinneyvsouthern_judgment.pdf [https://perma.cc/YF3Z-THVX]; *Donald v. United Klans of Am. Inc., Knights of the Ku Klux Klan*, No. 84-0725-AH (S.D. Ala. 1987), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/beulahvunklan_judgment.pdf [https://perma.cc/B7HP-MMNR]. While these judgments do not mention the specific claims, other court filings for both cases do. See *Complaint, Williams v. S. White Knights of the Ku Klux Klan*, No. C87-565A, at 2 (N.D. Ga. 1987), http://www.splcenter.org/sites/default/files/d6_legacy_files/mckinneyvsouthern_complaint.pdf [https://perma.cc/9MNH-2SJ8]; *Composite Complaint, Donald v. United Klans of Am.*, No. 84-0725-C-S, at 3 (S.D. Ala. 1985), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/beulahvunklan_compcomplaint.pdf [https://perma.cc/2VFB-N5JQ].

92. See Joyner, *supra* note 85, at 455.

Most modern victims of domestic terrorism, however, are not victims of the KKK or other similar organizations.⁹³ The main perpetrators of domestic terrorism attacks are typically individuals with no formal organizational ties.⁹⁴ As such, the conspiracy requirement in Sections 1985 and 1986 precludes victims of individual perpetrators from recovering under these statutes.⁹⁵ These victims have instead filed a variety of tort claims in an attempt to recover under civil law.⁹⁶

B. Challenges in Prosecuting Material Support for Terror

In the post-9/11 era, material support to terrorists has been the most commonly charged terroristic-type crime, making the distinction between domestic and international terrorism particularly relevant in analyzing the current legal gap.⁹⁷ The majority of material support cases have considered individuals associated with international terrorist organizations and have held that a wide array of activities can constitute material support.⁹⁸ Prosecutors have charged individuals pursuant to a material support statute for traveling to a foreign country to train with a foreign terrorist organization,⁹⁹ attempting to transfer funds to a terrorist organization,¹⁰⁰ and purchasing the weapon used in an attack, even though the purchaser took no part in the actual attack.¹⁰¹

Conversely, the material support statutes have rarely been used to prosecute individuals associated with crimes meeting the definition of domestic terrorism under Section 2331(5).¹⁰² Those who have been charged with material support in connection to domestic terrorism have typically either pled guilty to the charge in exchange for a

93. See BJELOPERA, *supra* note 38, at 53 (“[A]ccording to the FBI, when it comes to violence attributed to white supremacist extremism, lone wolves play a prominent role.”).

94. See GEORGE MICHAEL, LONE WOLF TERROR AND THE RISE OF LEADERLESS RESISTANCE 3 (2012).

95. See 42 U.S.C. §§ 1985–86.

96. For example, after the Charleston church shooting, several family members of victims and victims’ estates sued the United States for wrongful death, survival, and conscious pain and suffering for allowing Dylann Roof to purchase the gun used in the shooting despite his previous criminal record. See, e.g., Complaint, Jackson v. United States, No. 2:16-cv-2359-RMG (D.S.C. June 30, 2016); Complaint, Pinckney v. United States, No. 2:16-cv-2350-RMG (D.S.C. June 30, 2016); Complaint, Thompson v. United States, No. 2:16-cv-2357-RMG (D.S.C. June 30, 2016).

97. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011, at 13–14 (Karen J. Greenberg ed., 2011).

98. See, e.g., United States v. Young, 916 F.3d 368 (4th Cir. 2019); United States v. Goba, 220 F. Supp. 2d 182 (W.D.N.Y. 2002); Affidavit in Support of a Criminal Complaint, United States v. Sewell, No. 4:19-MJ-146 (N.D. Tex. Feb. 7, 2019); see also PROGRAM ON EXTREMISM, GEORGE WASHINGTON UNIV., GW EXTREMISM TRACKER: TERRORISM IN THE UNITED STATES (2019), <http://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Feb19%20Update.pdf> [https://perma.cc/XE27-JCUH].

99. See Goba, 220 F. Supp. 2d at 194 (quoting United States v. Lindh, 212 F. Supp. 2d 541, 577 (E.D. Va. 2002)).

100. See Young, 916 F.3d at 374–75.

101. See Criminal Complaint at 3–5, United States v. Marquez, No. 5:15-MJ-498 (C.D. Cal. Dec. 17, 2015).

102. Aaronson, *Terrorism’s Double Standard*, *supra* note 30.

lesser sentence or had it dropped in favor of more serious charges carrying heavier sentences.¹⁰³

For instance, domestic terrorists Eric Feight and Glendon Scott Crawford were both arrested for and charged with material support under Section 2339A.¹⁰⁴ Crawford attempted to build a radiological death ray to kill Muslims within the United States and recruited Feight to assist him in building a remote for this device.¹⁰⁵ Although the government originally charged both Crawford and Feight with material support, the prosecutors eventually dropped the charge against Crawford in favor of other charges, including attempting to produce and use a radiological dispersal device, conspiring to use a weapon of mass destruction, and distributing information relating to weapons of mass destruction.¹⁰⁶ Crawford was eventually convicted and sentenced to thirty years.¹⁰⁷ Feight, on the other hand, accepted a plea agreement for the material support charge and received a ninety-seven month sentence.¹⁰⁸ The limited and infrequent use of the material support statutes, with regard to domestic terrorism, is complicated by the nature of these attacks as well as the gaps that currently exist in the statutes for domestic actors.¹⁰⁹

This Part aims to explain the difficulties of investigating and prosecuting domestic terrorists under the material support statutes. Part II.B.1 discusses the role the internet plays in prosecutions for material support to international and domestic terrorists, while Part II.B.2 discusses why domestic terrorism is more difficult than international terrorism to detect, investigate, and prevent.

1. Online Radicalization and Material Support

Plaintiffs have sought to establish liability against internet platforms where connections between foreign organizations and individuals who have subsequently engaged in terrorism have been established.¹¹⁰ Courts, however, have been hesitant to extend liability here because of the tenuous connection between the internet platform and the terrorist organization, the individual who perpetrated the attack, or the attack itself.¹¹¹

For instance, in *Crosby v. Twitter, Inc.*,¹¹² the U.S. District Court for the Eastern District of Michigan failed to find that a social media network provided material support

103. See, e.g., Trevor Aaronson, *Homegrown Material Support: The Domestic Terrorism Law the Justice Department Forgot*, INTERCEPT (Mar. 23, 2019, 8:33 AM), <http://theintercept.com/2019/03/23/domestic-terrorism-material-support-law/> [<https://perma.cc/4A9V-EWHS>] [hereinafter Aaronson, *Homegrown Material Support*] (detailing the use of material support laws against domestic terrorists).

104. See Criminal Complaint at 2, *United States v. Crawford*, No. 1:13-MJ-312 (N.D.N.Y. June 18, 2013).

105. *Id.* at 2–4; see also Aaronson, *Homegrown Material Support*, *supra* note 103.

106. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, New York Man Sentenced to 30 Years for Plot To Kill Muslims (Dec. 19, 2016) [hereinafter Press Release, Plot to Kill Muslims].

107. *Id.*

108. *Id.*; see also Plea Agreement, *United States v. Feight*, No. 14-CR-12 (GLS) (N.D.N.Y. Jan. 22, 2014).

109. See Aaronson, *Homegrown Material Support*, *supra* note 103.

110. See, e.g., *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1160 (N.D. Cal. 2018); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 567 (E.D. Mich. 2018), *aff'd* 921 F.3d 617 (6th Cir. 2019); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 876 (N.D. Cal. 2017).

111. See *Crosby*, 303 F. Supp. 3d at 578.

112. 303 F. Supp. 3d 564 (E.D. Mich. 2018), *aff'd* 921 F.3d 617 (6th Cir. 2019).

to the Islamic State of Iraq and Syria (ISIS) after the 2016 Pulse Nightclub shooting.¹¹³ The court concluded that

although the plaintiffs have alleged that the defendants provided routine social media services to ISIS, they have not pointed to any individual or cognizable entity that the defendants plausibly knew to be facilitating or carrying out any acts of terrorism, and to whom the defendants nevertheless knowingly continued to provide services or support to in any form.¹¹⁴

In addition, the court refrained from characterizing the attack as an act of international terrorism at all.¹¹⁵ The court determined there was nothing that the shooter, Omar Mateen, had said or done in connection with this attack “that had any transnational component.”¹¹⁶ The court found no support for the allegation that “because some acts of ISIS are ‘international,’ and because Mateen may have viewed [i]nternet postings or videos sympathetic to ISIS’s cause, Mateen [was] an ‘international terrorist,’ and any violent act he committed there comprised ‘international terrorism.’”¹¹⁷

However, liability for internet entities has not been litigated in the context of domestic terrorism.¹¹⁸ One reason for this dichotomy is the absence of civil liability for material support to domestic terrorists.¹¹⁹ Section 2333 is explicitly limited to acts of international terrorism.¹²⁰ Additionally, there are approximately one billion individuals who use social media platforms on a daily basis.¹²¹ It would seem unjust to criminally punish these platforms for failure to notice one specific interaction that resulted in violence out of millions of completely innocent interactions simultaneously occurring on their platforms.¹²²

Further, domestic terrorists are not typically thought of as working together.¹²³ These individuals are consistently portrayed as lonely and socially isolated individuals who are radicalized by the internet.¹²⁴ Because of this characterization, there have not

113. *Crosby*, 303 F. Supp. 3d at 578.

114. *Id.* at 577.

115. *See id.* at 572–73.

116. *Id.*

117. *Id.* at 573.

118. *See Tate*, *supra* note 39, at 1736–37.

119. *See id.* at 1741.

120. *See* 18 U.S.C. § 2333 (2018).

121. Emily Goldberg Knox, Note, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 319 (2014) (“For example, approximately one billion people use Facebook in over seventy languages. Twitter, which is offered in over twenty-one languages, has over 200 million users each day.” (footnotes omitted)).

122. Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 7–8 (2017). *But see* Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605, 608 (2017) (arguing that the First Amendment and the Communications Decency Act would not prohibit federal criminal prosecutions of content intermediaries for failing to remove terrorist content).

123. *See* BJELOPERA, *supra* note 38, at 53–54.

124. *See, e.g.*, Matt Gutman, Victor Ordonez & Emily Shapiro, *The Lonely Lone Shooter: The Pittsburgh Synagogue Suspect’s Apparently Isolated Life*, ABC NEWS (Oct. 31, 2018, 4:29 PM), <http://abcnews.go.com/US/lonely-lone-shooter-pittsburgh-synagogue-suspects-apparently-isolated/story?id=58872568> [<https://perma.cc/E6FK-BU5U>]; Olga Khazan, *Why Many Mass Shooters Are ‘Loners,’* ATLANTIC (Aug.

been significant efforts to connect these seemingly independent attacks and understand the ideology by which these individuals are connected.¹²⁵ The media has repeatedly reported that recent terrorist attacks were motivated and inspired by past attacks aimed at furthering similar beliefs.¹²⁶ Perpetrators of lone wolf attacks are able to connect and communicate through the use of internet platforms and growing online communities of hate.¹²⁷

Instead of using mainstream social media platforms such as Facebook or Twitter, many white supremacist communities have formed through fringe websites often created for the sole purpose of fostering a place where users can freely share their hateful ideologies with like-minded individuals.¹²⁸ Websites such as the Daily Stormer, Stormfront, and 8chan cater to these ideologies and act as a support system for individuals who espouse these beliefs.¹²⁹ For instance, prior to killing twenty-two people in an El Paso Walmart, Patrick Crusius posted a manifesto on 8chan detailing his beliefs and motivation for the attack.¹³⁰ This is the same website where the Christchurch shooter in New Zealand and the synagogue shooter in Poway, California posted their manifestos prior to their attacks.¹³¹ In Dylann Roof's manifesto, he praised the awakening he experienced due to the online community he found and how this community inspired his

5, 2019, 1:43 PM), <http://www.theatlantic.com/health/archive/2019/08/el-paso-shooting-when-loneliness-leads-mass-murder/595498/> [https://perma.cc/JKW8-TCD8].

125. See Peter Simi, Andrew J. Bringuel II, Steven M. Chermak, Joshua D. Freilich, Gary LaFree & Lynn Maskel, *What Is Lone Wolf Terrorism?: A Research Note*, in 1 TERRORISM RESEARCH AND ANALYSIS PROJECT (TRAP): A COLLECTION OF RESEARCH IDEAS, THOUGHTS, AND PERSPECTIVES 311, 321 (Andrew J. Bringuel et al. eds., 2011) (asserting that considering these individuals as acting alone ignores “where lone wolves come from,” “how lone wolves maintain their radical beliefs,” and “the possibility that lone wolves are not really alone”).

126. See, e.g., Lizzie Dearden, *Revered as a Saint by Online Extremists, How Christchurch Shooter Inspired Copycat Terrorists Around the World*, INDEPENDENT (Aug. 24, 2019, 10:22 PM), <http://www.independent.co.uk/new128renton128s1at128renton/brenton-tarrant-christchurch-shooter-attack-el-paso-norway-poway-a9076926.html> [https://perma.cc/UV6B-A7GY].

127. See Tate, *supra* note 39, at 1735–36.

128. See *id.* But see Affidavit in Support of Criminal Complaint at 2, United States v. Holzer, No. 1:19-mj-00246-NYW (D. Colo. Nov. 2, 2019) (stating that the defendant “used several Facebook accounts to promote white supremacy ideology and acts of violence”).

129. See, e.g., Kevin Crowe & David Heath, *Sites Like Facebook, Google and Twitter Allowed White Supremacists To Flourish. Now What?*, USA TODAY (Aug. 21, 2019, 10:10 AM), <http://www.usatoday.com/story/news/investigations/2019/08/21/4-chan-el-paso-new-zealand-shooter-white-supremacy/2054378001/> [https://perma.cc/YR4N-2CWW]; Hatewatch Staff, *Daily Stormer Website Goes Dark Amid Chaos*, S. POVERTY L. CTR. (Sept. 18, 2019), <http://www.splcenter.org/hatewatch/2019/09/18/daily-stormer-website-goes-dark-amid-chaos> [https://perma.cc/JZ2T-MHQQ].

130. Davis, *The Manifesto Posted*, *supra* note 1.

131. Aurora Almendral & Yuliya Talmazan, *Founder of 8chan Wishes He Could ‘Uncreate’ Forum Popular With White Supremacists*, NBC NEWS (Aug. 6, 2019, 11:29 AM), <http://www.nbcnews.com/news/world/founder-8chan-wishes-he-could-uncreate-forum-popular-white-supremacists-n1039496> [https://perma.cc/LKD8-FKXV].

attacks.¹³² Yet, these individuals have largely been considered as acting independently in their violent attacks.¹³³

Beyond the tenuous connections that exist in internet relationships, another obstacle in both the international and domestic terrorism contexts is issues presented by the First Amendment and the Communications Decency Act (CDA).¹³⁴ Under the CDA, internet platforms are largely immune from liability for the content published on their websites by third-party users.¹³⁵ Although there have been a few exceptions carved out of this statute in recent years,¹³⁶ similar exceptions have not been created to cover terrorist propaganda that is spread through internet platforms.¹³⁷

The issue of prosecuting those connected to both domestic and international terrorism is further complicated by the changing nature of terrorist recruitment, radicalization, and organizational structure.¹³⁸ More often, individuals who have perpetrated attacks have attributed their ideological beliefs to communities they have found online.¹³⁹ While there is no formal organizational structure, these individuals are connected through the internet and share a similar set of beliefs as well as a common violent disposition in how to achieve their desired political goals.¹⁴⁰ For example, Patrick Crusius posted a manifesto online less than half an hour before killing twenty-two people in an El Paso Walmart.¹⁴¹ In his manifesto, Crusius credits the Christchurch shooting in New Zealand for his beliefs and inspiration for the attack.¹⁴² While Crusius's manifesto

132. See McLaughlin, *supra* note 3 (statement of Dylann Roof) (“But more importantly this prompted me to type in the words ‘black on White crime’ into Google, and I have never been the same since that day We have no skinheads, no real KKK, no one doing anything but talking on the internet. Well someone has to have the bravery to take it to the real world, and I guess that has to be me.”).

133. See, e.g., Noah Bierman, Brittny Mejia & Richard A. Serrano, *Charleston Shooting Suspect Dylann Roof Said To Be ‘A Classic Lone Wolf,’* L.A. TIMES (June 20, 2015, 3:00 AM), <https://www.latimes.com/nation/la-na-charleston-lone-wolf-20150620-story.html>; see also *supra* note 124 and accompanying text.

134. See Goodman, *supra* note 70, at 182–84.

135. See 47 U.S.C. § 230 (2018).

136. See, e.g., Allow States and Victims To Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)); *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016) (holding that a website was not immune under the CDA where its employees had actively participated in and encouraged the posting of defaming content). But see Lucy Wiesner, *Good Intentions and Unintended Consequences: SESTA/FOSTA’s First Two Years*, 93 TEMP. L. REV. 151, 176 (2020) (arguing that exceptions to Section 230 aimed at curtailing online sex trafficking have largely failed).

137. Goodman, *supra* note 70, at 181–82.

138. See MICHAEL, *supra* note 94, at 1.

139. See Maggie Koerth, *No Terrorist Is a ‘Lone Wolf,’* FIVETHIRTYEIGHT (Aug. 6, 2019, 1:55 PM), <http://fivethirtyeight.com/features/no-terrorist-is-a-lone-wolf/> [<https://perma.cc/7JRQ-JTJ4>] (“[A]nalysis also showed that these same people were often involved in ideological communities—communities built online and offline, where future terrorists sought (and often found) support and validation for their ideas.”).

140. Yigal Carmon & Michael Davis, *Online Non-Jihadi Terrorism: Identifying Potential Threats*, MEMRI (May 30, 2019), <http://www.memri.org/reports/online-non-jihadi-terrorism-identifying-potential-threats> [<https://perma.cc/7M5B-FZHF>].

141. Davis, *The Manifesto Posted*, *supra* note 1.

142. News Division, *supra* note 2 (statement of Patrick Crusius) (“In general, I support the Christchurch shooter and his manifesto.”); see also Rick Noack, *Christchurch Endures as Extremist Touchstone, as Investigators Probe Suspected El Paso Manifesto*, WASH. POST (Aug. 6, 2019, 3:05 PM),

demonstrates an unusually explicit connection between these seemingly remote attacks and individuals, he is not alone among both domestic and international terrorists in developing his beliefs online.¹⁴³

2. The Domestic Terrorism Threat

The rise in online communities of hate and radicalization has also contributed to the increase in attacks perpetrated by lone-wolf actors within the United States.¹⁴⁴ Since two attacks in the 1950s, lone-wolf terrorism has increased sixteen-fold with thirty-two attacks committed by individuals in the 2000s.¹⁴⁵ Globally these numbers translate into a 143% increase in lone-wolf attacks.¹⁴⁶ These actors typically have no ties to a formal organization and instead act on their own in furtherance of a particular ideology.¹⁴⁷ These characteristics make lone-wolf terrorists much harder to track and investigate, decreasing the probability that such individuals will be apprehended prior to an attack.¹⁴⁸

It is misleading, however, to consider these individuals as acting completely alone.¹⁴⁹ While many of these individuals commit their actions entirely on their own, some attackers have assistance in carrying out their acts even without ties to a formal organization.¹⁵⁰ Others find support online through communities of people with similar views.¹⁵¹ In this Comment, discussion of lone-wolf domestic terrorists focuses on those not associated with a formal group, regardless of whether they work alone or with another individual.¹⁵²

<http://www.washingtonpost.com/world/2019/08/06/christchurch-endures-extremist-touchstone-investigators-probe-suspected-el-paso-manifesto/> [https://perma.cc/ETE2-KL39].

143. See, e.g., *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 572–73 (E.D. Mich. 2018), *aff'd* 921 F.3d 617 (6th Cir. 2019) (discussing the Pulse Night Club shooter's social media usage and interaction with online ISIS propaganda); Davis, *The Anti-Jewish Manifesto*, *supra* note 3; McLaughlin, *supra* note 3 (quoting Dylann Roof's manifesto in full, where he discusses finding support for his beliefs in communities online).

144. See Goodman, *supra* note 70, at 158; Brian J. Phillips, *Deadlier in the U.S.? On Lone Wolves, Terrorist Groups, and Attack Lethality*, 29 TERRORISM & POL. VIOLENCE 533, 535 (2017) (asserting that the number of lone-wolf attacks in the United States has increased each decade since the 1970s).

145. SEC. STUDIES PROGRAM, NAT'L SEC. CRITICAL ISSUE TASK FORCE, LONE WOLF TERRORISM 10 (2015).

146. *Id.*

147. MICHAEL, *supra* note 94, at 3.

148. *Id.* at 3.

149. See McLaughlin, *supra* note 3 (discussing how Dylann Roof found support for his beliefs in communities online).

150. See *United States v. Nichols*, 132 F. Supp. 2d 931, 933–34 (D. Colo. 2001) (denying a motion to vacate the sentence of Timothy McVeigh's coconspirator, Terry Nichols).

151. See, e.g., McLaughlin, *supra* note 3.

152. See Raffaello Pantucci, *A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists*, in DEVELOPMENTS IN RADICALISATION AND POLITICAL VIOLENCE 9 (Int'l Ctr. for the Study of Radicalisation & Political Violence, 2011) (expanding his definition of lone wolf to include "small isolated groups pursuing the goal of . . . terrorism together under the same ideology, but without the sort of external direction from, or formal connection with, an organised group or network"). *But see* Bart Schuurman, Lasse Lindekilde, Stefan Malthaner, Francis O'Connor, Paul Gill & Noémie Bouhana, *End of the Lone Wolf: The Typology That Should Not Have Been*, 42 STUD. CONFLICT & TERRORISM 771, 772 (2019) ("Regardless of how small [a group] may be, as soon as two or more people interact with one another with the aim of committing a terrorist attack, small-group dynamics come into play.").

Lone-wolf attacks are especially problematic in combatting terrorism because would-be lone-wolf terrorists are much harder to discover and track prior to an attack.¹⁵³ For instance, the “Unabomber,” Ted Kaczynski, evaded arrest for seventeen years after his first attack, which allowed him to conduct fifteen more bombings, killing three individuals and injuring twenty-four in total.¹⁵⁴ Even the FBI’s website marvels at his elusiveness, stating,

How do you catch a twisted genius who aspires to be the perfect, anonymous killer—who builds untraceable bombs and delivers them to random targets, who leaves false clues to throw off authorities, who lives like a recluse in the mountains of Montana and tells no one of his secret crimes?¹⁵⁵

This ability to go undetected for such a long period of time continues to be the most significant obstacle in combatting domestic terrorism in the United States.¹⁵⁶

Lone wolves, because of their independence and ability to go unnoticed in society, are exceptionally dangerous.¹⁵⁷ They are not influenced by group pressure or collective decision-making processes, which allows them to adapt to changing situations much faster than an organization could.¹⁵⁸ For example, in Eric Rudolph’s confession and justification for his attack on the 1996 Summer Olympics in Atlanta, he detailed how he adjusted his plans and made changes on a whim to adapt to new developments.¹⁵⁹

Conversely, Feight and Crawford were apprehended before they could carry out their planned attack.¹⁶⁰ The ability of law enforcement to investigate and arrest these individuals was largely due to their self-proclaimed organizational ties to the KKK and Crawford’s willingness to reach out to the organization for assistance.¹⁶¹ Without this organizational connection, Feight and Crawford would have likely gone unnoticed.¹⁶² Similarly, last year the FBI arrested Richard Holzer, who intended to poison an entire synagogue congregation as well as blow up their building to prevent worship.¹⁶³ As a former KKK member and current skinhead, his organizational ties and willingness to reach out to the online white supremacist community were the reasons the FBI was initially alerted to his plans.¹⁶⁴

153. MICHAEL, *supra* note 94, at 3.

154. *Unabomber*, FBI, <http://www.fbi.gov/history/famous-cases/unabomber> [https://perma.cc/M6BU-4F2S] (last visited Nov. 1, 2020). Ted Kaczynski was eventually identified and arrested after sending a manifesto detailing his motives and aspirations to the news media. *Id.*

155. *Id.*

156. See, e.g., Jeffrey D. Simon, *What Makes Lone-Wolf Terrorists So Dangerous?*, UCLA NEWSROOM (Apr. 18, 2013), <http://newsroom.ucla.edu/stories/what-makes-lone-wolfe-terrorists-245316> [https://perma.cc/88VK-CX4K].

157. MICHAEL, *supra* note 94, at 3.

158. Phillips, *supra* note 144, at 536.

159. Eric Rudolph, *Full Text of Eric Rudolph’s Confession*, NPR (Apr. 14, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4600480> [https://perma.cc/FHJ8-4WD3].

160. Aaronson, *Homegrown Material Support*, *supra* note 103.

161. *Id.*

162. See *id.*

163. Affidavit in Support of Criminal Complaint, *supra* note 128, at 6–7.

164. See *id.* at 2–3.

Despite the success of law enforcement in apprehending individuals such as Crawford, Feight, and Holzer prior to their planned attacks, preventative arrests are not common when it comes to domestic terrorism.¹⁶⁵ Legislators and law enforcement officials face significant obstacles in drafting laws and creating procedures that target the amorphous online networks and the individual actors who are encouraged and inspired by their peers online.¹⁶⁶

C. Proposed Solutions in Congress

In response to the significant number of attacks attributed to far-right extremism, there have been several proposals by congressmembers to address this issue.¹⁶⁷ These proposals fall into two broad categories based on their intended effects—research and information gathering¹⁶⁸ and criminalizing domestic terrorism.¹⁶⁹ Part II.C.1 discusses the bills that focus on information gathering. These bills have received far less media attention than their counterparts that suggest criminalizing domestic terrorism. Part II.C.2 turns to the bills that propose criminalizing domestic terrorism criminal penalties and the debates surrounding this potential solution.

1. Research and Information Gathering

While some members of Congress aim to take immediate and decisive action to address the domestic terrorism threat, others believe more information is necessary before determining a course of action.¹⁷⁰ In January 2020, Senator Dick Durbin (D-IL) introduced the Domestic Terrorism Prevention Act of 2020.¹⁷¹ This proposed bill documented the findings of several studies on white supremacy and other far-right ideologies.¹⁷² If implemented, the bill would authorize several offices within federal agencies to focus specifically on the domestic terrorism threat and subsequently require

165. See BJELOPERA, *supra* note 38, at 54.

166. See *id.* at 53–55.

167. See, e.g., Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020); Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. (2019); Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (2019).

168. See, e.g., S. 3190; Raising the Bar Act of 2019, H.R. 5209, 116th Cong. (2019); National Commission on Online Platforms and Homeland Security Act, H.R. 4782, 116th Cong. (2019).

169. See, e.g., H.R. 4192; H.R. 4187.

170. See, e.g., Emily Birnbaum & Chris Mills Rodrigo, *House Homeland Security Committee Advances Online Extremism Bill*, HILL (Oct. 23, 2019, 10:40 AM), <http://thehill.com/policy/national-security/467076-house-homeland-committee-advances-online-extremism-bill> [<https://perma.cc/7XBX-RCPE>].

171. S. 3190. A similar version of this bill was originally introduced by Senator Durbin in March 2019. See Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong. (2019). The main differences between the two versions of this bill are requiring more frequent reports to Congress, specifying that “White supremacy” is one subcategory of domestic terrorism that must be included in the reports, and focusing special attention on “hate crime incidents with a nexus to domestic terrorism” in the 2020 bill. Compare S. 894, with S. 3190. Identical bills were introduced in the House of Representatives by Congressman Schneider in 2019 and 2020. See Domestic Terrorism Prevention Act of 2020, H.R. 5602, 116th Cong. (2020); Domestic Terrorism Prevention Act of 2019, H.R. 1931, 116th Cong. (2019).

172. S. 3190 § 2.

rigorous reporting from these offices and agencies.¹⁷³ It does not, however, propose any changes to the criminal code or any criminal penalties specific to acts of domestic terrorism.¹⁷⁴

Although Senator Durbin's bill does not mention or address the use of the internet by domestic terrorists,¹⁷⁵ two bills introduced in late 2019 focus on this issue directly.¹⁷⁶ In October 2019, Congressman Bennie Thompson (D-MS) introduced the National Commission on Online Platforms and Homeland Security Act, which proposed the creation of a commission charged with "identify[ing], examin[ing], and report[ing]" on how online platforms have been used to further acts of terrorism, the potential impact this use has on free speech and civil liberties, and policies and procedures the owners of online platforms have to prevent or limit this use.¹⁷⁷ After conducting this research, the commission would be charged with recommending how to address this use without infringing on "free speech and innovation on the internet."¹⁷⁸

In November 2019, Congressman Max Rose (D-NY) introduced the Raising the Bar Act of 2019, which proposed the creation of an "exercise program" to gather data on how participating technology companies adhered to their terrorist content moderation policies.¹⁷⁹ The bill would provide funding to a university to run several exercises in which "trusted flaggers" would alert participating companies to terrorist content on their platforms and then track their response to determine if they were compliant with their stated policies and rate companies accordingly.¹⁸⁰ The program would also track the frequency of flagged content, the number of removed posts and accounts, and any emerging trends in the data, among other things.¹⁸¹ However, neither Congressman Thompson's nor Congressman Rose's bill criminalizes any activity or suggests potential next steps once the data is collected and reported.¹⁸²

Only one bill has successfully made it out of its relevant committee and passed in the U.S. House of Representatives.¹⁸³ This bill, also authored by Congressman Thompson, is similar to Senator Durbin's bill because it requires annual reporting to Congress.¹⁸⁴ These reports, submitted by the FBI director, Secretary of Homeland Security, and the Attorney General, would be required to provide information on investigative policies, federal compliance with privacy and civil liberties, threat prioritization and the methodology for identifying acts of terrorism, and data on incidents

173. *See id.* § 4. The domestic terrorism divisions within the Department of Homeland Security, the FBI, and the Department of Justice would be tasked with implementing the bill's provisions. *Id.*

174. *See id.*

175. *See id.*

176. *See* Raising the Bar Act of 2019, H.R. 5209, 116th Cong. (2019); National Commission on Online Platforms and Homeland Security Act, H.R. 4782, 116th Cong. (2019).

177. H.R. 4782 § 2.

178. *Id.* § 2(b)(3).

179. H.R. 5209 § 2.

180. *Id.*

181. *Id.* § 2(f)(2).

182. *See id.*; H.R. 4782.

183. *See* Domestic and International Terrorism DATA Act, H.R. 3106, 116th Cong. (2019).

184. *Compare id.*, with Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020).

and attempted incidents since the last report.¹⁸⁵ One major difference, however, is that Congressman Thompson's bill is not limited to domestic terrorism but also includes international terrorism reporting requirements.¹⁸⁶

2. Criminalizing Domestic Terrorism

In contrast to bills that would require mere information gathering, two additional bills introduced in the weeks immediately following the August 2019, El Paso Walmart shooting proposed more concrete action: criminalizing domestic terrorism.¹⁸⁷ This shooting in particular ignited a renewed debate about whether domestic terrorism should be criminalized as a charge of its own.¹⁸⁸ First, Congressman Randy Weber (R-TX) introduced a bill in the U.S. House of Representatives that would achieve this goal by defining the charge of domestic terrorism and adding corresponding penalties under a new Section, 2339E.¹⁸⁹ The penalties under this new provision would be scaled according to the specific act of terrorism committed.¹⁹⁰ The bill does not discuss whether Section 2339A would be amended to include this new crime under the material support statutes.¹⁹¹

Within the same week, Congressman Adam Schiff (D-CA) introduced a similar bill.¹⁹² While Congressman Schiff also proposed criminalizing domestic terrorism and amending Title 18 of the U.S. Code, he instead included this provision under Section 2332.¹⁹³ Rather than including penalties corresponding to certain types of acts similar to those in Congressman Weber's bill, Congressman Schiff proposed the penalties be the same as those listed under Section 2332b(c).¹⁹⁴ Additionally, he restricted prosecution under this new provision by requiring that the Attorney General first approve the United States' ability to prosecute.¹⁹⁵ Finally, Congressman Schiff's bill would subsequently amend Section 2339A by adding his new code section to the list of crimes currently

185. H.R. 3106 § 101(b).

186. *Compare id.* § 1, with S. 3190.

187. Harsha Panduranga & Faiza Patel, "Domestic Terrorism" Bills Create More Problems Than They Solve, JUST SECURITY (Aug. 28, 2019), <http://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/> [<https://perma.cc/4WAA-Q7PS>].

188. Chesney, *Domestic Terrorism?*, *supra* note 38; see also Barbara McQuade, *Proposed Bills Would Help Combat Domestic Terrorism*, LAWFARE (Aug. 20, 2019, 8:49 AM), <http://www.lawfareblog.com/proposed-bills-would-help-combat-domestic-terrorism> [<https://perma.cc/TZ4C-EKFK>].

189. Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. § 2(a) (2019). Senator Martha McSally (R-AZ) had released a similar draft bill to be introduced in the Senate after the El Paso shooting, but it does not appear the bill was ever actually introduced. See *McSally Makes Domestic Terrorism a Punishable Crime*, MARTHA MCSALLY: U.S. SENATOR FOR ARIZ. (Aug. 14, 2019), <http://www.mcsally.senate.gov/news/press-releases/mcsally-makes-domestic-terrorism-punishable-crime> [<https://perma.cc/V5HN-WDR9>] (announcing Senator McSally's draft bill and linking to a copy of the discussion draft).

190. *See* H.R. 4187 § 2.

191. *See id.*

192. Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. (2019).

193. *Id.* § 2(a).

194. *Id.*

195. *Id.* § 2(a)(e).

enumerated.¹⁹⁶ Neither of these bills discussed domestic terrorists' use of online platforms.¹⁹⁷

Proponents of these bills assert that criminalizing domestic terrorism is necessary to adequately address the issue and deter attacks in the future.¹⁹⁸ They argue that by calling these attacks terrorism, American citizens will take these threats more seriously and be more likely to report potential attackers to the appropriate authorities.¹⁹⁹ Others believe a domestic terrorism charge will fill current gaps in criminal law and diffuse the perception that only actors of certain demographics can be terrorists.²⁰⁰

However, many others criticize these bills by asserting that a federal charge of domestic terrorism is unnecessary because would-be domestic terrorists under the proposed provisions are already being prosecuted under other criminal statutes.²⁰¹ Despite the lack of a terrorist label, there have been no shortage of charges against individuals like Dylann Roof,²⁰² Robert Gregory Bowers,²⁰³ and Alex James Fields.²⁰⁴ There have even been several instances where prosecutors have dropped charges of material support against individuals whose actions would constitute terrorism in favor of other charges that carry higher criminal penalties.²⁰⁵ These critics further contend that these new provisions would allow the federal government to unjustly target individuals and groups in opposition to the government²⁰⁶ as well as racial and social minorities.²⁰⁷

Some critics believe that penalties for domestic terrorism would likely violate the First Amendment rights of free speech and freedom of association.²⁰⁸ For instance, the

196. *Id.* § 2(c).

197. *See id.*; Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (2019).

198. *See* McQuade, *supra* note 188.

199. Norris, *supra* note 42, at 291.

200. Dilts, *supra* note 10, at 719–22.

201. *See, e.g.,* Chesney, *Domestic Terrorism?*, *supra* note 38.

202. *See* Press Release, U.S. Att'y's Office, Dist. S.C., *supra* note 41.

203. *See* Press Release, Tree of Life Synagogue, *supra* note 41.

204. *See* Press Release, Office Pub. of Affairs, U.S. Dep't of Justice, Ohio Man Pleads Guilty to 29 Fed. Hate Crimes for August 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019).

205. *See, e.g.,* Press Release, Plot to Kill Muslims, *supra* note 106; *see also* Aaronson, *Homegrown Material Support*, *supra* note 103.

206. *See* Matt Ford, *The Danger of a Domestic Terrorism Law*, NEW REPUBLIC (Aug. 15, 2019), <http://newrepublic.com/article/154785/danger-domestic-terrorism-law> [https://perma.cc/58JY-JNT7].

207. Roy L. Austin Jr. & Kristen Clarke, *Creating a 'Domestic Terrorism' Charge Would Actually Hurt Communities of Color*, WASH. POST (Aug. 26, 2019, 11:39 AM), http://www.washingtonpost.com/opinions/domestic-terrorism-doesnt-need-to-be-a-chargeable-offense-we-already-have-powerful-hate-crime-laws/2019/08/26/14c6f354-c4eb-11e9-b72f-b31d4aa77212_story.html [https://perma.cc/JK6D-6SJM] (“Historically, federal law enforcement agencies have used [counterterrorism laws] to target not only those who commit acts of violence but also those who advocate [for] social and racial justice—including the FBI’s covert operations against the Rev. Martin Luther King Jr. . . . and . . . its creation of the term ‘black identity extremists’ to target those protesting excessive force by police.”); Letter from Vanita Gupta, President & CEO, Leadership Conference on Civil & Human Rights Congress (Sept. 6, 2019), <http://civilrights.org/resource/oppose-a-new-federal-domestic-terrorism-crime-2/> [https://perma.cc/9YR3-TFDM] (“The federal government has no shortage of counterterrorism powers, and these powers have been used to unjustly target American Muslim, Arab American, South Asian American, African American communities and those who fight for racial and social justice.”).

208. Matt Apuzzo, *‘Urgent Resolve’ To Fight Domestic Terrorism Faces Tall Legal Obstacles*, N.Y. TIMES (Aug. 5, 2019), <http://www.nytimes.com/2019/08/05/world/americas/shooting-response-dayton-el>

Supreme Court has held that monetary donations to designated foreign terrorist organizations are not protected under the First Amendment.²⁰⁹ This holding is in contrast to laws that allow donations to domestic political organizations.²¹⁰ In *United States v. Afshari*,²¹¹ the defendants were charged under Section 2339B for having solicited donations for the Mujahedin-e Khalq (MEK) despite having knowledge that the MEK was a designated foreign terrorist organization.²¹² The United States Court of Appeals for the Ninth Circuit, ruling on the constitutionality of the terrorist designation statute, explicitly distinguished between foreign and domestic organizations,²¹³ suggesting that contributions to domestic groups such as the KKK may be afforded constitutional protection.²¹⁴

Opponents also contend that creating a designated domestic terrorist organization list, similar to the list that exists for foreign groups, could be unconstitutional.²¹⁵ Foreign organizations located outside of the United States do not enjoy First Amendment protections such as freedom of speech and freedom of association.²¹⁶ However, the First Amendment does apply to domestic individuals and organizations.²¹⁷ As such, a domestic terrorist organization list would likely infringe on the civil liberties and constitutional freedoms of Americans participating in these organizations.²¹⁸ In the face of these issues, critics believe the best course of action is to continue prosecuting acts of domestic terrorism under already existing criminal statutes.²¹⁹

This is not the first time that similar issues and concerns have been raised with regard to creating laws that may restrict the rights of certain groups of Americans.²²⁰ During the Cold War era, membership in any “society, group, or assembly of persons” that encouraged the overthrow of the government was criminalized under the Smith

-paso.html [https://perma.cc/TBP5-GV5W]; see also Joseph Moreno, *A Domestic Terrorism Law is Not Enough To Combat Gun Violence*, HILL (Aug. 19, 2019, 10:00 AM), <http://thehill.com/opinion/national-security/457770-a-domestic-terrorism-law-is-not-enough-to-combat-gun-violence> [https://perma.cc/WHJ8-DWM2].

209. *United States v. Afshari*, 426 F.3d 1150, 1160–61 (9th Cir. 2005).

210. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010) (holding that corporate donations to political campaigns are an expression of free speech).

211. 426 F.3d 1150 (9th Cir. 2005).

212. *Afshari*, 426 F.3d at 1152.

213. *Id.* at 1160–61.

214. See *id.*; see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39–40 (2010) (“We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations. . . . Congress is not required to ban material support to every group or none at all.”).

215. *Domestic Terrorism Conference Series: Combating Domestic Terrorism With Thomas Brzozowski*, N.J. OFF. HOMELAND SEC. & PREPAREDNESS (Aug. 7, 2017), <http://www.njhomelandsecurity.gov/media/podcast-combating-domestic-terrorism-with-thomas-brzozowski> [https://perma.cc/KR3Y-6UHX]; see also BJELOPERA, *supra* note 38, at 9.

216. See Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 PM), <http://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism> [https://perma.cc/QE37-XS69].

217. See *id.*

218. BJELOPERA, *supra* note 38, at 9.

219. See, e.g., Moreno, *supra* note 208 (“The problem is these bills effectively serve as solutions to a problem that does not exist. It is true that . . . domestic terrorism is defined but not criminalized in federal law. But this does not mean there are terror attacks that are going unpunished.”).

220. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961).

Act.²²¹ Congress intended this Act to combat the growth of communism in the United States.²²² In *Scales v. United States*,²²³ the Supreme Court affirmed the conviction of the defendant for active membership in the Communist Party of the United States and upheld the constitutional validity of the Smith Act's membership requirement despite the looming First Amendment concerns.²²⁴

The *Scales* test for determining membership in such an organization addressed many concerns that are strikingly similar to issues currently being debated regarding domestic terrorism.²²⁵ The two-part *Scales* test requires both the individual's active participation in the group's activities and the specific intent to facilitate the group's unlawful ends.²²⁶ While the threat of domestic terrorism largely stems from individual action as compared to the collective action pondered by the Smith Act and resulting *Scales* test, parallels between the two antigovernment movements can prove helpful in thinking about domestic terrorism.²²⁷

III. DISCUSSION

This Section proposes several amendments to the material support statutes to fill the current gaps that exist in terrorism laws and create greater accountability through civil liability for acts meeting the current definition of domestic terrorism in Section 2331.²²⁸ Part III.A advocates for eliminating the distinction between domestic and international terrorism in Title 18. It also contends that acts of terrorism, even those committed by individuals with jihadi ideologies, can fall between the cracks created by these definitional differences. It further discusses whether a designated domestic terrorist organization list is necessary and what such a list may entail. Part III.B advocates for amending the definition of material support to account for the evolving nature of terrorism, including decentralized organizations and increased internet usage. It additionally provides a refined analysis for determining who is liable under the material support statutes.

A. *Eliminate the Distinction Between Domestic and International Terrorism*

The debates surrounding how to address domestic terrorism are not new.²²⁹ However, the events of September 11, 2001 led to a dramatic shift in how acts of terror

221. Alien Registration Act of 1940 (Smith Act), ch. 439, § 23, 54 Stat. 670, 673 (codified at 18 U.S.C. § 2385 (2018)).

222. Chesney, *Sleeper Scenario*, *supra* note 57, at 66 ("The Smith Act, officially titled the Alien Registration Act of 1940, contained an array of measures designed to suppress communist party activity in the United States.").

223. 367 U.S. 203 (1961).

224. *Scales*, 367 U.S. at 228–29.

225. *See id.* (discussing the legality of membership in an organization intended to promote advocacy previously held to be not protected constitutionally).

226. *Id.* at 221.

227. *Cf.* Chesney, *Sleeper Scenario*, *supra* note 57, at 68–70 (discussing the application of the *Scales* test to foreign terrorist organizations).

228. 18 U.S.C. § 2331(5) (2018).

229. *See, e.g.*, COUNTERTERRORISM THREAT ASSESSMENT & WARNING UNIT, COUNTERTERRORISM DIV., FED. BUREAU INVESTIGATION, *TERRORISM IN THE UNITED STATES* 1999, at 28–33 (1999).

were characterized and discussed throughout the government²³⁰ and in the media.²³¹ As federal law enforcement focused primarily on international jihadi terror and actors whose plots originated and sometimes even occurred outside American borders, efforts addressing similar acts occurring within the United States remained stagnant and underdeveloped.²³² The current debate primarily focuses on whether an independent criminal charge and corresponding civil liability should be created for domestic terrorism in the same way it currently exists for international terrorism.²³³ However, there has been very little discussion about whether the distinction between the two is necessary at all.²³⁴ Part III.A.1 discusses the gap created by the different definitions for international and domestic terrorism and why eliminating this distinction would close this gap. Part III.A.2 furthers the discussion of why the distinction should be eliminated by discussing whether a list, similar to the designated foreign terrorist organization list, should be created for the domestic context and the implications of such a list.

1. Filling the Gap in the Law

As evidenced in *Crosby*, the distinction between domestic and international terrorism is not only unhelpful in addressing many of the attacks occurring in the United States but it also creates a significant gap in the law.²³⁵ The Pulse Night Club shooter, Omar Mateen, is a prime example of this gap.²³⁶ Mateen, an American citizen with Afghani heritage,²³⁷ was radicalized by ISIS propaganda he found through the internet.²³⁸ Mateen had traveled to Saudi Arabia twice for religious pilgrimages,²³⁹ was briefly on an FBI terrorist watchlist for “inflammatory comments claiming connections to overseas

230. Compare *id.* at 16 (“During the past 30 years, the vast majority—but not all—of the deadly terrorist attacks occurring in the United States have been perpetrated by domestic extremists.”), with BJELOPERA, *supra* note 38, at 1 (“Since the terrorist attacks of September 11, 2001 (9/11), domestic terrorists . . . have not received as much attention from federal law enforcement as their violent jihadi counterparts.”).

231. See, e.g., Erin M. Kearns, Allison E. Betus & Anthony F. Lemieux, *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, 36 JUST. Q. 985, 999 (2019) (“[T]errorist attacks perpetrated by Muslims receive drastically more media coverage than attacks by non-Muslims.”).

232. See BJELOPERA, *supra* note 38, at 1.

233. See Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020); Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. (2019); Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (2019).

234. But see Daniel L. Byman, *Should We Treat Domestic Terrorists the Way We Treat ISIS?: What Works—And What Doesn’t*, BROOKINGS INST. (Oct. 3, 2017), <https://www.brookings.edu/articles/should-we-treat-domestic-terrorists-the-way-we-treat-isis-what-works-and-what-doesnt/>.

235. See *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 572–73 (E.D. Mich. 2018), *aff’d* 921 F.3d 617 (6th Cir. 2019).

236. See *id.*

237. Mark Mazzetti, Eric Lichtblau & Alan Blinder, *Omar Mateen, Twice Scrutinized by F.B.I., Shows Threat of Lone Terrorists*, N.Y. TIMES (June 13, 2016), <http://www.nytimes.com/2016/06/14/us/politics/orlando-shooting-omar-mateen.html> [https://perma.cc/G4SH-H83B].

238. *The Orlando Massacre and the Conundrum of Online Radicalization*, COUNCIL ON FOREIGN REL.: NET POL. (June 16, 2016), <http://www.cfr.org/blog/orlando-massacre-and-conundrum-online-radicalization> [https://perma.cc/LKZ7-ELXG].

239. Mazzetti et al., *supra* note 237.

terrorists,”²⁴⁰ had ties to an ISIS suicide bomber,²⁴¹ and perhaps most importantly, had pledged his allegiance to ISIS both prior to and during the attack itself.²⁴² Despite these facts and ISIS’s claim of responsibility for the attack,²⁴³ the U.S. District Court for the Eastern District of Michigan held that Mateen’s attack, killing forty-nine Americans, was not an act of international terrorism.²⁴⁴

Mateen’s actions would clearly be considered terrorism under the Code of Federal Regulations.²⁴⁵ Additionally, these acts would meet the definitions for terrorism provided in Section 2331 absent the geographical distinctions between Sections 2331(1)(C) and 2331(5)(C).²⁴⁶ The court determined the attack did not meet the Section 2331(1) definition of international terrorism,²⁴⁷ but if it had characterized Mateen’s actions as acts of domestic terrorism, it would be misleading because doing so ignores the glaring link to an organization currently on the designated foreign terrorist organization list.²⁴⁸

Creating a criminal charge for domestic terrorism would fail to address the gap illustrated in *Crosby* because individuals such as Mateen—an American citizen located in the United States, who planned and perpetrated an attack entirely in the United States, and who was inspired by a foreign terrorist organization online—would still fall through the cracks.²⁴⁹ A more effective solution would instead be to eliminate the distinction between domestic and international terrorism that currently exists under the law.²⁵⁰ This solution would first require amending Section 2331 to remove the separate definitions

240. *Id.*

241. *Id.*

242. Kevin Sullivan, Ellen Nakashima, Matt Zapposky & Mark Berman, *Orlando Shooter Posted Messages on Facebook Pledging Allegiance to the Leader of ISIS and Vowing More Attacks*, WASH. POST (June 15, 2016), http://www.washingtonpost.com/world/national-security/investigation-into-orlando-shooting-continues-no-impending-charges-expected/2016/06/15/c3eccf5e-3333-11e6-8758-d58e76e11b12_story.html [https://perma.cc/4LCV-7PLW].

243. Rukmini Callimachi, *Was Orlando Shooter Really Acting for ISIS? For ISIS, It’s All the Same*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/orlando-omar-mateen-isis.html> [https://perma.cc/UD99-6RGW] (“Mr. Adnani [ISIS’s spokesman] made clear that anyone and everyone could, and should, carry out acts of terror in the group’s name. . . . [A]fter it was known that Mr. Mateen had invoked ISIS, the group’s official news agency issued a bulletin . . . confirming that Mr. Mateen was acting on the Islamic State’s behalf.”).

244. *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 567, 572–73 (E.D. Mich. 2018), *aff’d*, 921 F. 3d 617 (6th Cir. 2019).

245. See 28 C.F.R. § 0.85(l) (2019) (defining terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives”).

246. See 18 U.S.C. § 2331(1), (5) (2018).

247. Section 2331(1)(C) defines international terrorism as acts that “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.” *Id.*

248. See *Crosby*, 303 F. Supp. 3d at 572–73; Dan Frosch & Nicole Hong, *Transcripts Show ISIS Influence on Orlando Gunman*, WALL STREET J. (Sept. 27, 2016, 8:38 PM), <http://www.wsj.com/articles/transcripts-show-isis-influence-on-orlando-gunman-1475023090> [https://perma.cc/3QK5-AC5Y]; see also *Foreign Terrorist Organizations*, *supra* note 72.

249. See *Crosby*, 303 F. Supp. 3d at 572–73.

250. See 18 U.S.C. § 2331(1), (5).

for international and domestic terrorism.²⁵¹ By removing subsections (1)(C) and (5)(C)²⁵² and amending subsection (1)(A) to eliminate the phrasing “or that would be a criminal violation if committed within the jurisdiction of the United States or of any State,”²⁵³ the definitions would become identical and could therefore be combined into one all-encompassing definition of terrorism.²⁵⁴ Consequently, it would no longer be legally relevant where an attack originated or where the individuals or organizations associated were located.²⁵⁵

Further, other provisions within Title 18 should also be amended to complete this solution.²⁵⁶ While this Comment focuses specifically on the material support statutes in Sections 2339A and 2339B, under this proposal, the code provision dealing specifically with “acts of terrorism transcending national boundaries”—Section 2332b—would have to be amended to eliminate references to international acts.²⁵⁷ Additionally, while civil liability for acts violating Section 2339A already exists under Section 2333,²⁵⁸ such claims are limited by the language in Section 2333, which restricts civil liability to “act[s] of international terrorism.”²⁵⁹ By removing this language, civil liability would be established for those who provide material support for any act listed under Section 2339A regardless of its geographic ties.²⁶⁰ This change could help create civil liability for institutional actors who knowingly assist a domestic terrorist.²⁶¹

For example, in August 2019, a man was arrested after making terroristic threats against Temple University while buying rifle ammunition at a local Walmart.²⁶² Although the employee who overheard these threats properly reported the incident,²⁶³ under this Comment’s proposed amendments to the material support statutes, a failure to report such communication could create liability for Walmart under Sections 2339A and 2333.²⁶⁴ It is important to note that without these amendments Walmart might still be

251. *See id.*

252. *See id.* § 2331(1)(C) (“The term ‘international terrorism’ means activities that . . . occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”); *Id.* § 2331(5)(C) (“The term ‘domestic terrorism’ means activities that . . . occur primarily within the territorial jurisdiction of the United States.”).

253. *Id.* § 2331(1)(A).

254. *See id.* § 2331(1), (5).

255. *See id.*

256. *See, e.g., id.* § 2333.

257. *See id.* § 2332b (prohibiting “[a]cts of terrorism transcending national boundaries”).

258. *See, e.g.,* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1015 (7th Cir. 2002), *overruled in part sub nom.* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685 (7th Cir. 2008) (en banc).

259. 18 U.S.C. § 2333.

260. *See id.*

261. *See, e.g., In re Chiquita Brands Int’l, Inc.*, 284 F. Supp. 3d 1284, 1316 (S.D. Fla. 2018) (dismissing a motion for summary judgment against a U.S. corporation under Section 2333 where there was underlying Section 2339A activity).

262. Rita Giordano, *Bucks County Man Charged with Terroristic Threats Against Temple University*, PHILA. INQUIRER (Aug. 3, 2019), <http://www.inquirer.com/news/threats-arrest-temple-university-ammunition-bucks-county-walmart-20190803.html> [https://perma.cc/3SHA-9XLV].

263. *Id.*

264. *See, e.g., In re Chiquita Brands*, 284 F. Supp. 3d at 1316; *see also* 18 U.S.C. §§ 2333, 2339A (2018).

criminally liable under Section 2339A.²⁶⁵ These amendments are significant because they would create civil liability for an institutional actor such as Walmart whom the federal government is unlikely to charge criminally²⁶⁶ but still knowingly sold ammunition despite being fully aware of this man's intentions.²⁶⁷

2. Designated Domestic Terrorism List?

This proposal does not suggest eliminating the designated foreign terrorist organization list or creating a similar list to address domestic organizations.²⁶⁸ Although recently there have been renewed discussions regarding designating domestic groups as terrorist organizations as a result of the 2020 Black Lives Matter protests,²⁶⁹ the creation of such a list would likely face significant constitutional obstacles by intruding on individuals' right of association.²⁷⁰ The government and those in power could also use a domestic list as a tool to target opposition groups.²⁷¹ These same issues do not apply to foreign organizations who do not enjoy First Amendment protections.²⁷²

Even before the 2020 Black Lives Matter protests,²⁷³ there had been calls for the Trump administration to designate a white supremacist group as a terrorist

265. See 18 U.S.C. § 2339A.

266. See, e.g., *In re Chiquita Brands*, 284 F. Supp. 3d at 1307–09 (discussing the necessity of a predicate criminal violation under Section 2339A to successfully plead a Section 2333 claim). There is currently no parallel case that criminally charges Chiquita Brands under Section 2339A for allegedly providing monetary support to the FARC in Colombia. *Id.*; see also *Foreign Terrorist Organizations*, *supra* note 72 (listing the FARC as a DFTO since 1997).

267. Giordano, *supra* note 262.

268. See *Foreign Terrorist Organizations*, *supra* note 72. But see BJELOPERA, *supra* note 38, at 58 (“[T]he absence of a designation regimen for domestic terrorist groups makes it harder for the federal government to discredit such groups, . . . strengthen public understanding of the domestic terrorist threat, [and] . . . communicate exactly what the threat is to its own agencies, let alone local or state entities.”).

269. See Donald J. Trump (@realDonaldTrump), TWITTER (May 31, 2020, 12:23 PM), <http://twitter.com/realDonaldTrump/status/1267129644228247552> [<https://perma.cc/SEE2-73E4>] (“The United States of America will be designating ANTIFA as a Terrorist Organization.”). In the days and weeks following President Trump's tweet during the 2020 Black Lives Matter protests, various online petitions and Twitter trends emerged calling for the KKK to be designated as a terrorist organization. See, e.g., Trevor Powers, *Declare the KKK a Terrorist Organization*, CHANGE.ORG (June 2, 2020), <http://www.change.org/p/donald-j-trump-declare-the-kek-a-terrorist-organization> [<https://perma.cc/6BZX-9EHU>]; A K, *Declare the KKK a Terrorist Organization*, CHANGE.ORG (June 4, 2020), <http://www.change.org/p/department-of-homeland-security-declare-the-kek-a-terrorist-organization> [<https://perma.cc/9NCP-XBNT>].

270. BJELOPERA, *supra* note 38, at 9; *Domestic Terrorism Conference Series: Combating Domestic Terrorism With Thomas Brzozowski*, *supra* note 215; *Foreign Terrorist Organizations*, *supra* note 72.

271. Ford, *supra* note 206.

272. See *supra* notes 208–219 and accompanying text.

273. These protests began in response to the death of George Floyd and denounced police brutality against African Americans as well as called for significant reforms to policing in the United States. See *#DefundThePolice*, BLACK LIVES MATTER (May 30, 2020), <http://blacklivesmatter.com/defundthepolice/> [<https://perma.cc/BJ9P-VJ83>]. During these protests, the extremist Boogaloo movement gained notoriety after three members were arrested in Las Vegas for conspiracy to damage and destroy by fire and explosive. See Complaint at 2, *United States v. Parshall*, No. 2:20-mj-00456-BNW (D. Nev. June 2, 2020). This movement will not be discussed in detail in this Comment because its members do not necessarily adhere to a white supremacist ideology (the focus of this Comment) but instead subscribe to a range of ideologies spanning the political spectrum. Jane Coaston, *The “Boogaloo” “Movement,” Explained*, VOX (June 8, 2020, 4:50 PM), <http://www.vox.com/2020/6/8/21276911/boogaloo-explained-civil-war-protests> [<https://perma.cc/U9TY>].

organization.²⁷⁴ Reports indicated that the most likely candidate would be the group Atomwaffen Division (AWD).²⁷⁵ However, the less well-known group Russian Imperial Movement (RIM) was declared a Specially Designated Global Terrorist (SDGT) instead.²⁷⁶ It is likely this substitution occurred because of AWD's significant presence in the United States.²⁷⁷ The State Department does not have the authority to designate domestic groups as terrorist organizations.²⁷⁸ Therefore, while AWD does have a foreign presence,²⁷⁹ its U.S. origins, attacks, and leadership base place the group in a constitutional gray area.²⁸⁰ Consequently, recent calls to designate other groups with U.S. origins and even less foreign presence as terrorist organizations would face significant constitutional hurdles.²⁸¹

A designated domestic terrorist organization list would fail to grasp the current structure and characterization of the domestic terrorism threat in the United States.²⁸²

-S8BU]. Despite ideological differences, Boogaloos are primarily connected through a pro-gun and antigovernment culture. *Id.*

274. See, e.g., Letter from Max Rose and Members of Congress, to Michael Pompeo, Sec'y of State (Oct. 16, 2019).

275. Natasha Bertrand, Nahal Toosi & Daniel Lippman, *State Pushes to List White Supremacist Group as Terrorist Org*, POLITICO (Mar. 9, 2020, 3:21 PM), <http://www.politico.com/news/2020/03/09/state-department-white-supremacist-group-124500> [<https://perma.cc/EG7X-AW83>].

276. Nathan A. Sales, *Designation of the Russian Imperial Movement*, U.S. DEP'T STATE (Apr. 6, 2020), <http://www.state.gov/designation-of-the-russian-imperial-movement/> [<https://perma.cc/Z4WR-DARV>]. While this is significant because it is the first white supremacist group to be labeled as terrorists, the SDGT designation is much more limited in legal remedies than if the group was listed as a designated foreign terrorist organization (DFTO). See Jon Lewis & Mary B. McCord, *The State Department Should Designate the Russian Imperial Movement as a Foreign Terrorist Organization*, LAWFARE (Apr. 14, 2020, 2:14 PM), <http://www.lawfareblog.com/state-department-should-designate-russian-imperial-movement-foreign-terrorist-organization> [<https://perma.cc/8NV5-HK2K>], for an in-depth discussion of the difference in legal remedies between the SDGT and DFTO designations. Currently, there are no white supremacist groups on the DFTO list. See *Foreign Terrorist Organizations*, *supra* note 72.

277. Compare JACOB WARE, SIEGE: THE ATOMWAFFEN DIVISION AND RISING FAR-RIGHT TERRORISM IN THE UNITED STATES 2, 4-6 (2019) (stating that "[t]he Atomwaffen Division is a small neo-Nazi terrorist organisation mainly active in the United States" and detailing their activity within the United States), with Daveed Gartenstein-Ross, Samuel Hodgson & Colin P. Clarke, *The Russian Imperial Movement (RIM) and its Links to the Transnational White Supremacist Extremist Movement*, INT'L CTR. FOR COUNTER-TERRORISM - THE HAGUE (Apr. 24, 2020), <http://icct.nl/publication/the-russian-imperial-movement-rim-and-its-links-to-the-transnational-white-supremacist-extremist-movement/> [<https://perma.cc/59ZT-9AKL>] (describing RIM as "an ultranationalist, pro-monarchist organization based in Russia" that is "seeking to establish an international network").

278. See Office of the Spokesperson, *Terrorism Designations FAQs*, U.S. DEP'T STATE (Feb. 28, 2018), <http://www.state.gov/terrorism-designations-faqs/> [<https://perma.cc/P6HW-ECKG>] (stating that a requirement for designation as either a DFTO or SDGT requires the individual or entity to be "foreign").

279. See WARE, *supra* note 277, at 6 (stating that AWD has expanded to Canada, Germany, and may have connections in Ukraine).

280. See Jason M. Blazakis, *Better Intel Could Help the US Designate White Supremacist Groups as Terrorists*, HILL (Mar. 25, 2020, 3:00 PM), <http://thehill.com/opinion/national-security/488571-better-intel-could-help-the-us-designate-white-supremacist-groups> [<https://perma.cc/RUP6-D24U>].

281. See BJELOPERA, *supra* note 38, at 9.

282. See *supra* Part II.B.2; see also Joshua Fisher-Birch, *Atomwaffen Division Claims to Have Disbanded*, COUNTER EXTREMISM PROJECT (Mar. 16, 2020), <http://www.counterextremism.com/blog/atomwaffen-division-claims-have-disbanded> [<https://perma.cc/8YBT-SFUA>] (stating that AWD leader James Mason

While white supremacist organizations still exist in the United States and continue to pose a threat to the safety and security of Americans, the current white supremacist threat differs significantly from the threat of international terrorism.²⁸³ Unlike their international counterparts, domestic terrorists generally operate without ties to a formal organization.²⁸⁴

Many domestic terrorists are caught only after reaching out to an organization such as the KKK.²⁸⁵ This connection between the individual and the organization is often essential in alerting law enforcement to potential plots and facilitating arrests prior to any attack.²⁸⁶ Those individuals who do not reach out to others for assistance are significantly less likely to be apprehended prior to committing their violent acts.²⁸⁷ Because the threat from lone-wolf terrorists is the most significant cause for concern, a designated domestic terrorist organization list would not be effective in addressing this threat.²⁸⁸

As discussed above, recent domestic terrorist attacks have overwhelmingly been characterized as isolated acts by lone-wolf actors.²⁸⁹ While at face value attacks such as those by Dylann Roof and Patrick Crusius appear isolated, both individuals turned to online communities instead of formal organizations to foster their ideologies and provide motivation for their attacks.²⁹⁰ A designated domestic terrorist organization list would not adequately address online communities that lack a formal organizational structure.²⁹¹

Although one potential solution could be to form a suspicious website list where IP addresses of individuals who visit these sites are tracked,²⁹² this would likely be an incomplete and ineffective solution, even if it were to survive constitutional scrutiny.²⁹³ Constitutional issues aside,²⁹⁴ this solution would be ineffective because tracking every visit to the website is likely to create overly broad monitoring. It likely would include individuals who do not associate with a white supremacist ideology, as well as passive followers of such an ideology who do not actively participate or would not engage in

announced that the group would be disbanded and speculating that this was a strategy to avoid designation as a terrorist organization).

283. See *BJELOPERA*, *supra* note 38, at 19–22 (detailing the state of major white supremacist movements and groups currently operating in the United States).

284. See *id.* at 50.

285. See, e.g., Aaronson, *Homegrown Material Support*, *supra* note 103 (discussing that the FBI was alerted to Crawford's plan by a KKK imperial wizard turned FBI informant); Affidavit in Support of Criminal Complaint, *supra* note 128, at 2–3.

286. See, e.g., Aaronson, *Homegrown Material Support*, *supra* note 103.

287. See *BJELOPERA*, *supra* note 38, at 54 (stating that lone wolves present significant challenges for law enforcement because they do not have organizations that can be infiltrated, communications that can be traced, or conspirators that can be turned into informants).

288. See *id.* at 53–54.

289. See *supra* Part II.B.2 for a discussion of domestic terrorism and lone wolf actors.

290. See *supra* notes 130–143 for a discussion of Dylann Roof's and Patrick Crusius's internet usage prior to their acts of terror.

291. See Chesney, *Sleeper Scenario*, *supra* note 57, at 73–74.

292. Examples of such websites include those known for espousing white supremacist ideologies such as 8chan, 4chan, Stormfront, etc. See Crowe & Heath, *supra* note 129.

293. See Tate, *supra* note 39, at 1751–53 (discussing the difficulties in holding fringe websites, such as IronFront.org, liable despite knowledge of their users' activity).

294. While constitutional issues may have a significant impact on many of the proposed recommendations, these issues are beyond the scope of this Comment.

violent action in support of white supremacy.²⁹⁵ Further, a suspicious website list would fail to include individuals who are connected to the white supremacist community and who support the ideology through mainstream websites.²⁹⁶ As such, a suspicious website list would simultaneously be too broad and too narrow in its scope to be as effective of a preventative measure as the designated foreign terrorist organization list.²⁹⁷ Consequently, the creation of a designated domestic terrorism list similar to the current list for foreign organizations would likely be ineffective, inadequate, and potentially even unconstitutional.²⁹⁸

B. Expand the Definition of Material Support

Eliminating the distinction between domestic and international terrorism in the material support statutes is only part of the solution; it still does not address the different form of threat that domestic terrorism represents.²⁹⁹ The definition of material support does not account for the changing nature of both domestic and international terrorism.³⁰⁰ As the terrorism threat continues to become less group-oriented and instead comes to resemble an amorphous network of cells,³⁰¹ the way in which individuals and institutions provide support and assistance to terrorist actors has also changed.³⁰² Part III.B.1 discusses the definition of material support itself and the need to clarify several of the terms within that definition, in general and in the context of domestic terrorism and the internet. Part III.B.2 continues the discussion of the material support definition and considers refining the analysis it entails as well as potential constitutional issues the proposed amendments might face.

1. Reducing Ambiguity in the Definition of Material Support

In the context of international terrorism, defendants charged with material support have often argued that the definition of material support provided in Section 2339A is both vague and overly broad.³⁰³ In particular, there have been several legal challenges to the meanings of “training,”³⁰⁴ “personnel,”³⁰⁵ and “expert advice or assistance”³⁰⁶ within

295. See Chesney, *Sleeper Scenario*, *supra* note 57, at 60–61.

296. See, e.g., Affidavit in Support of Criminal Complaint, *supra* note 128, at 2–3 (detailing how the accused and his intended terrorist plot were detected through his Facebook usage).

297. See Chesney, *Sleeper Scenario*, *supra* note 57, at 60–61 (analogizing membership in a political party to that of a terrorist organization).

298. BJELOPERA, *supra* note 38, at 9; *Domestic Terrorism Conference Series: Combating Domestic Terrorism With Thomas Brzozowski*, *supra* note 215.

299. See, e.g., BJELOPERA, *supra* note 38, at 1.

300. See 18 U.S.C. § 2339A(b) (2018).

301. BJELOPERA, *supra* note 38, at 2.

302. See Chesney, *Sleeper Scenario*, *supra* note 57, at 20.

303. See, e.g., *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1187 (C.D. Cal. 2004).

304. E.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000).

305. See *United States v. Sattar*, 272 F. Supp. 2d 348, 358–59 (S.D.N.Y. 2003), *aff’d sub nom.*, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009). The holding of vagueness in this case was superseded by an amendment to 18 U.S.C. § 2339A in 2004 which clarified that “personnel” could include self-provision. See 18 U.S.C. § 2339A(b)(1).

306. See *Ashcroft*, 309 F. Supp. 2d at 1200.

the definition of material support.³⁰⁷ While these meanings have not been challenged in the domestic terrorism context, it is far more significant that these meanings have not been considered in the context of connections facilitated through the internet.³⁰⁸

The issue of vagueness will continue to be a significant problem in prosecutions for both international and domestic terrorism under the material support statutes as the internet continues to become a prominent platform for the spread of radical ideologies.³⁰⁹ The application of these terms to digital relationships will likely provide new challenges for courts already struggling with vague definitions and unclear legislative intentions.³¹⁰ The use of the internet may allow “training” or “expert advice or assistance” to be transmitted online, and courts will have to determine when this transmission constitutes the provision of material support.³¹¹ For instance, despite congressional efforts to prevent access to internet sources detailing how to make a bomb, there is no shortage of such information.³¹² Additionally, white supremacist websites such as Stormfront display forum threads offering various types of advice such as “Rifle and ground-fighting techniques,” “The Ammunition Source Thread,” and “How to start a militia,” among hundreds of others.³¹³ The provision of this information over the internet may very well be included within Section 2339A,³¹⁴ particularly when the individual who posted this information has the requisite mental states for furnishing support to terrorists or terrorist organizations.³¹⁵

Thus far, the only discussion of terms within the material support definition that touches upon the internet has been regarding the use of “communications equipment.”³¹⁶ In *Sattar*, this term was held to be unconstitutionally vague because Section 2339A did not put the defendants on notice that merely using communications equipment to further an organization’s objectives was criminal conduct.³¹⁷ While the use of communications equipment alone does not constitute material support, courts have yet to rule on whether information transmitted over that equipment could constitute material support.³¹⁸ This uncertainty, particularly in relation to “training” and “expert advice or assistance,” should be considered in the context of internet communication, as domestic terrorists

307. See 18 U.S.C. § 2339A(b); see also *supra* notes 55–60.

308. See 18 U.S.C. § 2339A(b).

309. See Tate, *supra* note 39, at 1734 (attributing the rise of domestic terrorism to increasing use of the internet).

310. See, e.g., *Ashcroft*, 309 F. Supp. 2d at 1199–201.

311. See 18 U.S.C. § 2339A(b).

312. Bryan J. Yeazel, Comment, *Bomb-Making Manuals on the Internet: Maneuvering a Solution Through First Amendment Jurisprudence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 279, 280 (2002).

313. See, e.g., STORMFRONT, <http://www.stormfront.org/forum/> [<https://perma.cc/8DMH-XS2W>] (last visited Nov. 1, 2020). This website states it is “a community of racial realists and idealists” and includes hundreds of user-posted forum threads, including the titles listed in this Comment. *Id.*

314. See 18 U.S.C. § 2339A(b); see *supra* notes 57–63.

315. See *supra* Part II.A.2 for a comparison of the different mental states required under Sections 2339A and 2339B.

316. See *United States v. Sattar*, 272 F. Supp. 2d 348, 357–58 (S.D.N.Y. 2003), *aff’d sub nom.*, *United States v. Stewart*, 590 F.3d 93 (2nd Cir. 2009).

317. *Id.* See also *supra* notes 56–62 and accompanying text for a discussion of *Sattar*.

318. *Cf. Sattar*, 272 F. Supp. 2d 348.

such as Dylann Roof and Patrick Crusius have directly attributed their knowledge to online communities.³¹⁹

While many of these arguments have been framed in terms of vagueness, at least one scholar has argued that these ambiguous meanings instead implicate the doctrine of overbreadth.³²⁰ Under this doctrine, a statute is considered overly broad when the activity it prohibits also encompasses constitutionally permissible activity.³²¹ This doctrine would appear particularly applicable to the material support statutes if one were to argue that protected speech was encompassed within the overly broad words within the material support definition.³²² However, challenges for overbreadth have often been rejected because instances where the material support statutes may prohibit constitutionally permissible activity are unlikely to comprise a substantial proportion of instances where the statutes are applied.³²³ Once again, these challenges have not arisen in the domestic terrorism context where they would more directly implicate American citizens.³²⁴

When “training” or “expert advice or assistance” are accessible online, the question of liability likely implicates Section 230 of the Communications Decency Act.³²⁵ As previously discussed, Section 230 creates immunity from liability for internet platforms that publish posts by third-party users on their platforms.³²⁶ Under this proposal, however, internet platforms would not be subject to liability solely because their platforms served as the medium through which “training” or “expert advice or assistance” were provided.³²⁷ Instead, clarifying the definitions of “training” and “expert advice or assistance” would simply create liability for the third-party users posting the information and avoid CDA immunity entirely.³²⁸

Clarifying the breadth of these terms under the definition of material support, specifically in relation to internet usage, would put individuals on notice of the prohibitions encompassed in “training” and “expert advice or assistance.”³²⁹ Additionally, internet platforms would be on notice of this prohibited activity as well.³³⁰ This notice for internet platforms should occur in conjunction with laws requiring greater

319. See *supra* Part II.B.1 for a discussion of online radicalization in the context of domestic terrorism.

320. Chesney, *Sleeper Scenario*, *supra* note 57, at 57.

321. *Virginia v. Hicks*, 539 U.S. 113, 118–20 (2003).

322. See 18 U.S.C. § 2339A(b) (2018).

323. Chesney, *Sleeper Scenario*, *supra* note 57, at 57–58 (asserting that court holdings rejecting the overbreadth doctrine are correct because of “the wide range of circumstances in which the statute constitutionally could be applied” including “the provision of guns, funds, and equipment”).

324. See Aaronson, *Terrorism’s Double Standard*, *supra* note 30 (discussing the infrequency of prosecutions for domestic terrorism under the material support statutes).

325. See 47 U.S.C. § 230 (2018).

326. See *supra* Part II.B.1 for a discussion of internet platforms and material support.

327. See, e.g., *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156 (N.D. Cal. 2018); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564 (E.D. Mich. 2018), *aff’d* 921 F.3d 617 (6th Cir. 2019); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017).

328. See, e.g., *Bently Reserve L.P. v. Papaliolios*, 160 Cal. Rptr. 3d 423, 431 (Cal. Ct. App. 2013) (stating that posting online does not immunize the user from legal liability).

329. See *United States v. Sattar*, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003), *aff’d sub nom.*, *United States v. Stewart*, 590 F.3d 93 (2nd Cir. 2009).

330. See *id.*

compliance and monitoring by the platforms themselves, which includes reporting suspicious activity that occurs on their websites.³³¹ Failure to implement effective monitoring systems would result in fines that could be reinvested in the investigation and prosecution of domestic terrorists.³³² Government resources could be used more efficiently by imposing a portion of the transaction costs associated with investigating domestic terrorism on private companies with greater resources than the federal government, with the hope of greater prevention.³³³

Critics will likely assert that increased monitoring and compliance would be ineffective in preventing domestic terrorist attacks.³³⁴ Given the number of social media users in the United States alone, opponents of increased monitoring have argued that it would be impossible to catch every instance of material support being furnished over internet platforms.³³⁵ Additionally, the ease with which individuals can create new and anonymous accounts to replace old accounts or to make identifying the account creator difficult may result in an overextension of resources without any significant result.³³⁶ However, increased monitoring and compliance would serve as a significant first step in deterring the provision of material support over the internet and may require individuals to seek other means of communication where they may be more readily tracked and detected.³³⁷ Reducing ambiguity within the definition of material support to address the evolving threat of terrorism would put individuals on notice regarding the legality of their actions as well as provide law enforcement with greater tools to detect, investigate, and prevent the domestic terrorism threat.

2. Applying the *Scales* Test to Domestic Terrorism

Even if the intent behind the different terms within the definition of material support was clarified, the statutes would still be ill-equipped to handle the amorphous associations that characterize the terrorism threat today.³³⁸ As this Comment has stressed, the organizational and group-collective structure that characterized terrorism in previous

331. Crystal M. Flinn, *As Support Materializes: An Examination of Contemporary Policy in the Prosecution Under the Material Support Statutes During the Current Wave of Terrorism*, 5 *HOMELAND & NAT'L SEC. L. REV.* 79, 118 (2016).

332. *Id.* at 135.

333. *See id.*

334. *See Knox, supra* note 121, at 324–25.

335. *See id.* at 319 (“For example, approximately one billion people use Facebook in over seventy languages. Twitter, which is offered in over twenty-one languages, has over 200 million users each day.”). *But see* Brian Fung, *Facebook Bans Hundreds of Accounts Related to the Boogaloo Movement*, *CNN BUS.* (June 30, 2020, 5:29 PM), <http://www.cnn.com/2020/06/30/tech/facebook-boogaloo-ban/index.html> [https://perma.cc/G85B-UFS8]. Facebook was recently criticized for its content moderation policies, prompting many large corporations to remove their advertisements from the platform. Facebook responded by removing over “220 Facebook accounts, 95 accounts on Facebook-owned Instagram and dozens of pages and groups” that were linked to the Boogaloo movement and “posed a ‘credible threat’ to public safety,” demonstrating that private platforms have the ability to monitor and regulate its users. *Id.*; *see also supra* note 273 for a description of the Boogaloo movement.

336. *See Knox, supra* note 121, at 319.

337. *See Flinn, supra* note 331, at 136.

338. *See* 18 U.S.C. §§ 2339A–2339B (2018); *see also* Chesney, *Sleeper Scenario, supra* note 57, at 73–74.

decades has largely fallen by the wayside.³³⁹ Instead, ideologies, motivations, knowledge, and support are spread over the internet between individuals with only tenuous connections to each other.³⁴⁰ Because the connection is not through an organization but a set of beliefs, significant First Amendment concerns are implicated by the investigation and prosecution of individuals associated with domestic terrorism.³⁴¹

However, there are certain comparisons that can be drawn to the anticommunism movement during the Cold War.³⁴² The *Scales* Test to determine membership in a communist organization could be helpful in preventative prosecutions of individuals who actively participate in white supremacist communities and whose actions may escalate to acts of domestic terrorism.³⁴³ This test requires both active participation by the individual and the specific intent to facilitate the group's—or if applied to domestic terrorism, the ideology's—unlawful ends.³⁴⁴ These elements, if applied to the material support statutes, would likely assist in addressing online communities of hate.³⁴⁵ The first element—active participation—would serve to distinguish individuals who merely espouse white supremacist views on the internet from those who actively participate in the movement.³⁴⁶ By considering only active participants in the ideology, the breadth of monitoring and investigations would likely decrease.³⁴⁷ The second element—having the specific intent to further the ideology's unlawful ends—would serve to incapsulate only those individuals who take violent action to further their beliefs.³⁴⁸ This element would serve to distinguish active participants who merely protest or attend rallies in support of white supremacy from individuals such as Alex James Fields.³⁴⁹ By applying the requirements under the *Scales* test to domestic terrorism investigations and prosecutions,

339. See *supra* Part II.B.2 for a discussion of lone-wolf domestic terrorism.

340. Carmon & Davis, *supra* note 140.

341. See Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 621–22 (2014).

342. See Chesney, *Sleeper Scenario*, *supra* note 57, at 66–68.

343. See, e.g., Jon Haworth, *Ohio White Nationalist, Anti-Semite Arrested for Threatening To Shoot up Jewish Community Center, Police Say*, ABC NEWS (Aug. 18, 2019, 5:33 AM), <https://abcnews.go.com/US/ohio-white-nationalist-anti-semite-arrested-threatening-shoot/story?id=65040200> (discussing the arrest of James Readon Jr. who had attended the 2017 “Unite the Right” march in Charlottesville, Virginia and was apprehended before carrying out a planned attack on a Jewish community center in Ohio).

344. *Scales v. United States*, 367 U.S. 203, 221 (1961); see also *supra* notes 220–226 and accompanying text.

345. See Chesney, *Sleeper Scenario*, *supra* note 57, at 68–69 (discussing the application of the *Scales* test to material support in general).

346. See McLaughlin, *supra* note 3 (statement of Dylann Roof) (“We have no skinheads, no real KKK, no one doing anything but talking on the internet. Well someone has to have the bravery to take it to the real world, and I guess that has to be me.”).

347. See Flinn, *supra* note 331, at 135.

348. See Chesney, *Sleeper Scenario*, *supra* note 57, at 68.

349. *Compare Two Years Ago, They Marched in Charlottesville. Where Are They Now?*, ANTI-DEFAMATION LEAGUE (Aug. 8, 2019), <http://www.adl.org/blog/two-years-ago-they-marched-in-charlottesville-where-are-they-now> [https://perma.cc/83BU-ACCA] (discussing white supremacists who organized and participated in the 2017 “Unite the Right” march), with Denise Lavoie, *Man Gets Second Life Sentence, 419 Years for Charlottesville Car Attack*, NBC NEWS WASH. (July 15, 2019, 4:30 PM), <http://www.nbcwashington.com/news/local/man-faces-second-sentence-in-fatal-charlottesville-car-attack/135999/> [https://perma.cc/YRN8-M4YM] (discussing Alex James Fields who drove a car into counterprotesters at the “Unite the Right” march, killing one).

law enforcement would be able to more narrowly direct their attention and resources to individuals most at risk of escalating to violence.³⁵⁰

The primary difficulty this suggestion faces in its application to the material support statutes and domestic terrorism in particular is the leap from a group or organization to an ideology as the beginning of the analysis.³⁵¹ This shift necessarily implicates First Amendment principles such as the freedoms of speech, belief, and association.³⁵² While these issues have not been discussed in detail in this Comment, courts have consistently given deference to issues implicating national security.³⁵³ By classifying these domestic acts as terrorism under the law and clarifying definitions within the material support statutes, law enforcement should be afforded more leeway in investigating and prosecuting would-be domestic terrorists.³⁵⁴

Additionally, several exceptions to the First Amendment have been carved out for various types of unprotected speech and association.³⁵⁵ As such, Congress should consider carving out an exception for information spread that constitutes material support that may not rise entirely to the level of inciting violence.³⁵⁶ Further, many other countries have enacted provisions restricting white supremacist speech and association to varying extents.³⁵⁷ Congress should consider similar legislation to enhance the ability of law enforcement to investigate and preemptively prevent such ideological attacks in the future.³⁵⁸

IV. CONCLUSION

Acts motivated by white supremacist ideologies have continued to increase in recent years, sparking intense debates about how such acts should be treated under the law. Events in response to the 2020 Black Lives Matter protests have signaled these type of attacks may become even more prominent.³⁵⁹ Recent acts have differed significantly

350. See Chesney, *Sleeper Scenario*, *supra* note 57, at 68–69 (discussing the application of the *Scales* test to material support in general).

351. See *id.* at 73 (“[T]he next generation of terrorist threats also is likely to include decentralized networks of like-minded but loosely affiliated individuals who come together sporadically and on an ad-hoc basis.”).

352. See U.S. CONST. amend. I.

353. See Chesney, *Sleeper Scenario*, *supra* note 57, at 52–55 (“The material support law thus has weathered First Amendment challenges with relatively little difficulty.”); Flinn, *supra* note 331, at 134.

354. See Flinn, *supra* note 331, at 134 (“[T]here have been many instances where U.S. courts allowed a person or entity to ‘infringe’ on First Amendment rights in the name of safety or in order to protect the domestic population.”).

355. See, e.g., Allow States and Victims To Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified at 18 U.S.C. §§ 1591, 1595, 2421A (2018) and 47 U.S.C. § 230 (2018)); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

356. See, e.g., Allow States and Victims To Fight Online Sex Trafficking Act of 2017; *Brandenburg*, 395 U.S. at 447.

357. See, e.g., Thomas J. Webb, *Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 460–66 (2011) (discussing various countries’ hate speech laws in comparison to the United States).

358. *Id.* at 481.

359. In August 2020, Kyle Rittenhouse killed two individuals and wounded a third while attending a protest in Kenosha, Wisconsin. Gina Barton & Bruce Vielmetti, *Kyle Rittenhouse, 17-Year-Old Charged in*

from previous waves of terrorism in that they are largely perpetrated by domestic individuals instead of foreign organizations, and these actors often use the internet as an avenue for disseminating their motivations and recruiting others to their cause. Because of these differences, law enforcement is hesitant to call these acts what they truly are—terrorism. Current proposals to address this issue would fail to close the gap between international and domestic terrorism, allowing certain types of individuals and attacks to fall through the cracks. However, by implementing the amendments suggested in this Comment, law enforcement will be better poised to investigate and prosecute such actions. By clarifying and reinterpreting the definition of material support itself and eliminating the distinction between domestic and international terrorism, the types of activities covered under these statutes would broaden to encompass the new characteristics of the terrorism threat. Only by calling these acts what they truly are can law enforcement properly develop the tools necessary to investigate, prevent, and prosecute the individuals responsible.

Kenosha Protest Shootings, Considered Himself Militia, Social Media Posts Show, USA TODAY (Aug. 26, 2020, 4:53 PM), <http://www.usatoday.com/story/news/nation/2020/08/26/kyle-rittenhouse-charged-kenosha-shootings-militia/5636473002/> [https://perma.cc/E4U9-88VF]. Rittenhouse has not admitted a motive for this attack, but news sources have speculated his intentions were grounded in a pro-police—and therefore anti-Black Lives Matter—ideology and contend he may have militia ties, including possibly to the Boogaloo movement. See, e.g., *id.* See *supra* note 273 for a discussion of the 2020 Black Lives Matter protests and the Boogaloo movement. It is likely that future attacks may be similarly motivated.