

One of These Things is Not Like the Other: Federal Law’s Inconsistent Treatment of Domestic and International Terrorism

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I. INTRODUCTION

“You rape our women, and you’re taking over our country. And you have to go.”¹ Dylann Roof offered this explanation to his pleading victims as he opened fire on a bible study meeting at the Mother Emanuel African Methodist Episcopal Church (“AME”) in Charleston, South Carolina.² Roof killed nine African American churchgoers in the 2015 attack.³ He openly admitted that he had intended to start a race war,⁴ and felt the attack was his responsibility because “no one else was brave enough.”⁵ With plans to shoot himself, he intentionally left one woman alive so she could “tell the story.”⁶

The incident reignited an ongoing conversation about domestic terrorism in the United States.⁷ The FBI’s website describes domestic terrorism generally as “[p]erpetrated by individuals . . . with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial, or environmental nature.”⁸ Federal law is slightly more specific, defining domestic terrorism in the Patriot Act as acts, “dangerous to human life that violate federal or state law” that “appear to be intended i) to intimidate or coerce a civilian population;” or “ii) to influence the policy of a government by intimidation or coercion.”⁹

Roof’s actions and the racist ideology that animated them easily fit that description—Loretta Lynch, former United States Attorney General, stated,

1. Erik Ortiz & F. Brinley Bruton, *Charleston Church Shooting: Suspect Dylann Roof Captured in North Carolina*, NBC NEWS (June 18, 2015), <https://www.nbcnews.com/storyline/charleston-church-shooting/charleston-on-church-shooting-suspect-dylann-roof-captured-north-carolina-n377546> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. Timothy M. Phelps, *Dylann Roof Indicted on Federal Hate-Crime Charges in Charleston Church Shooting*, L.A. TIMES (July 22, 2015), <http://www.latimes.com/nation/la-na-roof-hate-crimes-20150722-story.html> (on file with *The University of the Pacific Law Review*).

4. *Id.*

5. Rebecca Hersher, *Jury Finds Dylann Roof Guilty in S.C. Church Shooting*, NPR (Dec. 15, 2016), <https://www.npr.org/sections/thetwo-way/2016/12/15/505723552/jury-finds-dylann-roof-guilty-in-s-c-church-shooting> (on file with *The University of the Pacific Law Review*).

6. *Id.*

7. Anthea Butler, *Shooters of Color are Called ‘Terrorists’ and ‘Thugs.’ Why are White Shooters Called ‘Mentally Ill’?*, WASH. POST (June 18, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/18/call-the-charleston-church-shooting-what-it-is-terrorism/> (on file with *The University of the Pacific Law Review*); Rick Gladstone, *Many Ask, Why Not Call Church Shooting Terrorism?*, N.Y. TIMES (June 18, 2005), <https://www.nytimes.com/2015/06/19/us/charleston-shooting-terrorism-or-hate-crime.html> (on file with *The University of the Pacific Law Review*).

8. *Terrorism*, FBI, <https://www.fbi.gov/investigate/terrorism> (last visited Mar. 31, 2018) (on file with *The University of the Pacific Law Review*).

9. 18 U.S.C.A. § 2331(5) (West 2018).

“[r]acially motivated violence such as this is the original domestic terrorism.”¹⁰ Delivering slain Pastor Clementa Pinckney’s eulogy, President Barack Obama described the attack as, “an act that drew on a long history of bombs and arson and shots fired at churches, not random[ly], but as a means of control, a way to terrorize and oppress.”¹¹ Senator Lindsay Graham echoed that “it wasn’t a random act of violence either. It is domestic terrorism.”¹² The Justice Department’s statement that they were looking into the crime “from all angles, . . . including as an act of domestic terrorism” further nurtured expectations that a domestic terrorism charge was possible, if not likely.¹³

Prosecutors eventually pursued 33 federal and 13 state charges against Roof.¹⁴ None of those charges related to terrorism in any way,¹⁵ sparking public outrage and a petition to charge Roof “as a Domestic Terrorist.”¹⁶ However, prosecutors faced a substantial hurdle in pursuing that charge even if they had wanted: domestic terrorism is not a federal crime.¹⁷

Federal law provides the domestic terrorism definition referenced above, but falls short of attaching criminal penalties to those acts.¹⁸ The determination that an act was domestic terrorism is legally relevant only to the extent the definition has been incorporated in another statute; for example, this designation impacts civil liabilities for individuals who come forward with information.¹⁹

Domestic terrorism’s threat in the United States is undeniable and recognized at the highest levels of law enforcement.²⁰ Nevertheless, the lack of a domestic

10. Catherine E. Shoichet & Evan Perez, *Dylann Roof Faces Hate Crime Charges in Charleston Shooting*, CNN (July 22, 2015), <https://www.cnn.com/2015/07/22/us/charleston-shooting-hate-crime-charges/index.html> (on file with *The University of the Pacific Law Review*).

11. Press Release, White House, Office of the Press Secretary, Remarks by the President in Eulogy for the Honorable Reverend Clementa Pinckney (June 26, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> (on file with *The University of the Pacific Law Review*).

12. Phillip Martin, *Defining Domestic Terrorism Part Three: Conservative Politicians Downplay Threat From the Far Right*, HUFFINGTON POST: THE BLOG (Jan. 3, 2016), https://www.huffingtonpost.com/phillip-martin/right-wing-terrorism_b_8907358.html (on file with *The University of the Pacific Law Review*).

13. Ralph Ellis et al., *Charleston Church Shooter Hears Victim’s Kin Say, ‘I Forgive You’*, CNN (June 19, 2015), <https://www.cnn.com/2015/06/19/us/charleston-church-shooting-main/index.html> (on file with *The University of the Pacific Law Review*).

14. Phelps, *supra* note 3; Soichet & Perez, *supra* note 10.

15. Phelps, *supra* note 3; Soichet & Perez, *supra* note 10.

16. KaTeysha Anderson, *Petition: Charge Charleston, SC Murderer Dylann Roof as a Domestic Terrorist*, CHANGE.ORG, <https://www.change.org/p/united-states-department-of-homeland-security-barack-obama-charge-dylann-roof-as-a-domestic-terrorist> (last visited Mar. 31, 2018) (on file with *The University of the Pacific Law Review*).

17. Phelps, *supra* note 3.

18. See 18 U.S.C.A. § 2332b(g)(5) (enumerating offenses that could be considered a crime of terrorism if committed with the specified intent). This list includes § 2332b (“acts of terrorism transcending national boundaries”), but not § 2331(5) (“domestic terrorism”).

19. See 6 U.S.C.A. § 1104 (West 2018) (incorporating the Patriot Act’s definition of domestic terrorism).

20. Christopher Wray, FBI Director, *Statement Before the House Homeland Security Committee, Keeping America Secure in the New Age of Terror*, FBI (Nov. 30, 2017), <https://www.fbi.gov/news/testimony/keeping->

terrorism charge is only one way in which the federal government fails to treat international and domestic terrorism as equally dangerous and repugnant.²¹ Currently, a victim of international terrorism may bring a civil action against those responsible, with federal law prescribing the monetary damages those victims are to receive.²² Victims of domestic terrorism, however, are not permitted to bring a similar action in federal court, leaving them without a remedy available to international terror victims.²³ 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.²⁴

To correct these deficiencies, this Comment urges three specific alterations to federal law: (1) Congress should create a civil cause of action for domestic terror victims;²⁵ (2) Congress should add domestic terrorism to the “federal crime of terrorism” as enumerated in § 2332b(g)(5);²⁶ and (3) Congress should expand the list of substantive crimes comprising the “federal crime of terrorism” to more accurately reflect the ways in which domestic terrorism is carried out in the United States.²⁷

This Comment begins by providing a brief history of how terrorism law has developed in the United States.²⁸ It then examines the social and legal considerations that support domestic terrorism legislation reform.²⁹ Finally, it explores the specific ways in which federal law treats international and domestic terrorism differently and propose the changes mentioned above.³⁰

II. DEVELOPMENT OF FEDERAL TERRORISM LAWS

Domestic terrorism was not defined in a federal statute until the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), commonly known as the

america-secure-in-the-new-age-of-terror (on file with *The University of the Pacific Law Review*) (“In addition to foreign terrorist organizations, domestic extremist movements collectively pose a steady threat of violence and economic harm to the United States . . . We anticipate law enforcement, racial minorities, and the U.S. government will continue to be significant targets for many domestic extremist movements.”).

21. See *infra* Part IV.

22. 18 U.S.C.A. § 2333(a) (West 2018).

23. See *infra* Part IV.A.

24. See 18 U.S.C.A. §§ 1001(a), 1028(b)(4), 1505 (West 2018) (imposing higher criminal penalties if the offense was committed in relation to an act of domestic or international terrorism).

25. *Infra* Part IV.A.

26. *Infra* Part IV.C.

27. *Infra* Part IV.C.

28. *Infra* Part II.

29. *Infra* Part III.

30. *Infra* Part IV.

“Patriot Act.”³¹ However, its linguistic roots can be traced to earlier general statutory definitions of terrorism.³²

A. FISA and the Federal Courts Administration Act of 1992

The first federal statute to define terrorism was the Foreign Intelligence Surveillance Act (FISA), passed in 1978.³³ FISA was enacted amid concerns about the executive branch’s surveillance capabilities.³⁴ FISA permitted the President to authorize warrantless wiretapping to acquire foreign intelligence information and created secret courts to provide oversight without compromising security interests.³⁵ The Supreme Court had previously held that the Fourth Amendment requires a warrant be issued before the government may wiretap a domestic threat,³⁶ but was silent regarding foreign threats. Accordingly, Congress expressly limited FISA surveillance to foreign powers and their agents.³⁷ FISA did not establish international terrorism as an independent crime.³⁸

While FISA differentiated between types of terrorism, it did so not by providing multiple classifications, but by defining only international terrorism.³⁹ It described international terrorism as activities involving “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States” which appear intended to “intimidate or coerce a civilian population,” “influence the policy of a government by intimidation or coercion,” or “affect the conduct of a government by assassination or kidnapping.”⁴⁰ FISA’s requirement that the act “occur totally outside the United States, or transcend national boundaries,” functionally excluded domestic terrorism from ever coming within its scope.⁴¹

The words “transcending national boundaries” would later become integral to many prosecutions under statutes incorporating this definition, but did not appear in the early drafts of the bill.⁴² The Legislature borrowed that language from Executive Order 12036, in which President Jimmy Carter put forth a similar but

31. USA Patriot Act of 2001, H.R. 3162, 107th Cong. (Oct. 23, 2001).

32. See Nicholas J. Perry, Comment, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249 (2005) (reviewing the evolution of language in terrorism legislation).

33. Foreign Intelligence Surveillance Act of 1978, Pub. L. No 95-511, 92 Stat. 1783.

34. Nick Harper, Comment, *FISA’s Fuzzy Line Between Domestic and International Terrorism*, 81 U. CHI. L. REV. 1123, 1128 (2014).

35. Foreign Intelligence Surveillance Act of 1978, Pub. L. No 95-511, § 102, 92 Stat. 1783.

36. *U.S. v. U.S. Dist. Ct.*, 407 U.S. 297, 320 (1972).

37. Foreign Intelligence Surveillance Act of 1978, Pub. L. No 95-511, § 102, 92 Stat. 1783.

38. *Id.*

39. Foreign Intelligence Surveillance Act of 1978, Pub. L. No 95-511, § 101, 92 Stat. 1783.

40. *Id.*

41. *Id.*

42. Harper, *supra* note 34.

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more expansive definition of international terrorism.⁴³ Originally, FISA considered a terrorist act to be international if it was perpetrated for or on behalf of a foreign power.⁴⁴ This led to concerns that surveillance could be permitted against some domestic groups—for example, the Communist Party—on the allegation that they were “acting for or on behalf of a foreign power in some abstract sense.”⁴⁵ Disagreement persisted, with the House preferring the Executive Order language and the Senate preferring the original.⁴⁶ The House eventually prevailed.⁴⁷

Fifteen years later, the Federal Courts Administration Act of 1992 (FCAA) created a civil cause of action for victims of international terrorism.⁴⁸ Though this act added international terrorism to Title 18 of the United States Code, which contains federal crimes and criminal procedure matters, it was relegated to the “Definitions” section and did not establish any new penalties or crimes.⁴⁹ The definition is identical to the language used in FISA, with the exception that the internationality threshold was reduced from acts “*totally* occurring outside the United States” to acts occurring “*primarily* outside the United States.”⁵⁰

B. *September 11, 2001 and the USA Patriot Act*

On a Tuesday morning in September 2001, Al Qaeda operatives hijacked four commercial airliners and forever changed the way we view and respond to terrorism in the United States.⁵¹ Two planes crashed directly into the World Trade Center towers, causing the 110-story buildings to collapse; one collided with the Pentagon and the last went down in a Pennsylvania field, avoiding additional fatalities thanks to its heroic passengers.⁵² These unprecedented, coordinated attacks took nearly 3,000 American lives and injured thousands more.⁵³ The loss of life was staggering and the questions loomed—how did this happen, and how do we keep it from happening again?⁵⁴

43. *Id.*

44. *Id.*

45. *Id.* at n. 72.

46. *Id.* at 1136.

47. *Id.*

48. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003, 106 Stat. 4506.

49. 18 U.S.C.A. § 2331(1) (West 2018).

50. *Id.* § 2331(1)(C) (emphasis added).

51. *September 11th Terror Attacks Fast Facts*, CNN (Aug. 24, 2017), <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> (on file with *The University of the Pacific Law Review*).

52. *Id.*

53. *Id.*

54. See Blaine Harden, *Physical and Psychological Paralysis of Nation*, N.Y. TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/us/a-day-of-terror-vulnerability-physical-and-psychological-paralysis-of-nation.html> (on file with *The University of the Pacific Law Review*) (discussing the emotional aftermath of the

Prevention became the government's top priority, with Senator Orrin Hatch stating "redeeming and rectifying this situation is the responsibility of Congress, the Justice Department, the FBI, the INS, and the Border Patrol."⁵⁵ Senator John Kyl echoed the sentiment that Congress had "a responsibility to the people of this nation to ensure that those who are charged with protecting us from future terrorist attacks are empowered to do so."⁵⁶

The pressure to take action was high and the legislative response was swift.⁵⁷ On September 18, 2001, just one week after the attacks, a resolution allowing the President to "use all necessary and appropriate force" against those responsible for the attacks passed both houses of Congress,⁵⁸ with California Representative Barbara Lee casting the only opposing vote.⁵⁹ Though Lee merely intended to convey the need to "step back and think" before granting the President sole discretion to use such force,⁶⁰ many viewed Lee's disapproval as soft on terrorism, resulting in death threats following the vote.⁶¹

The government believed that FISA's domestic surveillance restrictions were partially to blame for the intelligence gaps that caused the FBI's failure to prevent the attacks.⁶² Attorney General John Ashcroft immediately directed the Department of Justice to begin working on a legislative package to provide "all that is necessary for law enforcement, within the bounds of the Constitution, to discharge the obligation to fight this war against terror."⁶³

The Patriot Act was introduced six weeks after the attacks.⁶⁴ It was largely a compilation of previously discussed bills and measures, hastily assembled to create as comprehensive a legislative package as possible.⁶⁵ In just three days, it passed the House and Senate, was signed by President Bush, and became law on October 26.⁶⁶ This expedited process is more remarkable in light of the Patriot Act's sheer size and breath—the bill spanned over 340 pages, which the most dedicated

September 11 attacks).

55. Kyle Welch, *The Patriot Act and Crisis Legislation: The Unintended Consequences of Disaster Lawmaking*, 43 CAP. U. L. REV. 481, 506 n.191 (2015).

56. *Id.*

57. *Id.* at 505.

58. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (codified as amended at 50 U.S.C.A. § 1541 (2001)).

59. Peter Carlson, *The Solitary Vote of Barbara Lee: Congresswoman Against Use of Force*, WASH. POST (Sept. 19, 2001), <https://www.washingtonpost.com/archive/lifestyle/2001/09/19/the-solitary-vote-of-barbara-lee/fb86aee7-3cc5-4cbd-98f1-e2650e545f42> (on file with *The University of the Pacific Law Review*).

60. *Id.*

61. *Id.*

62. Robert O'Harrow Jr., *Six Weeks in Autumn*, WASH. POST (Oct. 27, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/09/AR2006050900961.html> (on file with *The University of the Pacific Law Review*).

63. *Id.*

64. USA Patriot Act of 2001, H.R. 3162, 107th Cong. (Oct. 23, 2001).

65. See Welch, *supra* note 55 (providing a detailed analysis of the Patriot Act's passing).

66. O'Harrow *supra* note 62.

lawmaker would struggle to fully process in the short amount of time available.⁶⁷ In addition to creating new laws, it also extensively amended existing ones, making it impossible to read through without researching and comparing the individual statutes being changed.⁶⁸

One such change was to expand 18 U.S.C.A. § 2331—which already defined international terrorism—to also define domestic terrorism.⁶⁹ The Patriot Act directly copied the language defining international terrorism, making only two changes: (1) including acts intended to affect a government through “mass destruction”⁷⁰ (the previous version only covered assassination or kidnapping); and (2) specifying that the acts “occur primarily within the territorial jurisdiction of the United States” (as opposed to primarily *outside*).⁷¹ This formulation remains unaltered today⁷² and is the only current federal statutory definition of domestic terrorism.

The terrorism definitions in § 2331 are the most significant in federal law, incorporated in a wide range of other statutes—for example, a determination that an act meets a § 2331 definition of terrorism can lead to a reward for information leading to an arrest,⁷³ civil immunity for reporting suspicious activity,⁷⁴ or disclosure of tax returns.⁷⁵ Despite both definitions’ wide application, there remains an important distinction between the way federal law views international and domestic terrorism—Section 2332b of the criminal code, which outlines penalties for terrorist crimes, enumerates the offenses included within the “federal crime of terrorism.”⁷⁶ This enumeration specifically includes the statute defining international terrorism, but omits its domestic counterpart.⁷⁷

III. WHY IS TERRORISM LEGISLATION REFORM NECESSARY?

Even though he was not charged with domestic terrorism, Dylann Roof was sentenced to death for federal hate crimes and nine consecutive life sentences for state charges.⁷⁸ Roof’s sentence raises the question: if we can already adequately

67. Welch, *supra* note 55.

68. USA Patriot Act of 2001, H.R. 3162, 107th Cong. (Oct. 23, 2001).

69. 18 U.S.C.A. § 2331(5) (West 2018).

70. *Id.* § 2331(5)(B)(3).

71. *Id.* § 2331(5)(C).

72. *Id.* § 2331(5).

73. *Id.* § 3077(1).

74. *Id.* § 44941(a).

75. 26 U.S.C.A. § 6103(i) (West 2018).

76. 18 U.S.C.A. § 2332b (West 2018).

77. *Id.* § 2332b.

78. Associated Press, *Dylann Roof: Charleston Church Shooter Gets Nine Life Sentences in State Case*, NBC NEWS (Apr. 10, 2017), <https://www.nbcnews.com/news/us-news/dylann-roof-charleston-church-shooter-pleads-guilty-state-charges-n744746> (on file with *The University of the Pacific Law Review*).

punish actors, why do we need to be able to charge them with domestic terrorism as well?⁷⁹

At the same time, the language defining domestic terrorism in the Patriot Act has been sharply criticized as problematic for criminal application due to its vague, subjective, and over-inclusive language.⁸⁰ The critique is likely not without merit, as the Patriot Act was passed remarkably quickly, without providing adequate time to debate the wording of individual provisions.⁸¹ Of the state domestic terrorism statutes that mirror the Patriot Act's language, several contain alterations that appear directly responsive to these concerns.⁸² The specific changes that would be needed to make criminal application of the Patriot Act's domestic terrorism definition more effective on the federal level, while beyond the scope of this Comment, will be a necessary part of any meaningful reform.⁸³ That said, the need to treat international and domestic terrorism equally under federal law is supported by social and legal considerations reaching far beyond any individual fear or outcome.⁸⁴

A. *Social Dimensions*

Criminal statutes serve an important expressive purpose in communicating a society's values.⁸⁵ "Journalists and academics have long criticized the government" for its focus on international terrorism, claiming it has neglected to recognize the threat of terrorism from domestic actors such as anti-abortion activists and white supremacists.⁸⁶ Federal prosecutors' inability to accurately describe a defendant's actions and charge them accordingly contributes to the pervasive confusion and debate following incidents of domestic terrorism and the social perception that only certain types of actors are terrorists.⁸⁷

79. *Id.*

80. *How the Patriot Act Redefines "Domestic Terrorism"*, ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> (last visited Sept. 5, 2017) (on file with *The University of the Pacific Law Review*); Karen J. Greenberg, *A Domestic Terrorism Statute is Federal Overreach, Not Justice*, NBC NEWS (Oct. 28, 2017), <https://www.nbcnews.com/think/opinion/domestic-terrorism-statute-federal-overreach-not-justice-ncna814826> (on file with *The University of the Pacific Law Review*).

81. *Supra* Part II.B.

82. N.Y. PENAL LAW § 490.05 (McKinney 2004); N.J. STAT. ANN. § 2C:38-2 (West 2002); OHIO REV. CODE ANN. § 2909.21 (West 2012).

83. ACLU, *supra* note 80; Greenberg, *supra* note 80.

84. *Infra* Parts III.A–B.

85. See Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414 (1999) (examining the "expressive" function of law).

86. Jesse J. Norris, Comment, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 269 (2017).

87. *Infra* Parts III.A.1–2.

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1. *Confusion Following Attacks*

Public officials generally use the term “terrorism” subjectively and without pointing to a clear definition, frequently rendering it a term of propaganda.⁸⁸ “You’d be hard pressed to find any two law enforcement officials, law enforcement entities, any two policymakers, any two journalists who are going to define terrorism the same way . . . That’s the problem.”⁸⁹ Inconsistent use of the word terrorism contributes to, if not directly causes, the confusion common in the days following violent incidents.⁹⁰ This was evident after the October 2017 mass shooting in Las Vegas.⁹¹

The night of October 1, 2017, country music star Jason Aldean took the stage at an outdoor music festival on the Las Vegas strip.⁹² Over 22,000 people attended the three-day event.⁹³ Around 10:00 p.m., James Paddock, a man with “with no real criminal history and no known affiliations with terror groups,” opened fire from the 32nd floor of the hotel hosting the event.⁹⁴ He brought 23 firearms with him, including an AK-47 and other guns with “calibers ranging from .223 to .308.”⁹⁵ Paddock shot and killed 59 people (including himself) and injuring hundreds more.⁹⁶

After the attack, Clark County Sheriff Joe Lombardo was asked if the incident was being considered an act of domestic terrorism.⁹⁷ He replied, “No, not at this point, we believe it is a local individual, he resides here locally. We don’t know what his belief system was at this time.”⁹⁸ This was perplexing to many because Nevada law, in contrast to federal law, makes no reference to any ideological

88. Laura Yuen, *Use of ‘Terrorism’ Label Depends on Questions of Rhetoric, Law*, MPR NEWS (Aug. 15, 2017), <https://www.mprnews.org/story/2017/08/15/use-of-terrorism-label-depends-on-questions-of-rhetoric-law> (on file with *The University of the Pacific Law Review*).

89. *Id.*

90. Glenn Greenwald, *Manipulative Use of the Term ‘Terrorism’*, SALON: RADIO (Mar. 14, 2010), https://www.salon.com/2010/03/14/terrorism_20/ (on file with *The University of the Pacific Law Review*).

91. See Lynh Bui et al., *At Least 59 Killed in Las Vegas Shooting Rampage, More than 500 Others Injured*, WASH. POST (Oct. 2, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting> (on file with *The University of the Pacific Law Review*) (describing the attack).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Tom Batchelor, *Nevada State Law Defines Las Vegas Mass Shooting as an Act of Terrorism*, INDEPENDENT (Oct. 2, 2017), <https://www.independent.co.uk/news/world/americas/las-vegas-shooting-nevada-terrorism-state-law-act-police-stephen-paddock-a7978456.html> (on file with *The University of the Pacific Law Review*).

98. *Id.*

component in its definition of an act of terrorism.⁹⁹ It requires only that an act of “sabotage, coercion, or violence” be intended to “cause great bodily harm or death to the general population” or to destroy or impair buildings, infrastructure, communications, or services.¹⁰⁰

Neither the federal nor Nevada law defining domestic terrorism include any indication that someone’s status as a terrorist would depend on whether they were a local resident.¹⁰¹ Lombardo’s response, therefore, could not have been based in those statutes.¹⁰² As one commentator observed, “This is thinly veiled code for ‘the shooter was a white man’ . . . Stephen Paddock was obviously a terrorist. But because he’s white, we don’t call him that.”¹⁰³

2. *Media Coverage and the Social Conception of Terrorism*

The infamous September 11 attacks were a turning point in the way American media handles terrorism, and “this post-September 11 landscape of discourse about terror was more polarized and less nuanced than it had been before.”¹⁰⁴

Following the attacks of September 11, 2001, attention and resources were focused almost exclusively towards preventing extremist Islamic attacks on the United States.¹⁰⁵ In the years since, however, domestic far-right violence has been responsible for 109 deaths in 62 separate incidents, while radical Islam accounts for slightly more deaths (119) across fewer incidents (23).¹⁰⁶ Of the deaths attributable to radical Islamic extremism, 41 percent occurred in a single attack at a Florida nightclub in 2016.¹⁰⁷ Despite the two groups being responsible for relatively the same number of deaths, Americans retain a racially influenced perception of who terrorists are.¹⁰⁸

This perception is strongly influenced by the deep disparity in the way United States media portrays subjects based on race.¹⁰⁹ Those of Middle Eastern descent

99. NEV. REV. STAT. ANN. § 202.4415 (West 2018).

100. NEV. REV. STAT. ANN. § 202.4415 (West 2018).

101. NEV. REV. STAT. ANN. § 202.4415 (West 2018); 18 U.S.C.A. § 2331 (West 2018).

102. Tom Batchelor, *Nevada State Law Defines Las Vegas Mass Shooting as an Act of Terrorism*, INDEPENDENT (Oct. 2, 2017), <https://www.independent.co.uk/news/world/americas/las-vegas-shooting-nevada-terrorism-state-law-act-police-stephen-paddock-a7978456.html> (on file with *The University of the Pacific Law Review*).

103. Jack Moore, *The Las Vegas Shooting is Terrorism*, GQ (Oct. 2, 2017), <https://www.gq.com/story/las-vegas-shooting-terrorism> (on file with *The University of the Pacific Law Review*).

104. RUTH DEFOSTER, *TERRORIZING THE MASSES: IDENTITY, MASS SHOOTINGS, AND THE MEDIA CONSTRUCTION OF TERROR* 35 (2017).

105. *Id.*

106. U.S. GOV’T ACCOUNTABILITY OFF., *REPORT TO CONGRESSIONAL REQUESTERS, COUNTERING VIOLENT EXTREMISM: ACTIONS NEEDED TO DEFINE STRATEGY AND ASSESS PROGRESS OF FEDERAL EFFORTS* 3 (Apr. 2017).

107. *Id.*

108. DEFOSTER, *supra* note 104.

109. *Id.*

are far more likely to be identified as terrorists in media coverage than white actors, often as a direct result of sensationalism and fear.¹¹⁰ One study found that attacks by Islamic perpetrators receive 449% more media coverage on average.¹¹¹

Former FBI agent Mike German explained that law enforcement's use of the term "terrorism" in some instances but not others creates a two-tiered system of justice in which minority communities feel less protected.¹¹² That feeling is validated by an FBI hate crime report showing that attacks against Muslim victims rose 67 percent from 2014 to 2015.¹¹³

Reforming federal terrorism legislation to include criminal penalties for acts of domestic terrorism could begin to alleviate issues.¹¹⁴ Having a federal crime of domestic terrorism would be a powerful step in combating the "[m]edia discourse reproducing simplified pre-existing anti-Muslim anxieties."¹¹⁵ It would also reduce the amount of confusion and debate following attacks by creating a clear standard that public officials could refer to, and more accurately reflect the relative severity and likelihood of domestic and international terrorism.¹¹⁶

B. *Legal Dimensions*

Beyond the social consequences of failing to equate international and domestic terrorism, purely legal considerations also support reform.¹¹⁷ Domestic terrorism's unavailability as a criminal charge contradicts the policy considerations prosecutors are instructed to consult when selecting charges.¹¹⁸ Additionally, the few scenarios in which domestic and international *are* already treated the same in federal law demonstrate their fundamentally similar nature, making it more difficult to justify the current disparate treatment.¹¹⁹

110. *Id.*

111. Benjamin Kentish, *Terror Attacks Receive Five Times More Media Coverage if Perpetrator is Muslim Study Finds*, INDEPENDENT (Jul. 3, 2017), <https://www.independent.co.uk/news/world-0/terror-attacks-media-coverage-muslim-islamist-white-racism-islamophobia-study-georgia-state-a7820726.html> (on file with *The University of the Pacific Law Review*).

112. Yuen, *supra* note 88.

113. Azadeh Ansari, *FBI: Hate Crimes Spike, Most Sharply Against Muslims*, CNN (Nov. 15, 2016), <https://www.cnn.com/2016/11/14/us/fbi-hate-crime-report-muslims/index.html> (on file with *The University of the Pacific Law Review*).

114. See Page Pate, *How Congress Has Dropped the Ball on Domestic Terror*, CNN (Aug. 14, 2017), <https://www.cnn.com/2017/08/14/opinions/congress-has-dropped-ball-on-domestic-terror-pate/index.html> (on file with *The University of the Pacific Law Review*).

115. DEFOSTER, *supra* note 104.

116. *Id.*

117. *Infra* Parts III.B.1–2.

118. *Infra* Part III.B.1.

119. *Infra* Part III.B.2.

1. Justice Manual

Federal prosecutors have wide discretion in choosing which charges to pursue against a defendant.¹²⁰ With that discretion comes guidance, most relevant to this Comment in the form of the Justice Manual (“Manual”), previously known as the United States Attorneys’ Manual.¹²¹

The Manual details what considerations a federal prosecutor should weigh when deciding what charge to pursue.¹²² As a general rule, prosecutors are directed to charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that will probably be sufficient to sustain a conviction.”¹²³ Still, prosecutors are urged to assess each circumstance individually and ensure that the charge (or charges) achieve the law enforcement purposes of “punishment, protection of the public, specific and general deterrence, and rehabilitation.”¹²⁴

Despite the various considerations listed, the presumption that the most serious offense available is the most appropriate charge pervades.¹²⁵ Its rationale is explained in the Comment to § 9-27.300: “The general presumption that a defendant will be charged with the most serious offense that is encompassed by his/her conduct provides the framework for ensuring equal justice in the prosecution of federal criminal offenders.”¹²⁶ This policy of seeking the highest available is guided by the additional instruction that “[i]n all cases, the charges should fairly reflect the defendant’s conduct.”¹²⁷

The Manual provides for situations where more than one charge may apply to a single course of conduct.¹²⁸ Prosecutors are permitted to pursue multiple charges in a variety of circumstances.¹²⁹ When determining whether to pursue more than one charge, the “prosecutor’s initial concern should be to recommend charges that adequately reflect the nature and full extent of the criminal conduct involved.”¹³⁰ The charges must accurately convey “the seriousness of the conduct involved” to

120. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[So] long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

121. See U.S. DEP’T OF JUST., JUSTICE MANUAL, available at <https://www.justice.gov/usam/united-states-attorneys-manual> (last visited Apr. 9, 2018) (on file with *The University of the Pacific Law Review*) (previously known as the U.S. Attorneys’ Manual) (hereinafter “MANUAL”) (outlining procedures and considerations to which federal prosecutors must adhere).

122. MANUAL, *supra* note 121, § 9-27.300.

123. *Id.*

124. *Id.*

125. *Id.*

126. MANUAL, *supra* note 121, § 9-27.300(B).

127. *Id.* § 9-27.300.

128. *Id.* § 9-27.320.

129. *Id.*

130. MANUAL, *supra* note 121, § 9-27.320(B)(1).

the public.¹³¹

Less than two weeks after the September 11 attacks, President George W. Bush addressed the nation and attempted to explain why a terror group would target the United States: “[I]ts goal is remaking the world and imposing its radical beliefs on people everywhere . . . These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us because we stand in their way.”¹³² While murder is undoubtedly a serious crime, a murder charge wholly fails to adequately express the “nature and full extent” of a terrorist act.¹³³

2. *Equal Treatment in Federal Law*

Examples of domestic and international terrorism currently being treated equally under federal law can be found in both criminal and civil contexts.¹³⁴ Despite domestic terrorism’s exclusion from the “federal crime of terrorism,” a few federal statutes provide higher criminal penalties when committed to facilitate a terrorist act, regardless of whether it was domestic or international.¹³⁵ Protections from civil liability are in place for individuals who come forward with information related to a suspected terrorist act, domestic and international alike.¹³⁶ Additionally, federal law authorizes monetary rewards for individuals who come forward with information.¹³⁷ Each of these instances demonstrate a policy judgment that terrorism is serious and deserving of our highest attention, regardless of whether it is international or domestic in nature.¹³⁸

i. Criminal Context

It is a federal crime to make false statements to a government agency regarding terrorism.¹³⁹ A defendant who violates this statute may be sentenced to up to five years’ imprisonment.¹⁴⁰ However, pursuant to this statute, if the defendant made

131. *Id.*

132. *Transcript of President Bush’s Address*, CNN (Sept. 21, 2001), <http://www.cnn.com/2001/US/09/20/gen.bush.transcript> (on file with *The University of the Pacific Law Review*).

133. MANUAL, *supra* note 121, § 9-27.320(B)(1).

134. See *infra* Parts III.B.2.i–ii (providing examples of each).

135. See 18 U.S.C.A. §§ 1001(a), 1028, 1505 (West 2018) (imposing higher criminal penalties if the offense was related to an act of domestic or international terrorism).

136. 6 U.S.C.A. § 1104 (West 2018); 49 U.S.C.A. § 44941 (West 2018).

137. 6 U.S.C.A. § 1104 (West 2018).

138. *Infra* Parts III.B.2.i–ii.

139. 18 U.S.C.A. § 1001(a) (West 2018).

140. *Id.*

the false statements to facilitate domestic *or* international terrorism, the potential sentence is increased to eight years.¹⁴¹ This penalty structure, while not drastically harsher for terrorism-related offenses, appears identically in a statute prohibiting obstruction of an antitrust proceeding.¹⁴²

Federal law also prohibits fraud in connection with identification documents such as birth certificates or drivers licenses.¹⁴³ This offense has a more complicated penalty structure, with different prescribed sentences based on the type of document involved, prior offenses, and underlying motivation.¹⁴⁴ A first-time offender whose conduct did not involve official U.S. documents, drug crimes, or terrorism faces up to one year in prison.¹⁴⁵ However, if the crime was intended to facilitate terrorism (international or domestic), the penalty increases to 30 years.¹⁴⁶

Among federal criminal statutes that equate domestic and international terrorism, the statute prohibiting “bribery affecting port security” is unique in that it expressly includes terrorist-related intent or knowledge as an essential element of the offense.¹⁴⁷ The prohibition applies both to an individual seeking to bribe and to an individual demanding or accepting a bribe.¹⁴⁸ The person seeking to bribe must have done so “with intent to commit international terrorism or domestic terrorism,” while the person accepting or agreeing to accept a bribe must have done so “knowing that such influence will be used to commit, or plan to commit, international or domestic terrorism.”¹⁴⁹

Despite the fact that this statute can only be violated by an act intended to further (or committed with the knowledge of) a terrorist goal, it is not included in the Federal Crime of Terrorism.¹⁵⁰ Given the wide breadth of offenses included within the Federal Crime of Terrorism, it seems strange to omit a crime so inextricably linked.¹⁵¹ The policy judgments inherent to that particular drafting choice, however, are beyond this Comment’s scope, and for this purpose it is sufficient to observe that these criminal statutes treat domestic and international terrorism with equal weight.¹⁵²

141. 18 U.S.C.A. § 1001(a) (West 2018).
142. *Id.* § 1505.
143. *Id.* § 1028.
144. *Id.* § 1028(b).
145. *Id.* § 1028(b)(6).
146. *Id.* § 1028(b)(4).
147. 18 U.S.C.A. §§ 226(a)(1), (2)(B) (West 2018).
148. *Id.*
149. *Id.*
150. *Id.* § 2332b(g)(5).
151. *Id.*
152. 18 U.S.C.A. §§ 226, 1001(a), 1028, 1505 (West 2018).

ii. Civil Context

Several federal civil statutes treat domestic and international terrorism equally, governing individual liability related to suspected terrorist acts.¹⁵³ One protects individuals who come forward with information leading to an arrest or “favorable outcome.”¹⁵⁴ Another provides essentially the same protections, but specifically for air carriers and their employees who come forward with similar information.¹⁵⁵ The last provides that an individual will not be liable for refusing to sell ammonium nitrate if they have a reasonable suspicion that the buyer is involved in terrorism.¹⁵⁶

In these statutes, the protections apply whether the terrorism involved is domestic or international.¹⁵⁷ These equal protections evince a value judgment that individuals with suspicions or information regarding terrorist activity should be equally incentivized to contact law enforcement.¹⁵⁸ This aligns with government statements that preventing acts of domestic terror is a top priority for the United States.¹⁵⁹

Interestingly, however, these statutes do not reference the Patriot Act definitions directly.¹⁶⁰ Each one states that terrorism shall be “defined as set forth in § 3077.”¹⁶¹ That section contains the definitions for Chapter 204 of the federal criminal code, governing “Rewards for Information Concerning Terrorist Acts and Espionage.”¹⁶² In particular, § 3077(1) specifies that an “act of terrorism” is “an act of domestic or international terrorism as defined in § 2331.”¹⁶³ This is not especially problematic—the end result is the same, ultimately arriving at the Patriot Act definition of domestic terrorism.¹⁶⁴ It does, however, contribute to a complicated statutory scheme in which several different statutes must be referenced to arrive at one definition, and it is more difficult to ascertain any one statute’s true reach when incorporated in this manner.¹⁶⁵

153. See 6 U.S.C.A. §§ 488f, 1104; 49 U.S.C.A. § 44941 (West 2018) (providing the same protections regardless of whether the terrorism was domestic or international).

154. 6 U.S.C.A. § 1104 (West 2018).

155. 49 U.S.C.A. § 44941 (West 2018).

156. 6 U.S.C.A. § 488f (West 2018).

157. *Id.* §§ 488f, 1104 (West 2018); 49 U.S.C.A. § 44941 (West 2018).

158. See 6 U.S.C.A. §§ 488f, 1104 (West 2018); 49 U.S.C.A. § 44941 (West 2018) (providing the same protections regardless of whether the terrorism was domestic or international).

159. See Wray, *supra* note 20 (“Preventing terrorist attacks remains the FBI’s top priority . . . The FBI is using all lawful investigative techniques and methods to combat these terrorist threats to the United States.”).

160. 6 U.S.C.A. §§ 488f, 1104 (West 2018); 49 U.S.C.A. § 44941 (West 2018).

161. *Id.*

162. 18 U.S.C.A. § 3077(1) (West 2018).

163. *Id.*

164. 18 U.S.C.A. §§ 2331(5), 3077(1) (West 2018).

165. See *id.* (incorporating by reference).

Additionally, federal law authorizes the Attorney General to provide a monetary reward to individuals who come forward with information leading to a wide range of outcomes related to terrorism.¹⁶⁶ A reward is available for information leading to an arrest or conviction for a completed terrorist act, conspiracy or attempts to commit a terrorist act, or the “prevention, frustration, or favorable resolution of an act of terrorism.”¹⁶⁷ This statute does not differentiate between international and domestic terrorism.¹⁶⁸ While the reward’s availability is limited to information relating to terrorism “primarily within the territorial jurisdiction of the United States,” this distinction speaks to where the act took place, not whether it was international or domestic.¹⁶⁹

Despite some flaws in these statutes’ mechanics, when taken together, they ultimately evince a legislative judgment that domestic and international terrorism should be treated equally in several situations.¹⁷⁰ They stand in conflict, however, with the significant ways in which federal law handles domestic and international terrorism differently.¹⁷¹

IV. INCONSISTENT TREATMENT OF INTERNATIONAL AND DOMESTIC TERRORISM

Federal law contains several statutes that treat international and domestic terrorism drastically differently.¹⁷² This Comment is not meant to represent every way in which terrorism is handled unevenly in federal law; however, the two most glaring situations where this presents are the lack of a civil cause of action for domestic terrorism victims¹⁷³ and the exclusion of domestic terrorism from the federal crime of terrorism.¹⁷⁴

A. Civil Cause of Action

A federal civil suit may be dismissed if the plaintiff fails to include “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁷⁵ A claim, or cause of action, must almost always be created by Congress.¹⁷⁶ The

166. 18 U.S.C.A. § 3071 (West 2018).

167. *Id.*

168. *Id.*

169. *Id.*

170. 6 U.S.C.A. §§ 488f, 1104 (West 2018); 18 U.S.C.A. §§ 226, 1001(a), 1028, 1505, 3077 (West 2018); 49 U.S.C.A. § 44941 (West 2018).

171. *Infra* Part IV.

172. *Infra* Parts IV.A–C.

173. *Infra* Part IV.A.

174. *Infra* Part IV.C.

175. FED. R. CIV. P. 8.

176. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (quoting *Bush v. Lucas*, 462 U.S. 367 (1983)) (“The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress.”).

Supreme Court has only rarely recognized a cause of action where Congress failed to expressly create one.¹⁷⁷ In each instance where it has, the cause of action related to constitutional rights violations and the Court found implied congressional intent sufficient to support the claims.¹⁷⁸

Congress expressly created a civil cause of action for victims of international terrorism in the Federal Courts Administration Act of 1992.¹⁷⁹ It allows victims—as well as their heirs, survivors, or estate—to bring claims for any injury sustained “by reason of an act of international terrorism.”¹⁸⁰ The statute not only permits the action to go forward, but also prescribes the amount of damages to be awarded.¹⁸¹ A plaintiff in such a suit “shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”¹⁸² A victim who prevails in court against a perpetrator of international terrorism is further protected, as payments to terrorism victims are excluded from income calculations in bankruptcy proceedings.¹⁸³ There is no corresponding statute providing such a cause of action, or prescribing a similar financial remedy for injuries sustained by domestic terrorism.¹⁸⁴

Because the statute’s language expressly limits this remedy’s availability to victims of international terrorism, victims of domestic terrorism are completely precluded from initiating a similar action.¹⁸⁵ The available case law, while not extensive, is consistent.¹⁸⁶ Courts hearing civil cases based on allegations of domestic terrorism have dismissed those actions for failure to state a claim.¹⁸⁷

177. See Ziglar, 137 S. Ct. at 1843 (providing a more thorough discussion of the circumstances in which the Supreme Court has recognized an implied cause of action).

178. *Id.*

179. Federal Courts Administration Act of 1992, Pub. L. No. 102-572 (S 1569), 106 Stat. 4506.

180. 18 U.S.C.A. § 2333 (West 2018).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Linde v. Arab Bank*, 353 F. Supp. 2d 327, 331 (E.D.N.Y. 2004); *Archer v. City of Taft*, No. 1:12-cv-00261-AWI-JLT, 2012 WL 1458136, at *6 (E.D. Cal. Apr. 26, 2012) (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)) (“Plaintiffs contend Defendants committed . . . domestic terrorism . . . and, thereby violated federal law. However, these statutes are federal criminal statutes that do not provide for a private civil right of action.”); *Boyd v. City of Oceanside Police Dep’t*, Civil No. 11cv3039 LAB (WMc), 2013 WL 5671164, at *5 (S.D. Cal. Oct. 11, 2013) (“[T]o the extent Plaintiff contends all named Defendants committed acts of domestic terrorism . . . he also fails to state a claim upon which relief can be granted because federal criminal statutes do not create a private civil right of action.”).

187. *Linde*, 353 F. Supp. at 331; *Archer*, 2012 WL at *62012 (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)) (“Plaintiffs contend Defendants committed . . . domestic terrorism . . . and, thereby violated federal law. However, these statutes are federal criminal statutes that do not provide for a private civil right of action.”); *Boyd*, 2013 WL 5671164 at *5 (“[T]o the extent Plaintiff contends all named Defendants committed acts of domestic terrorism . . . he also fails to state a claim upon which relief can be granted because federal criminal statutes do not create a private civil right of action.”).

1. *Boyd v. City of Oceanside Police Dep't*

The United States District Court for the Southern District of California dismissed such a claim in just one sentence, finding that “to the extent Plaintiff contends all named Defendants committed acts of domestic terrorism . . . he also fails to state a claim upon which relief can be granted because federal criminal statutes do not create a private civil right of action.”¹⁸⁸ The Plaintiff in *Boyd* had sued the many police officers, SWAT team members, and attorneys involved in his prior criminal conviction.¹⁸⁹ His third amended complaint was dismissed with prejudice.¹⁹⁰

2. *Archer v. City of Taft*

The Eastern District of California similarly dismissed a civil domestic terrorism claim because “Plaintiffs are unable to state cognizable claims for violations of Title 18, and these claims for . . . domestic terrorism must be dismissed.”¹⁹¹

In *Archer*, Plaintiffs had been doing construction on their home, and subsequently had lumber, metal sheeting, and other supplies laid out on their property.¹⁹² The legal action was initiated because city officials removed the supplies and sent Plaintiffs an invoice after Plaintiffs failed to respond to violation notices.¹⁹³ Plaintiffs brought suit against the city, alleging numerous claims including violations of several constitutional rights and the Racketeer Influenced and Corrupt Organizations (RICO) Act, as well as grand theft and domestic terrorism.¹⁹⁴

In these cases, the courts did not consider the merits of the claims whatsoever.¹⁹⁵ They gave no indication that a subsequent claim under different factual circumstances would prevail, instead foreclosing the possibility that any domestic terrorism claims could be pursued civilly in federal court.¹⁹⁶ Domestic

188. *Boyd*, 2013 WL 5671164 at *5.

189. *Id.* at *2.

190. *Id.* at *5.

191. *Archer*, 2012 WL 1458136 at *6.

192. *Id.*

193. *Id.*

194. *Id.*

195. *See Archer*, 2012 WL1458136 at *6 (dismissing civil claims alleging domestic terrorism against city officials); *see also Boyd*, 2013 WL 5671164 (dismissing civil claims with prejudice where the Plaintiff’s third amended complaint alleged domestic terrorism against the many police officers, SWAT team members, and attorneys involved in his prior criminal conviction).

196. *Id.*

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terror victims will not be able to bring such claims until Congress passes a law granting them the same legal rights as victims of international terrorism.¹⁹⁷

B. Protection in Bankruptcy Proceedings

A federal law excluding payments to terrorism victims from consideration in bankruptcy proceedings further protects terror victims who prevail on their civil claims.¹⁹⁸ For bankruptcy purposes, an individual's current monthly income is defined as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income."¹⁹⁹ This inclusive definition provides for a few specific exceptions, one of which is "payments to victims of international terrorism . . . or domestic terrorism . . . on account of their status as victims of such terrorism."²⁰⁰

While this statute appears to treat domestic and international terrorism equally, it does so only on its face.²⁰¹ As discussed above, there is no federal civil cause of action for victims of domestic terrorism.²⁰² There are undoubtedly other claims they may be able to pursue, but those causes of action must be rooted in some law aside from terrorism.²⁰³ Under this construct, even if a victim of domestic terrorism succeeded in bringing a non-terrorist civil action and was awarded damages, any payments they received would not be similarly protected if that individual were to later file bankruptcy because those payments would not be "*on account of their status as victims of such terrorism.*"²⁰⁴ Inasmuch as this statute appears intended to protect victims of domestic and international terrorism equally, it fails to do so.²⁰⁵

C. The Federal Crime of Terrorism

There are two requirements that an act must meet to fall under the "Federal Crime of Terrorism" laid out in § 2332b(g)(5).²⁰⁶ First, the act must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to

197. See 18 U.S.C.A. § 2333 (West 2018) (facially excluding domestic terror victims from bringing a civil action based on their status as terror victims).

198. 11 U.S.C.A. § 101(10A)–(B) (West 2018).

199. *Id.* § 101(10A).

200. *Id.* § 101(10A)–(B).

201. *Id.*

202. 18 U.S.C.A. § 2333 (West 2018).

203. Archer, 2012 WL 1458136 at *6 (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980)) ("Plaintiffs contend Defendants committed . . . domestic terrorism . . . and, thereby violated federal law. However, these statutes are federal criminal statutes that do not provide for a private civil right of action.").

204. 11 U.S.C.A. § 101(10A) (West 2018).

205. *Id.*

206. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

retaliate against government conduct.”²⁰⁷ Second, the act must also fit within one of many enumerated offenses.²⁰⁸ While international terrorism is listed specifically, domestic terrorism is not.²⁰⁹ The enumeration of offenses in this statute has been amended several times, most recently in 2015.²¹⁰ Each time, further offenses have been added, still omitting domestic terrorism.²¹¹

As written, the statute includes many offenses that do not strictly apply to either international or domestic terrorism.²¹² For example, the current law includes crimes involving weapons of mass destruction, biological agents, and assassinating congressional, Cabinet, and Supreme Court members, with no mention of whether the act must be international or domestic.²¹³ The two-part test (requiring a particular intent and a particular action) results in a construct where purely domestic actions, if taken with the requisite intent, could still fall under this provision.²¹⁴

When federal courts have addressed the issue of whether the federal crime of terrorism excludes purely domestic conduct, it has most frequently been in the context of determining whether a sentencing enhancement for acts of terrorism applied in domestic cases.²¹⁵ Appellate courts across multiple circuits have uniformly found that “the definition of a ‘federal crime of terrorism’ does not require the offense conduct to transcend national boundaries,” so long as it meets the statute’s intent and offense requirements.²¹⁶ Given that interpretation, it would seem as though domestic terrorists can already be adequately charged through the current scheme; however, a survey of the included offenses reveals clear gaps in statutory coverage as related to domestic terrorism.²¹⁷

Most of the underlying offenses included in the “federal crime of terrorism” can be grouped into two categories: (1) offenses based on the intended target,²¹⁸

207. *Id.* § 2332b(g)(5)(a).

208. *Id.* § 2332b(g)(5)(b).

209. *Id.* § 2332b(g)(5).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *U.S. v. Garey*, 546 F.3d 1359, 1163 (11th Cir. 2008); *see also U.S. v. Salim*, 549 F.3d 67, 78 (2d Cir. 2008) (“Congress could have defined ‘Federal crime of terrorism’ to include a requirement that the offense conduct transcend national boundaries, but it did not.”); *U.S. v. Harris*, 434 F.3d 767, 773 (5th Cir. 2005) (finding that application of the sentencing enhancement was appropriate to the defendant’s purely domestic conduct because he committed an enumerated offense with the requisite intent).

215. *Garey*, 546 F.3d at 1163; *see also Salim*, 549 F.3d at 78 (“Congress could have defined ‘Federal crime of terrorism’ to include a requirement that the offense conduct transcend national boundaries, but it did not.”); *Harris*, 434 F.3d at 773 (finding that application of the sentencing enhancement was appropriate to the defendant’s purely domestic conduct because he committed an enumerated offense with the requisite intent).

216. *Id.*

217. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

218. *Infra* Part IV.C.1.

and (2) offenses based on the instrumentality used.²¹⁹ Both categories fail to adequately represent domestic terrorism as it currently presents in the United States.²²⁰

1. *Offenses Based on Intended Target*

The “federal crime of terrorism” encompasses many crimes committed against specified persons, primarily government officials.²²¹ Killing or attempting to kill “officers and employees of the United States,” the President, a member of the President’s staff, or “congressional, cabinet, and Supreme Court” members are all included, as is the murder or attempted murder of “foreign officials, official guests, or internationally protected persons.”²²²

Crimes against ordinary citizens do not share the same unequivocal inclusion in this statute.²²³ Some enumerated offenses, discussed more thoroughly below, are only concerned with the means or weaponry used.²²⁴ These *could* apply to attacks on civilians, but only in certain circumstances.²²⁵ For example, crimes involving chemical or biological weapons do not require that the actor have a particular target in mind for the act to be terrorism.²²⁶ One included offense directly covers “homicides and other violence against United States nationals,” but limits its application to violence “occurring outside of the United States.”²²⁷ The only other enumerated offense to cover violence against civilians without reference to a particular instrumentality involves “conspiracy to murder, kidnap, or maim persons *abroad*.”²²⁸ Under this statutory structure, Dylann Roof’s actions would have fallen under the “federal crime of terrorism” if he had killed American citizens overseas, but did not because he perpetrated his attack in South Carolina.²²⁹

Some included offenses are based on a geographical physical target such as aircraft facilities, government property, and federal facilities.²³⁰ Such attacks would likely injure civilians, but civilians are not the primary focus, and these

219. *Infra* Part IV.C.2.

220. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Infra* Part IV.C.2.

225. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

226. 18 U.S.C.A. §§ 175, 229 (West 2018).

227. 18 U.S.C.A. § 2332 (West 2018).

228. 18 U.S.C.A. § 956(a)(1) (West 2018).

229. 18 U.S.C.A. § 2332b(g)(5) (West 2018); Ortiz & Bruton, *supra* note 1.

230. 18 U.S.C.A. §§ 32, 930(c), 1361 (West 2018).

offenses' application as related to civilian victims would be incidental.²³¹

2. *Offenses Based on Instrumentality*

Many statutes included in the “federal crime of terrorism” relate solely to the instrumentality by which they are carried out - for example, attacks using chemical, biological, or nuclear weapons are terrorism regardless of the intended target.²³² However, the enumerated offenses fail to include mass shootings, despite their prevalence in domestic terrorism.²³³

The closest offense currently included covers acts involving a weapon of mass destruction (WMD).²³⁴ A WMD is defined, in relevant part, as “any destructive device as defined in section 921,”²³⁵ which in turn is defined as “any type of weapon . . . which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of *more than one-half inch in diameter*.”²³⁶

The bore of a gun is the barrel's interior.²³⁷ The bore diameter is referred to as the caliber, which corresponds to the size of compatible ammunition.²³⁸ For a mass shooting to come within “the federal crime of terrorism,” a gun must have a caliber above 0.50.²³⁹ Dylan Roof used a .45-caliber handgun to murder AME's congregants, just five hundredths of an inch short.²⁴⁰ Assault rifles, another common choice among domestic terrorists, are .233 caliber, far below the .50 caliber threshold.²⁴¹

The current enumeration defining the “federal crime of terrorism” creates an uneven statutory scheme where attacks on United States civilians by United States civilians, even if committed with clearly terrorist intent, are only considered terrorism from a criminal perspective if they are committed overseas, in certain locations, or with certain weapons.²⁴² In addition to including more substantive underlying offenses that more accurately reflect the ways in which domestic

231. 18 U.S.C.A. §§ 32, 930(c), 1361 (West 2018).

232. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

233. Wray, *supra* note 20 (“We are most concerned about the lone offender attacks—primarily shootings, as they have served as the dominant mode for lethal domestic extremist violence.”).

234. 18 U.S.C.A. § 2332a(c)(2)(a) (West 2018).

235. *Id.*

236. 18 U.S.C.A. § 921(a)(4)(B) (West 2018).

237. *Bore: Firearms*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/bore-firearms> (last visited Mar. 31, 2018) (on file with *The University of the Pacific Law Review*).

238. *Id.*

239. 18 U.S.C.A. § 921(a)(4)(B) (West 2018).

240. Phelps, *supra* note 3.

241. John Cassidy, *Gun Laws and Terrorism: An American Nightmare*, NEW YORKER (June 13, 2016), <https://www.newyorker.com/news/john-cassidy/gun-laws-and-terrorism-an-american-nightmare> (on file with *The University of the Pacific Law Review*).

242. 18 U.S.C.A. § 2332b(g)(5) (West 2018).

terrorism is carried out in the United States, adding domestic terrorism to the enumerated list would fill these gaps and better serve federal law enforcement's stated interests.²⁴³

V. CONCLUSION

Despite the recognized threat that domestic terrorism poses in the United States, federal law still does not treat it as seriously as international terrorism.²⁴⁴ Creating a civil cause of action for victims of domestic terrorism would hold them in the same regard as victims of international terrorism, as well as ensure that damages awarded in such an action would be protected from bankruptcy calculations consistent with congressional intent.²⁴⁵ Expressly adding domestic terrorism to the federal crime of terrorism would hold it equally reprehensible as international terrorism and permit federal prosecutors to better align their charging decisions with the policy considerations in the Justice Manual.²⁴⁶ Additionally, including more underlying offenses within the federal crime of terrorism would update the federal statutory scheme to reflect current knowledge about domestic terrorism in the United States.²⁴⁷

As Senator John Kyl observed following the attacks on September 11, 2001, Congress has “a responsibility to the people of this nation to ensure that those who are charged with protecting us from future terrorist attacks are empowered to do so.”²⁴⁸ The time has come for Congress to finally correct these harmful gaps in our federal legal system and treat domestic terrorism as seriously as it deserves.²⁴⁹

243. *Id.* § 2332b(g)(5); Wray, *supra* note 20 (“We are most concerned about the lone offender attacks—primarily shootings, as they have served as the dominant mode for lethal domestic extremist violence.”).

244. *See* Wray, *supra* note 20 (“In addition to foreign terrorist organizations, domestic extremist movements collectively pose a steady threat of violence and economic harm to the United States . . . We anticipate law enforcement, racial minorities, and the U.S. government will continue to be significant targets for many domestic extremist movements.”).

245. 11 U.S.C.A. § 101(10A)–(B) (West 2018).

246. MANUAL, *supra* note 121, § 9-27.300.

247. Cassidy, *supra* note 241.

248. Welch, *supra* note 55.

249. Wray, *supra* note 20.