

2023

Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest

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Madeline Johl, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 Fordham Urb. L.J. 465 (2023).

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ACTIVISM OR DOMESTIC TERRORISM? HOW THE TERRORISM ENHANCEMENT IS USED TO PUNISH ACTS OF POLITICAL PROTEST

*Madeline Johl**

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INTRODUCTION

In the summer of 2016, climate activist and member of the Catholic Workers’ Movement Jessica Reznicek participated in marches, rallies, boycotts, encampments, and hunger strikes to try to halt construction of the Dakota Access Pipeline.¹ Reznicek was one of thousands who participated in the Indigenous-led protests that year, motivated by concern that the pipeline would leak crude oil into the drinking water and soil for the nearby Standing Rock Sioux reservation.² Despite this fierce resistance, construction began in Reznicek’s home state of Iowa that fall.³ Feeling frustrated, on election night 2016, Reznicek and fellow activist Ruby Montoya set fire to a bulldozer and other construction equipment along the pipeline.⁴ In the following months, they did further damage by melting holes in three valves along the pipeline using oxy-acetylene torches.⁵ The two later held a press conference claiming responsibility for the property destruction,⁶

1. See Julia Shipley, *You Strike a Match*, GRIST (May 26, 2021), <https://grist.org/protest/dakota-access-pipeline-activists-property-destruction/> [https://perma.cc/9YMM-6ZRQ]; Appellant’s Brief at 15–16, *United States v. Reznicek*, No. 21-2548, 2022 WL 1939865 (8th Cir. Nov. 5, 2021), 2021 WL 5294686 [hereinafter *Reznicek* Brief].

2. See Jeff Brady, *Two Years after Standing Rock Protests, Tensions Remain but Oil Business Booms*, NPR (Nov. 29, 2018, 7:20 AM), <https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming> [https://perma.cc/JE7Q-WN6E].

3. See Shipley, *supra* note 1.

4. *Id.*; see also Naveena Sadasivam, *Jessica Reznicek Set Fire to Dakota Access Pipeline Construction. Is She a Terrorist?*, GRIST (May 18, 2022), <https://grist.org/protest/jessica-reznicek-sentence-dakota-access-pipeline-terrorism/> [https://perma.cc/6D7T-2XVT].

5. See Sadasivam, *supra* note 4. Just one of these incidents is estimated to have cost at least \$2.5 million. See William Morris, *Appeals Court Upholds 8-Year Sentence of Des Moines Activist in Dakota Access Pipeline Sabotage*, DES MOINES REG. (June 6, 2022, 4:21 PM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2022/06/06/dakota-access-pipeline-dapl-protestor-sentence-jessica-reznicek/7535555001/> [https://perma.cc/32E9-PSGJ].

6. See Sadasivam, *supra* note 4.

asserting that “the system is broken and it is up to us as individuals to take peaceful action and remedy it, and this we did, out of necessity.”⁷

Unsurprisingly, Reznick was charged with nine felony counts,⁸ and pled guilty to conspiracy to damage an energy facility.⁹ However, climate activists were shocked when District Judge Leigh Goodgame Ebinger applied the terrorism enhancement to Reznick’s sentence.¹⁰ The enhancement changed what would have been a 37 to –46-month sentence to an eight year prison term followed by three years of supervised release.¹¹ This decision was reaffirmed by the Eighth Circuit in May 2022.¹²

Conversely, two months earlier District Judge Dabney Friedrich opted not to apply the terrorism enhancement against Guy Wesley Reffitt for his involvement in the January 6th Capitol Hill attack.¹³ Equipped with a handgun, body armor, a helmet, radio, and flex cuffs, Reffitt threatened to “physically attack, remove, and replace”¹⁴ Democratic lawmakers, saying “I didn’t come here to play games . . . I just want to see Pelosi’s head hit every f***ing stair on the way out.”¹⁵ Video recording showed Reffitt climbing a stone banister and confronting a U.S. Capitol Police officer near scaffolding meant to keep the protestors out.¹⁶ Reffitt gestured to the crowd behind him, in an apparent attempt to get them into the building.¹⁷ Prosecutors argue that this confrontation was one of the moments in which the police lost

7. Morris, *supra* note 5.

8. See Sadasivam, *supra* note 4.

9. See United States v. Reznicek, No. 21-2548, 2022 WL 1939865, at *1 (8th Cir. June 6, 2022).

10. See *id.*; Morris, *supra* note 5.

11. See Reznicek, 2022 WL 1939865, at *1.

12. See *id.* at *2.

13. See Lucien Bruggeman, *Who Should be Labeled a Terrorist? Jan. 6 Sentencing Fuels the Debate*, ABC NEWS (Aug. 1, 2022, 9:28 PM), <https://abcnews.go.com/US/labeled-terrorist-jan-sentencing-fuels-debate/story?id=87769985> [<https://perma.cc/WT3W-3PMG>].

14. See Eric Neugeboren, *Texas Who Prosecutors Say “Lit the Match” of Jan. 6 Riot Sentenced to More than Seven Years in Prison*, TEX. TRIB. (Aug. 1, 2022, 3:00 PM), <https://www.texastribune.org/2022/08/01/guy-reffitt-jan-6-riot/> [<https://perma.cc/KHW9-PLSJ>].

15. Alexander Mallin et al., *First Capitol Rioter to Stand Trial Gets Seven Years, the Longest Sentence for a Jan. 6 Defendant So Far*, ABC NEWS (Aug. 1, 2022, 4:03 PM), <https://abcnews.go.com/US/1st-capitol-rioter-stand-trial-faces-sentencing/story?id=87735164> [<https://perma.cc/XG9K-XJR8>].

16. See *id.*

17. See *id.*

control of the crowd.¹⁸ While Reffitt never got into the Capital, he helped ignite the crowd “into an unstoppable force.”¹⁹

Reffitt was sentenced to a little over seven years after being found guilty by a jury of two counts of civil disorder, one count of obstruction of an official proceeding, one count of entering and remaining on restricted grounds with a firearm, and one count of obstruction of justice.²⁰ However this sentence is half of what prosecutors sought under the terrorism enhancement.²¹ If applied, it would have increased his sentence to 15 years.²² The sentencing judge resisted labeling Reffitt a domestic terrorist, stating that other defendants who engaged in more dangerous conduct than Reffitt on January 6th did not face the terrorism enhancement.²³ Clinton Broden, Reffitt’s attorney, said that the push to apply the enhancement was an attempt to “make an example” of Reffitt in this highly politicized trial.²⁴

Why was Reznicek’s act of property destruction labeled domestic terrorism, but Reffitt’s armed attack on the Capitol not? The inconsistent application of the terrorism enhancement reveals a larger issue in the law: it has proven difficult to articulate a definition of domestic terrorism that does not implicate the right to political protest.²⁵ The right to protest is critical to a functioning democracy²⁶ — but so too is the ability to live free from a persistent threat of violence.²⁷ It is thus difficult to express when, exactly, we should label an act that is meant to create political pressure as an act of terrorism. This difficulty is compounded when new domestic skirmishes give rise to calls for new tools to police and deter certain behaviors.²⁸ As Daniel L. Byman from the Brookings Institution acknowledges, “[o]ne person’s terrorist is another person’s freedom fighter.”²⁹

18. See Neugeboren, *supra* note 14.

19. *Id.*

20. *See id.*

21. *See* Bruggeman, *supra* note 13.

22. *See id.*

23. *See* Mallin et al., *supra* note 15.

24. *Id.*

25. *See infra* Part II.A.

26. *See infra* Part III.

27. *See infra* Part III.

28. *See, e.g.,* NAT’L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021) (President Biden has putting forward a national plan to crack down on domestic terrorism following the January 6th attack).

29. Daniel L. Byman, *Who is a Terrorist, Actually?*, BROOKINGS (Sept. 22, 2020) [hereinafter Byman, *Who is a Terrorist, Actually?*], <https://www.brookings.edu/blog/order-from-chaos/2020/09/22/who-is-a-terrorist-actually/> [https://perma.cc/3KRF-9B7G].

There is no single federal crime of domestic terrorism.³⁰ 18 U.S.C. Sections 2331(5) and 2332b(g)(5) offer definitions of terrorism,³¹ but neither act as a criminal enforcement statute in itself.³² Actions that meet the statutory definition must be prosecuted under other criminal statutes.³³ This has led many to call for new domestic terrorism sanctions, with increasingly severe punishments.³⁴ However, others have noted that a myriad of vehicles for criminalizing domestic terrorism already exist.³⁵ In fact, scholars have said that it is “unlikely”

30. See Rachel Hanna & Eric Halliday, *Discretion without Oversight: The Federal Government's Powers to Investigate and Prosecute Domestic Terrorism*, 55 *LOY. L.A. L. REV.* 775, 783–86 (2022).

31. 18 U.S.C. § 2331(5):

- (5) the term ‘domestic terrorism’ means activities that—
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) 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 by mass destruction, assassination, or kidnapping; and
 - (C) occur primarily within the territorial jurisdiction of the United States definition);

18 U.S.C. § 2332b(g)(5):

- (5) the term “Federal crime of terrorism” means an offense that—
 - (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
 - (B) is a violation of—
 - (i) [Listing sections that violations of which qualify as terrorism under the state]

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

33. See *id.*.

34. See Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 *Nw. U. L. REV.* 1061, 1078–79 (2020). Support for increasing criminal sanctions for acts of domestic terror is often bipartisan. See *id.* For example, in 2019, Republican Senator Martha McSally drafted a domestic terrorism statute, criminalizing a wide range of conduct with “intent to intimidate or coerce a civilian population or influence, affect, or retaliate against the policy or conduct of a government.” *Id.* Democrat Congressman Adam Schiff of California proposed a similar bill, adding those who act with intent to “affect the conduct of a government by mass destruction, assassination, or kidnapping.” *Id.* Further, a “bipartisan group of Texas Congressmen” proposed a bill that includes property destruction that does not cause a “substantial risk of serious injury.” *Id.*

35. See German, *supra* note 32.

that Congress understands the “full scope of the government’s power” to prosecute terrorism.³⁶

This Note focuses on one of these federal sentencing tools, the so-called “terrorism enhancement:” section 3A1.4 of the United States Sentencing Guidelines. It is a powerful tool that allows the government to prosecute those who act in ways deemed politically radical. Its scope is broad, and its effects are punishingly severe. This Note explores how the terrorism enhancement has emerged as an effective weapon wielded against those who intentionally commit criminal acts as a form of political protest. Ultimately, this Note argues that the enhancement may be used to punish acts meant to cause mass panic, however it must not be used to suppress legitimate forms of political protest.

Part I reviews the statutory language of the terrorism enhancement, the legislative intent of the Congresses that enacted and amended it, and how judicial interpretation of the enhancement has dramatically increased the breadth of its potential application.³⁷ Part II explores some of the ramifications of the terrorism enhancement’s broad scope and language, and its use in cases of political protest.³⁸ Part III evaluates the underlying purposes of criminalizing domestic terrorism, and the validity of the various policy goals inherent in the enhancement’s language.³⁹ Lastly, Part IV proposes amending the terrorism enhancement so that it applies in a much narrower set of cases.⁴⁰

I. POLITICAL ORIGINS OF THE TERRORISM ENHANCEMENT

A confluence of political factors emerged in the 1990s and 2000s that allowed policymakers and Circuit Court judges to turn the terrorism enhancement into a broadly applicable tool of criminal sentencing. Already deep into the tough on crime era,⁴¹ three attacks on American soil within a ten year period — the 1993 World Trade Center bombing, the 1995 Oklahoma City attack, and the September 11th attack —

36. Hanna & Halliday, *supra* note 30, at 781.

37. See *infra* Part I.

38. See *infra* Part II.

39. See *infra* Part III.

40. See *infra* Part IV.

41. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, SENT’G PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/> [https://perma.cc/8TQN-2YTF].

shocked the American public.⁴² Congress responded, in part, by creating the terrorism enhancement and expanding its scope with each subsequent attack.⁴³ As described below, the resulting enhancement gave courts a “far-reaching power”⁴⁴ to severely punish many individuals, some of whom may lack a motivation to incite terror.

This Part outlines the language and legislative history of the terrorism enhancement. Section I.A reviews the terrorism enhancement’s passage, its language, and the function it serves in criminal cases. Section I.B then explores the relationship between the jury and the sentencing judge, and how the terrorism enhancement evolved into a recommended guideline for sentencing judges — but not juries — to consider. Finally, Section I.C explains how the terrorism enhancement has dramatically expanded in scope in the decades after its passage, through both Congressional direction and judicial interpretation.

A. Enactment of the Terrorism Enhancement

In 1993, a bomb attack in the parking garage of the World Trade Center killed six people and wounded thousands more.⁴⁵ This attack shocked the nation, and prompted Congress to crack down on acts of international terrorism.⁴⁶ As part of the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Congress directed the Sentencing Commission to “provide an appropriate enhancement for any felony . . . that involves or is intended to promote international terrorism.”⁴⁷

The VCCLEA was an enormous bill that dramatically increased criminal punishments for a whole host of acts.⁴⁸ Part of a national

42. See James P. McLoughlin, *Deconstructing United States Sentencing Guideline Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 MINN. J. L. & INEQ. 51, 51 (2010); see also *World Trade Center Bombing 1993*, FBI, <https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993> [<https://perma.cc/3A3G-34AM>] (last visited Jan. 31, 2023).

43. See *infra* Section I.A.

44. See McLoughlin, *supra* note 42.

45. See *World Trade Center Bombing 1993*, *supra* note 42.

46. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, §120004, 108 Stat. 1796, 2022.

47. *Id.*

48. See *generally id.* The VCCLEA “authorized the death penalty for over 60 new offenses,” “imposed mandatory life sentences for individuals with three or more felony convictions,” and introduced “draconian penalties for so-called super predators.” Ranya Shannon, *Three Ways the 1994 Crime Bill Continues to Hurt Communities of Color*, CTR. FOR AM. PROGRESS (May 10, 2019),

strategy of getting tough on crime, Republicans and Democrats alike used this bill as an opportunity to demonstrate their commitment to mass incarceration.⁴⁹ While the terrorism-related provisions were only a small portion of the bill, this rhetoric was just as prevalent in justifying new terror sanctions.⁵⁰ Senator Charles Schumer called the World Trade Center attack a “wakeup call, [] a shot across the bow, importuning us to act.”⁵¹

Following Congress’s directive, the Sentencing Commission added the terrorism enhancement — section 3A1.4 — to the Sentencing Guidelines (the “Guidelines”).⁵² The Guidelines are a manual for district judges to follow when deciding on an appropriate sentence for a criminal defendant.⁵³ The guidelines were created by the Sentencing Commission, which is an “independent agency in the judicial branch”⁵⁴ that was formed by Congress under the Sentencing Reform Act of 1984 (SRA).⁵⁵ The SRA directed the newly-formed Sentencing Commission to promulgate a set of guidelines for judges to follow when sentencing criminal defendants.⁵⁶ Congress passed the SRA to help address the seeming “wide disparity in sentences imposed for similar criminal offenses committed by similar offenders” and offer proportionate sentences.⁵⁷ They hoped that by requiring judges to

<https://www.americanprogress.org/article/3-ways-1994-crime-bill-continues-hurt-communities-color/> [https://perma.cc/L66D-DYJA].

49. The majority of the statutory provisions in this crime bill were directed at urban crime, with thinly veiled references to the criminalizing the activities of young black men. *See, e.g.*, 140 CONG. REC. H2,602 (daily ed. Apr. 21, 1994) (statement of Rep. Alan Wheat) (“[This bill] lets gun thugs and urban terrorists know that the tide is turning against their bloody reign of terror.”).

50. *See* 140 CONG. REC. S12,414 (daily ed. Aug. 24, 1994) (statement of Sen. Dianne Feinstein) (“Now, let me dispel another myth promulgated by the minority: that this crime bill is soft on crime. Not so.”). *Id.* Listing all of the increased penalties, the Senator notes that this bill introduces “a whole series of increased terrorism penalties.” *Id.*

51. *See* Stephen Floyd, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. Security*, 109 GEO. L.J. 142, 143 n.6 (2021) (quoting *World Trade Center Bombing: Terror Hits Home: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. at 1–2 (1993) (statement of Sen. Charles Schumer, Chairman, S. Comm. on the Judiciary)).

52. *See* U.S. SENT’G GUIDELINES MANUAL § 3A1.4 (U.S. SENT’G COMM’N 2018).

53. *See id.* at ch. 1 pt. A(2).

54. *See id.*

55. *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 483 (2014).

56. *See id.*

57. U.S. SENT’G GUIDELINES MANUAL § 1A3 (U.S. SENT’G COMM’N 2018).

apply sentences with defined parameters, the Guidelines would act as a check on those who abuse their discretion by subjecting criminal defendants of similar charges to substantially different sentences.⁵⁸

After notice and comment rulemaking, The Sentencing Commission added the terrorism enhancement to the Guidelines in 1995⁵⁹ under the subset of “victim-related” adjustments.⁶⁰ This portion of the Guidelines is dedicated to increasing sentences of defendants who commit crimes considered particularly heinous,⁶¹ such as hate crimes, crimes against government officials, serious human rights offenses, and terrorism.⁶²

Section 3A1.4(a) instructs judges that if a felony “involved, or was intended to promote, a federal crime of terrorism, the sentencing judge should increase [the defendant’s sentence] by 12 levels.”⁶³ If the resulting offense level is less than 32, it must be “increase[d] to level 32”⁶⁴ to meet a floor imposed under the Guidelines. A criminal defendant’s offense level is meant to serve as a starting point in sentencing and can then be deviated upward based on an applicable enhancement.⁶⁵ The terrorism enhancement’s increase of 12 offense levels is significantly higher than the level increases for all other victim-related offenses, which are between two to six levels.⁶⁶ Having a baseline offense level of 32 puts defendants in offense level “Zone D,” which is the highest of four possible offense level zones.⁶⁷ This results in a sentence that is much higher than it would have been without the enhancement.

Section 3A1.4(b) further dictates that in all cases in which the terrorism enhancement is applied, a defendant’s “criminal history category” is increased to Category VI,⁶⁸ which is the highest criminal history category.⁶⁹ If a defendant is a first-time offender, they would

58. *See Said, supra* note 55.

59. *See* U.S. SENT’G GUIDELINES MANUAL § 3A1.4 cmt. hist. n. (U.S. SENT’G COMM’N 2018).

60. *See id.* at ch. 3, pt. A.

61. *See Said, supra* note 55, at 481.

62. *See* U.S. SENT’G GUIDELINES MANUAL § 3A1.1 (U.S. SENT’G COMM’N 2018).

63. *Id.* at § 3A1.4(a).

64. *Id.*

65. *See Said, supra* note 55, at 489.

66. *See* U.S. SENT’G GUIDELINES MANUAL § 3A1 (U.S. SENT’G COMM’N 2018).

67. *See id.* at § 5A sentencing tbl.

68. *See id.* at § 3A1.4(b).

69. *See id.* at § 5A sentencing tbl.

normally be placed in Category I.⁷⁰ But a first-time offender who is sentenced under the terrorism enhancement is automatically placed in the maximum criminal history level, as if they were a career offender.⁷¹ A crime with an offense level of 32 under Category VI should result in a sentence of 210 to 262 months, or 17 and a half to a little under 22 years.⁷²

The terrorism enhancement may be applied to any offense that “involved or [] intended to promote[] a federal crime of terrorism.”⁷³ Application Note One explains that the language “federal crime of terrorism” is defined by 18 U.S.C. Section 2332b(g)(5),⁷⁴ which states that a federal crime of terrorism is an offense that is both “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and a violation of one of a list of specified offenses.⁷⁵ The first prong sets out a motivational element, and the second specifies criminal acts that, if done with the requisite motivation, qualify as a federal crime of terrorism.⁷⁶ Thus, if a defendant has terrorist motivation, and commits a crime enumerated in the list described above, then the sentencing judge is free to apply the section 3A1.4 enhancement.⁷⁷

B. The Role of the Sentencing Judge

The terrorism enhancement is not itself a criminal statute, but rather a tool of sentencing. The Guidelines are meant to help sentencing

70. See Pinky Wassenberg, *U.S. Circuit Courts & the Application of the Terrorism Enhancement Provision*, 42 S. ILL. UNIV. L.J. 85, 87 (2017).

71. *See id.*

72. *See* U.S. SENT’G GUIDELINES MANUAL § 5A sentencing tbl. (U.S. SENT’G COMM’N 2018).

73. *Id.* at § 3A1.4(a).

74. *See id.* at § 3A1.4 cmt. n.1.

75. 18 U.S.C. §2332(g)(5). This provision lists a wide range of triggering offenses, including, inter alia, violations of 18 U.S.C. § 37 (relating to violence at international airports); §§ 175 or 175b (relating to biological weapons); § 351 (a), (b), (c), or (d) (relating to congressional, cabinet, and Supreme Court assassination and kidnaping); § 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States); § 1114 (relating to killing or attempted killing of officers and employees of the United States); § 1203 (relating to hostage taking); § 18 (relating to arson within maritime and territorial jurisdiction); § 1030(a)(1) (relating to the protection of computers); § 1361 (relating to government property or contacts), § 1362 (relating to destruction of communication lines, stations, or systems); § 1363 (relating to injury to buildings or property within territorial or maritime jurisdiction); § 1366(a) (relating to destruction or attempted destruction of an energy facility exceeding \$100,000 in damages).

76. *See* McLoughlin, *supra* note 42, at 60.

77. *See id.*

judges determine an appropriate criminal sanction for a defendant.⁷⁸ The decision of whether or not to apply the terrorism enhancement is not a question of criminal liability that goes to the jury.⁷⁹ Rather, the sentencing judge considers section 3A1.4 in determining if the defendant should be subjected to a sentence that is on the higher end of the statutory range⁸⁰ for the crime that the jury has held them criminally liable for.⁸¹ When applicable, section 3A1.4 has a dramatic upward effect on sentences by increasing the two main factors of sentencing: the offense level and criminal history category.⁸²

The Guidelines were initially envisioned to be mandatory rules for district judges.⁸³ However, because a judge — not the jury — decides if an enhancement applies, the Supreme Court held in *United States v. Booker* that this is unconstitutional if the guidelines are compulsory.⁸⁴ In *Booker*, a defendant was found guilty by a jury of crack cocaine possession and intent to distribute.⁸⁵ After a jury found him criminally liable, the sentencing judge then found by a preponderance of the evidence that he possessed more cocaine than the jury determined and that he was guilty of obstructing justice, subsequently sentencing him according to the Guidelines' requirements.⁸⁶ The Supreme Court held that this violated Booker's Sixth Amendment rights, because the enhancement was applied on factual determinations that were "not found by the jury or admitted by the defendant."⁸⁷

The *Booker* Court held that mandating sentencing judges to comply with the Guidelines violated the Sixth Amendment.⁸⁸ Rather than invalidating the Guidelines altogether, though, the Supreme Court held that this constitutional violation could be remedied by making

78. See Wassenberg, *supra* note 70, at 85–86.

79. See *id.*

80. In *Blakely v. Washington*, the Supreme Court held that a "statutory maximum" is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. 296, 303 (2004) (emphasis omitted).

81. See Wassenberg, *supra* note 70, at 85–87.

82. See George D. Brown, *Notes on a Terrorism Trial — Preventive Prosecution, "Material Support," and the Role of the Judge after United States v. Mehanna*, 4 HARV. NAT'L SEC. J. 51, 55 (2012).

83. See Wassenberg, *supra* note 70, at 85.

84. See *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

85. See *id.* at 227.

86. See *id.*

87. *Id.* at 245. The court also noted that, in applying the enhancement, Judges may rely on facts admitted by the defendant or concerning a prior conviction, even if not explicitly found by the jury. See *id.*

88. See *id.*

them “effectively advisory.”⁸⁹ The Court reasoned that it does not “implicate the Sixth Amendment” for a sentencing judge to consider the Guidelines when exercising their “broad discretion in imposing a sentence within a statutory range.”⁹⁰

After withstanding this constitutional challenge, sentencing judges were empowered to use the Guidelines liberally. Post-*Booker*, many courts have held that juries do not need to find facts that are sentence-determinative, because sentencing under the Guidelines is discretionary.⁹¹

C. Expansion of the Terrorism Enhancement’s Scope

In 1995, Timothy McVeigh set off a bomb in the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people.⁹² Unlike the perpetrators of the World Trade Center attack two years earlier, McVeigh was a U.S. citizen.⁹³ Born and raised in New York and a U.S. Army veteran, McVeigh changed the nation’s understanding of what a terrorist could look like.⁹⁴

When faced with a threat from inside our own borders, a political impulse emerged among elected officials who proposed to weed out citizens who believe in “anarchistic radicalism, be it from the left or from the right.”⁹⁵ For example, Senator Hatch said individuals like McVeigh “are not true Americans.”⁹⁶ Those who hold American citizenship, rather, are those who in their “heart and spirit . . . condemn . . . political extremism.”⁹⁷ What remains are only those citizens who believe that “[t]he rule of law and popular

89. *Id.* at 245.

90. *Booker*, 543 U.S. at 233.

91. See George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J. L. & PUB. POL’Y 517, 527 (2014). Brown argues that the *Booker* holding, and lower courts’ subsequent practice of making sentencing decisions without a jury, is constitutionally questionable. See *id.* at 524–26.

92. See *Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> [<https://perma.cc/Z75C-AXTJ>] (last visited Jan. 27, 2023).

93. See *From Decorated Veteran to Mass Murderer*, CNN, <https://www.cnn.com/CNN/Programs/people/shows/mcveigh/profile.html> [<https://perma.cc/BR8J-3GYH>] (last visited Jan. 27, 2023).

94. See *id.*

95. 104 CONG. REC. S14,528 (daily ed. May 25, 1995) (statement of Sen. Orrin Hatch).

96. *Id.*

97. *Id.*

government will prevail.”⁹⁸ While the nation was disturbed by the violence displayed in Oklahoma City, the dehumanizing rhetoric that emerged began to sow the seeds for using excessive punishment against those perceived to pose a domestic threat.

Shortly after the Oklahoma City bombing, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, which introduced a new host of measures aimed at addressing domestic terrorism.⁹⁹ While the terrorism enhancement was initially limited to felonies involving or intending to promote international terrorism,¹⁰⁰ the AEDPA directed the Sentencing Commission to make section 3A1.4 applicable to federal crimes of terrorism as defined in 18 U.S.C. Section 2332b(g)(5).¹⁰¹ This extended the terrorism enhancement to crimes of both international and domestic terrorism, exposing a large swath of criminal defendants to its potential application.¹⁰²

Despite the wide array of new offenses now included under the terrorism enhancement, some of the AEDPA’s proponents were careful to note that their support of the bill was contingent on the protection of certain civil liberties. For example, Senator Hatch said on the Senate Floor that the new regulations would still protect “free speech, assembly, petition for the redress of grievances, and the right to keep and bear arms.”¹⁰³

98. *Id.*

99. *See* Said, *supra* note 55, at 499 n.128.

100. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25086 (May 10, 1995), <https://www.govinfo.gov/content/pkg/FR-1995-05-10/pdf/95-11371.pdf> [<https://perma.cc/A5SM-UXGT>].

101. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303; *see also* Said, *supra* note 55, at 499 n.128.

102. *See* McLoughlin, *supra* note 42, at 51; *see also* Said, *supra* note 55, at 499 n.128.

103. 104 CONG. REC. S14523, S14524 (daily ed. May 25, 1995) (statement of Sen. Orrin Hatch). This Note argues that this impulse to protect political assembly was fueled, in part, by racism. For example, Senator Strom Thurmond said that the bill must respect the right to “form groups, gather, and engage in dialog even when that dialog involves harsh antigovernment rhetoric.” *Id.* at S14532 (statement of Sen. Strom Thurmond); *see, e.g., Segregation in America*, EQUAL JUST. INITIATIVE, <https://segregationinamerica.eji.org/segregationists#full> [<https://perma.cc/YNC7-A8G2>] (last visited Feb. 25, 2023) (“Strom Thurmond was a prominent South Carolina politician and vocal segregationist. While governor of South Carolina, he led the Dixiecrat ticket in 1948 as the pro-segregationist presidential candidate.” As a Senator, “he grew in national influence as a leading opponent of civil rights. In 1956, he was a primary drafter of the Southern Manifesto, which denounced the Supreme Court’s 1954 decision in *Brown v. Board of Education* and encouraged Southern states to prevent public school integration. A staunch opponent of civil rights legislation, Thurmond famously staged a 24-hour filibuster to prevent passage of the Civil Rights Act of 1957. He also opposed the Voting Rights Act of 1964 and its reauthorization in 1975”); Timothy Noah, *The Legend of Strom’s Remorse*, SLATE (Dec. 16, 2002, 12:09

After September 11th, 2001, anti-terrorism efforts became a top political priority. In the aftermath of the deadly attack, during the “War on Terror,” the terrorism enhancement’s scope was further expanded by both the USA PATRIOT Act (“Patriot Act”) and judicial interpretation. Under the Patriot Act, the enhancement was amended in three noteworthy ways.¹⁰⁴ First, the amendment added an application note to the terrorism enhancement, expanding its applicability to cases where a crime was calculated to influence or affect government through intimidation or coercion — fulfilling Section 2332b(g)(5)(A) — but was not an offense specifically enumerated in Section 2332b(g)(5)(B).¹⁰⁵ This amendment made it possible to apply the enhancement to *any* criminal act that has the intention of coercing or intimidating the government into action. Second, the amendment applied the terrorism enhancement to offenses specifically enumerated in Section 2332b(g)(5)(B) committed with the “motive . . . to intimidate or coerce a civilian population,” expanding its purview beyond actions that merely coerce the government.¹⁰⁶ Lastly, it dramatically expanded the “materially support” provisions, which expanded the enhancement’s use in cases involving international terrorism.¹⁰⁷

After September 11th, several Circuit Courts opted to read the terrorism enhancement broadly. In *United States v. Graham*, the Sixth Circuit found that the Patriot Act emboldened the courts to apply the terrorism enhancement against a defendant convicted of general conspiracy charges, even though the offense is not listed under Section 2332b(g)(5)(B).¹⁰⁸ So long as the offense was intended to promote another offense listed in Section 2332b(g)(5)(B), the Sixth Circuit

PM), <https://slate.com/news-and-politics/2002/12/the-legend-of-strom-s-remorse.html> [<https://perma.cc/T4BQ-L5RP>] (“All the laws of Washington and all the bayonets of the army cannot force the negro race into our homes, into our schools, our churches and our places of recreation and amusement.”).

104. See U.S. SENT’G GUIDELINES MANUAL supp. app. C, amend. 637 (2002); see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

105. See U.S. SENT’G GUIDELINES MANUAL § 3A1.4 cmt. n.4 (2002); McLoughlin, *supra* note 42, at 61.

106. McLoughlin, *supra* note 42, at 61.

107. While this is largely outside the scope of this Note, many have written extensively on how the expansion to so-called “material support” crimes justified imposing draconian sentences for acts of international terrorism. See, e.g., McLoughlin, *supra* note 42; Brown, *supra* note 82.

108. See *United States v. Graham*, 275 F.3d 490, 516–17 (6th Cir. 2001).

found that the enhancement could apply.¹⁰⁹ The Eleventh Circuit held similarly in *United States v. Mandhai*, stating that the Guideline drafters “unambiguously cast a broader net,” allowing judges to apply the enhancement to offenses intended to promote another offense, if the promoted offense is a crime of terrorism.¹¹⁰ The Seventh Circuit also held as such in *United States v. Arnaout*.¹¹¹

In *United States v. Awan*, the Second Circuit refused to read the statute as imposing an overt motivational element,¹¹² potentially opening up its use to an even larger universe of offenses. The court held that the statutory requirement that actions be “calculated” to influence the government “does *not* require proof of a defendant’s *particular motive*.”¹¹³ In other words, the defendant’s subjective motivation is irrelevant to a judge deciding if their actions warrant the terrorism enhancement.¹¹⁴ All that the prosecution must prove is that they have the “specific intent to commit an offense that was calculated to influence the government through intimidation or coercion, or to retaliate against government conduct.”¹¹⁵ Thus, Awan was properly sentenced using the terrorism enhancement, because he gave money to a criminal conspiracy, and there was “little doubt” that these funds would be used as part of a conspiracy calculated to threaten the Indian government.¹¹⁶ It did not matter if Awan shared that goal; his motive was “simply not relevant.”¹¹⁷ In short, no longer limited to an

109. *See id.* at 518.

110. *See United States v. Mandhai*, 375 F.3d 1243, 1247 (11th Cir. 2004). Mandhai was convicted of conspiracy to destroy buildings used in interstate commerce by fire or explosives. *Id.* The “object of Mandhai’s conspiracy,” the destruction of buildings, is listed in § 2332b(g)(5)(B), but *conspiracy* to do so is not. *Id.* Despite this, however, the court held that the broad language of the terrorism enhancement allowed them to sentence him under the enhancement. *See id.* at 1247–48.

111. *See United States v. Arnaout*, 431 F.3d 994, 1000–01 (7th Cir. 2005) (“[A] defendant need not be convicted of a federal crime of terrorism as defined by § 2332(g)(5)(B) for the district court to apply § 3A1.4. Instead, the terrorism enhancement is applicable where a defendant is convicted of a federal crime of terrorism as defined by § 2332b(g)(5)(B) or where the district court finds that the purpose or intent of the defendant’s substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by § 2332b(g)(5)(B).”).

112. *See United States v. Awan*, 607 F.3d 306, 313 (2d Cir. 2010).

113. *Id.* at 317 (emphasis added).

114. *See id.*

115. *Id.* (quoting 18 U.S.C. § 2332b(g)(5)(A)) (“[T]he section is better understood as imposing a requirement ‘that the *underlying felony* [be] calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.’” (quoting *United States v. Stewart*, 590 F.3d 93, 138 (2d. Cir. 2009))).

116. *Id.*

117. *Id.*

enumerated set of offenses, and effectively stripped of many of its motivational elements, the terrorism enhancement has stretched “far beyond its roots”¹¹⁸ by a Congress and judicial branch keen on cracking down on terrorist activity.

II. THE TERRORISM ENHANCEMENT IN USE

In the decades after the VCCLEA’s enactment, the terrorism enhancement became a powerful tool to prosecute a “wide range of domestic terrorists.”¹¹⁹ As is true of any broadly applicable criminal measure, it is critical to examine who it is brought against and what actions trigger its application. If large swaths of criminal defendants may permissibly be labelled as a terrorist during sentencing, it matters when that label is assigned to someone and when it is not. These sentencing decisions reveal the priorities of state actors and demonstrates when the government’s fear of certain behaviors is great enough to warrant imposing the terrorist label.

Section II.A examines cases in which political protestors choose to engage in activity they know to be illegal with the explicit intention of influencing the government, and where their sentences are (and are not) dramatically increased by the terrorism enhancement. This Part also explores how the terrorism enhancement is often applied to both violent and non-violent forms of protest without distinction. Section II.B elaborates on how the terrorism enhancement has the potential to deter legitimate forms of civil disobedience.

A. Issues of Scope: A Politicized Sanction’s Use (and Misuse)

The terrorism enhancement has been described as a draconian device because it is both overly broad and overly severe.¹²⁰ It can be applied to many offenses, ranging from property destruction to murder and hostage taking.¹²¹ Covering such a wide array of criminal activity, it is difficult to determine when a sentencing judge may choose to invoke the enhancement. But when they do, the consequences are lifechanging for defendants.

118. McLoughlin, *supra* note 42, at 51.

119. Hanna & Halliday, *supra* note 30, at 832; *see also* McLoughlin, *supra* note 42, at 54 (“[T]he breadth of its applicability, and its severity make U.S.S.G. section 3A1.4 a key component of the U.S. government’s anti-terrorism arsenal.”).

120. McLoughlin, *supra* note 42, at 54.

121. *See, e.g.*, United States v. Thurston, No. CR 06-60069-01-AA, 2007 WL 1500176, at *2–3 (D. Or. May 21, 2007), *aff’d sub nom.* United States v. Tubbs, 290 F. App’x 66 (9th Cir. 2008); 18 U.S.C. §2332(g)(5).

1. *Overly Broad Application: Non-Violent Protest as “Terrorism”*

The terrorism enhancement’s broad scope includes many crimes not traditionally considered “terrorism.” Specifically, the flexibility of the enhancement’s language allows prosecutors and sentencing judges to use it against political actors who engage in non-violent property destruction as a form of protest.

For example, in 2007, ten criminal defendants who were members of the Earth Liberation Front (“ELF”) and the Animal Liberation Front (“ALF”) were sentenced under the terrorism enhancement for a series of property destruction crimes and arsons committed against parties the groups believed were responsible for the “degradation of the environment, tree harvesting, and cruel treatment of animals.”¹²² The groups’ self-proclaimed goals were to “inflict the maximum economic damage on those profiting from the destruction or exploitation of the natural environment,” while “tak[ing] all necessary precautions against harming human life.”¹²³ In doing so, they hoped to “reveal to and to educate the public about the atrocities committed against the Earth.”¹²⁴ As part of that mission, they often left “communiques,” at their targeted properties.¹²⁵ For example, after committing arson at a ski resort in Vail to protest its expansion into the surrounding natural environment, ELF members left a note saying that they took action “[o]n behalf of the lynx.”¹²⁶ Similarly, after setting fire to property at a hybrid tree farm, they noted that they did so because the farm was “threatening native biodiversity in the ecosystem.”¹²⁷ And after setting fire to \$1 million dollars’ worth of luxury SUVs,¹²⁸ defendants stated they “can no longer allow the rich to parade around in their armored existence, leaving a wasteland behind in their tire tracks.”¹²⁹

The ELF and ALF defendants argued that the terrorism enhancement should not apply to instances of property damage that “did not cause injury or death,” because to hold otherwise would defy Congressional intent.¹³⁰ ELF and ALF were political organizations,

122. *Thurston*, 2007 WL 1500176, at *2.

123. Appellant’s Opening Brief at *7, *United States v. Meyerhoff*, Nos. 07-30242, 07-30243 (9th Cir. Oct. 5, 2007), 2007 WL 3388722 [hereinafter *Meyerhoff* Brief] (internal quotations and citations omitted).

124. *Id.*

125. *Thurston*, 2007 WL 1500176, at *3.

126. *Id.*

127. *Id.*

128. *Meyerhoff* Brief, *supra* note 123, at *12.

129. *Thurston*, 2007 WL 1500176, at *3.

130. *Id.* at *11.

they argued, that do not promote violence.¹³¹ The court was not persuaded by this argument, holding that the plain language of the sentencing enhancement did not support requiring such a finding, because Section 2332b(g)(5)(B) includes several offenses that are not violent in nature.¹³² Defendants also argued that Congress did not intend for the enhancement to apply to underlying offenses that were not within the enumerated list.¹³³ However, the court applied the reasoning of *Graham*, *Mandhai*, and *Arnaout* to hold that sentencing judges may apply the enhancement to non-enumerated crimes, so long as they were intended to promote another federal crime of terrorism.¹³⁴

Similarly, the terrorism enhancement was applied to Reznicek's non-violent act of property destruction along the Dakota Access Pipeline¹³⁵ despite her claim that she did not intend to influence government policy.¹³⁶ Rather, her goal was to encourage public discourse about how "public officials allowed . . . corporations to steal permissions from landowners and brutalize the land, water, and people."¹³⁷ Despite these arguments, the sentencing court held that, under the broad language of the enhancement, her offense "was both

131. *See id.* ("Essentially, defendants argue that the label 'terrorist' should apply to only those people who intend to wreak havoc and cause harm.").

132. *See id.* at *12 ("§ 2332b(g)(5)(B) includes violations of 18 U.S.C. §§ 18 (relating to arson within maritime and territorial jurisdiction), 1030(a)(1) (relating to the protection of computers), 1361 (relating to government property or contacts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within territorial or maritime jurisdiction), and 1366(a) (relating to destruction or attempted destruction of an energy facility exceeding \$100,000 in damages). None of these offenses include a substantial risk of injury as an element.").

133. *See id.* at *7.

134. *See id.* at *8–9. ("As applied to this case, defendants' convictions for conspiracy under 18 U.S.C. § 371 may support the terrorism enhancement if the government establishes [at sentencing] that defendants' participation in the conspiracy involved or was intended to promote a "federal crime of terrorism.""). The defendants further argued that they lacked the motivational element needed to apply the enhancement, because their offenses were "calculated merely to gain and generate publicity." *Id.* at *15. Without determining if the enhancement would apply, the court rejected the government's contention that the court would be empowered to apply the enhancement in the absence of the motivational element under Application Note Four. *See id.* at *15–16. The court determined such an argument would be ineffective because Application Note Four did not become effective until after commission of the defendants' offenses. *See id.*

135. *See supra* notes 1–12 and accompanying text.

136. *See Reznicek* Brief, *supra* note 1, at 15–16.

137. *Id.* at 15.

calculated to influence or affect the conduct of government, and was intended as retaliation against government conduct.”¹³⁸

Prosecutors appear to be following the playbook used against environmental activists to similarly punish activists in the wake of the Black Lives Matter protests of 2020.¹³⁹ For instance, in the Eastern District of New York (EDNY), young lawyers Colinford Mattis and Urooj Rahman faced up to ten years in prison under the terrorism enhancement for property destruction committed in the 2020 racial justice protests.¹⁴⁰ After the murder of George Floyd, the two “lifelong social justice advocates” joined the thousands of protestors who took to the streets that summer to challenge the government’s complicity in the police killings of Black Americans.¹⁴¹ Shortly after midnight on May 30th, 2020, the two drove up to a New York Police Department car, and Rahman threw a Molotov cocktail into the police cruiser.¹⁴² The car was empty, and one window had already been broken.¹⁴³ No one was harmed in the attack.¹⁴⁴ After their arrest, however, prosecutors threatened to apply the terrorism enhancement to their case for this act of non-violent property destruction.¹⁴⁵

Prosecutors in the EDNY agreed to drop the terrorism enhancement against Mattis and Rahman as part of a plea deal.¹⁴⁶ The court accepted the prosecutors’ recommendation.¹⁴⁷ Rahman was eventually sentenced to 15 months in prison and two years of supervised release; Mattis received a sentence of 12 months and one

138. *See id.* at 7.

139. *See, e.g.,* Rebecca Davis O’Brien & Jonah E. Bromwich, *Brooklyn Lawyers Plead Guilty in Firebomb Case*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/20/nyregion/george-floyd-protests-lawyers-plea-deal.html> [<https://perma.cc/7WUD-2W28>].

140. *See id.*

141. Erica Orden, *How Two Promising Lawyers Found Themselves Facing Life in Prison for Alleged Molotov Cocktail Attack During Protests in NY*, CNN (June 18, 2020), <https://www.cnn.com/2020/06/17/us/brooklyn-molotov-lawyers-protests> [<https://perma.cc/49ML-8XYY>].

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. *See Pair of NYC Lawyers Face Significantly Less Prison Time for Firebombing NYPD Vehicle*, NBC N.Y. (June 3, 2022, 1:47 AM), <https://www.nbcnewyork.com/news/local/crime-and-courts/pair-of-nyc-lawyers-to-face-significantly-less-prison-time-for-firebombing-nypd-vehicle/3718268/> [<https://perma.cc/HL9P-ET4M>].

147. *See During George Floyd Protests, 2 Lawyers’ Futures Went Up in Flames*, N.Y. TIMES (Jan. 26, 2023), <https://www.nytimes.com/2023/01/26/nyregion/lawyers-sentenced-molotov-police-car.html> [<https://perma.cc/EB5H-RVKD>].

day followed by one year of supervised release.¹⁴⁸ However, the prospect of the terrorism enhancement's application almost certainly influenced the bargaining positions of the two activists. This is a common prosecutorial practice; they use the terrorism enhancement as a "bargaining chip to strong-arm a desired result."¹⁴⁹ Human Rights Watch has reported on how prosecutors frequently use the threat of sentence enhancements during plea negotiations.¹⁵⁰ Additionally, prosecutors sometimes seek the terrorism enhancement against a formerly cooperative defendant if they default on a cooperation agreement.¹⁵¹ Rather than determining "who is and who is not . . . a terrorist," the enhancement's practical utility is often reduced to that of a tool used to "punish[] a lack of cooperation."¹⁵²

Comparatively, Judge Friedrich opted not to apply the enhancement when sentencing Reffitt and other Capital Rioters.¹⁵³ Assistant U.S. Attorney Jeffrey Nestler stated that "We do believe that what [Reffitt] was doing that day was domestic terrorism and we do believe that he's a domestic terrorist."¹⁵⁴ However, while technically applicable, the District Judge chose not to apply the enhancement, likely agreeing with Reffitt's attorney that to do so would be "making an example" of the defendant in light of his politically polarizing actions.¹⁵⁵

2. *Overly-Severe Application: When the Punishment Does Not Fit the Crime*

Part of what makes the enhancement so draconian is that it creates a "monolithic perception of terrorism."¹⁵⁶ The enhancement treats similarly all crimes under its scope, without any attention to the

148. *See id.*

149. Melissa Powers, *Drifting Away from Terrorism: Downward Departure from the Terrorism Enhancement in Cases of Mental Illness*, 62 ST. LOUIS U. L.J. 939, 955 (2018) (internal quotations omitted).

150. *See Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions*, HUM. RTS. WATCH (July 21, 2014), http://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions#_ftnref558 [<https://perma.cc/222Z-X4SN>].

151. *See* Shane Harris, *The Terrorism Enhancement: An Obscure Law Stretches the Definition of Terrorism, and Metes Out Severe Punishments*, NAT'L J. (July 13, 2007), <http://shaneharris.com/magazinestories/terrorism-enhancement-obscure-law-stretches-the-definition-of-terrorism-and-metes-out-severe-punishments/> [<https://perma.cc/RJ7Z-3JGN>].

152. Powers, *supra* note 149, at 955–56.

153. *See* Bruggeman, *supra* note 13.

154. *Id.*

155. *See* Mallin et al., *supra* note 15.

156. Brown, *supra* note 82, at 48.

circumstances of the crime or the individual against whom it is applied.¹⁵⁷ Because all acts within this broad scope are potentially subject to the same increase in sentence length, an act of property destruction may result in the same sentence enhancement as an act of murder.

A comparison of *United States v. Dowell* and *Graham* illustrates this unjust result. In *Dowell*, a criminal defendant's sentence was increased by about 25 years after the terrorism enhancement was applied to his non-violent crime of property destruction.¹⁵⁸ The defendant set fire to an empty Internal Revenue Service (IRS) building in the middle of the night to protest taxation, which he felt was an unjust government intrusion.¹⁵⁹ Despite the arson causing little-to-no risk of bodily harm — he attacked the building when no one was present — the terrorism enhancement was applied.¹⁶⁰ A jury found that defendant intentionally “endeavored to obstruct or impede” IRS operations, thus permitting the upward departure from the norm under the terrorism enhancement.¹⁶¹ As a first-time offender, without the enhancement, he would have served 51 to 63 months.¹⁶² However, after the terrorism enhancement added 12 offense levels and placed him in Criminal History Category VI, he was left with a sentence of 360 months.¹⁶³

In the aforementioned *Graham* case, a defendant who planned a violent attack against federal government officials was subject to the same sentencing increases as the defendant in *Dowell*: 12 offense levels, and five criminal history categories.¹⁶⁴ Graham and other members of his North American Militia group planned to launch strikes against various U.S. transportation, communication, and energy facilities, as well as kill certain federal officials.¹⁶⁵ At sentencing, the judge applied the terrorism enhancement, increasing his charge by 12 levels to level 41, and his Criminal History Category from I to VI.¹⁶⁶

157. *See id.*; *see also* Wassenberg, *supra* note 70 (stating that the terrorism enhancement is criticized for being “too heavy a sanction” to be applied as “indiscriminately” as it is).

158. *See* Appellant's Opening Brief at 2, 10, *United States v. Dowell*, 430 F.3d 1100 (10th Cir. 2005) (No. 03-1341), 2004 WL 2097177 [hereinafter *Dowell* Brief].

159. *See Dowell*, 430 F.3d at 1105.

160. *See id.*

161. *Id.* at 1110.

162. *See Dowell* Brief, *supra* note 158, at 14.

163. *See id.* at 15.

164. *See United States v. Graham*, 275 F.3d 490, 497, 500, 514 (6th Cir. 2001).

165. *See id.* at 497–98.

166. *See id.* at 500.

Under the Guidelines, this increases what would have been an 87 to 108-month sentence to 360 months.¹⁶⁷

Despite a clear difference in the danger the two men presented to human life, the defendants in *Dowell* and *Graham* were both subjected to the same unilateral increase in offense level and Criminal History Category under the enhancement.¹⁶⁸ In fact, as a violent offender, the defendant in *Graham* faced less of an increase under the enhancement than did the *Dowell* defendant, whose actions posed little risk of violence.¹⁶⁹ Thus, the terrorism enhancement's unilateral application leads to disproportionate outcomes because it treats property destruction and planning violent attacks on human life as one in the same.

B. Selective Application of an Indiscriminate Sanction

A wide variety of crimes may be prosecuted under the terrorism enhancement — and yet, not all are.¹⁷⁰ The indiscriminate nature of the terrorism enhancement gives state actors wide latitude to pick and choose which criminal defendants deserve its application. The enhancement's defenders claim that the severe sanctions it imposes are meant to act as a signal to the public that such actions will not be tolerated.¹⁷¹ Thus, when wielded against political protestors, the terrorism enhancement presents an opportunity for state actors to ostracize certain types of protest.¹⁷²

For example, *Reznicek* illustrates how the terrorism enhancement can be used to punish environmentalists who oppose government projects that expand the use of fossil fuel burning infrastructure.¹⁷³ Labeling Reznicek as a terrorist for damaging an oil pipeline tells the nation that environmental protest which brushes up against government interests runs the risk of severe punishment. Rather than punishing terrorism, here it punishes dissent. Comparatively, when prosecuting January 6th rioters, Reffitt and others were granted

167. See U.S. SENT'G GUIDELINES MANUAL § 5A sentencing tbl. (U.S. SENT'G COMM'N 2018).

168. See *Graham*, 275 F.3d at 500; *Dowell* Brief, *supra* note 158, at 14.

169. See *Graham*, 275 F.3d at 500; *Dowell* Brief, *supra* note 158, at 14.

170. See, e.g., Bruggeman, *supra* note 13.

171. See Said, *supra* note 55, at 481 (discussing appellate court opinions that apply the terrorism enhancement and stating “[a]t the heart of these opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence”).

172. *Id.* at 480.

173. See *United States v. Reznicek*, No. 21-2548, 2022 WL 1939865, at *1 (8th Cir. June 6, 2022); see also Sadasivam, *supra* note 4.

proportionality in sentencing.¹⁷⁴ Prosecutors appear wary about employing the enhancement against these defendants for fear that it may alienate a large portion of the American population.¹⁷⁵

Some have argued that a solution to the inequitable application of our terrorism laws is to double down on criminal prosecution efforts.¹⁷⁶ In order to make the system fair, the argument goes, both the right and the left should be equally subject to our severe terrorism laws.¹⁷⁷ For example, Democratic Congressman Adam Schiff introduced legislation in 2019 that would give the Attorney General “broad discretion” to prosecute acts of terrorism committed on American soil,¹⁷⁸ “providing new and necessary tools to prosecutors and

174. See John Gerstein, *Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants*, POLITICO (Jan. 4, 2022, 4:30 AM), <https://www.politico.com/news/2022/01/04/doj-domestic-terrorism-sentences-jan-6-526407> [<https://perma.cc/52A5-YKWQ>].

175. See *id.* (“[T]he Justice Department might be more reluctant to seek the terrorism enhancement — and the harsh sentences it can bring — in the Jan. 6 cases because of a potential political backlash.”). While prosecutors showed concern for alienating those who share Reffitt’s belief that the 2020 election was stolen, the number of Americans who disapprove of the Dakota Access Pipeline — the motivation behind Reznick’s crime — was slightly higher than those who agree with Reffitt at the time Reznick was arrested. 40% of Americans believed that the 2020 election was stolen in January 2022, while 48% of Americans disapproved of the pipeline’s construction in February 2017. Yet this did not seem to motivate the same concern among prosecutors in that case. See Rob Suls, *Public Divided over Keystone XL, Dakota Pipelines; Democrats Turn Decisively against Keystone*, PEW RSCH. CTR. (Feb. 21, 2017), <https://www.pewresearch.org/fact-tank/2017/02/21/public-divided-over-keystone-xl-dakota-pipelines-democrats-turn-decisively-against-keystone/> [<https://perma.cc/EB8V-JJTR>]; Maya Yang, *More than 40% In U.S. Do Not Believe Biden Legitimately Won Election — Poll*, GUARDIAN (Jan. 5, 2022, 1:16 PM), <https://www.theguardian.com/us-news/2022/jan/05/america-biden-election-2020-poll-victory> [<https://perma.cc/5PCT-DKU7>].

176. Press Release, Adam Schiff, Schiff Introduces Legislation to Create a Federal Domestic Terrorism Crime (Aug. 19, 2019) [hereinafter Press Release, Adam Schiff], <https://schiff.house.gov/news/press-releases/schiff-introduces-legislation-to-create-a-federal-domestic-terrorism-crime> [<https://perma.cc/288Y-K8DG>].

177. See German, *supra* note 32 (“DOJ officials have long responded to public concerns about the federal government’s lackluster response to racist, nativist, homophobic, Islamophobic, and anti-Semitic violence from the far-right by calling on Congress to pass a new domestic terrorism law.”); Press Release, Adam Schiff, *supra* note 176 (“Even though Americans today are more likely to be killed by white-supremacists than international terrorism organizations while on American soil, treating these terrorist attacks, including racist or anti-Semitic shootings, differently than other acts of terrorism makes the public take it less seriously.”).

178. See Alex Emmons, *Capitol Hill Assault Revives Call For Domestic Terrorism Law, but Civil Liberties Groups Are Wary*, INTERCEPT (Jan. 10, 2021, 5:15 PM), <https://theintercept.com/2021/01/10/capitol-hill-riot-domestic-terrorism-legislation/> [<https://perma.cc/KP7B-TV2T>].

investigators to respond to the rising threat of domestic terrorism.”¹⁷⁹ Similarly, after the January 6th attack, President Biden adopted a national strategy for combatting terrorism that includes, among other things, increasing funding to ongoing federal anti-terrorism efforts, increasing surveillance and information-sharing among law enforcement agencies, and preempting future attacks.¹⁸⁰

However, increasing the government’s anti-terrorism power will likely do more harm than good. The impulse to further expand terrorism laws to punish one side of the political spectrum will increase the power of the state to punish political protest on both sides of the aisle.¹⁸¹ A myopic look at this issue through partisan lenses may result in statutes that further degrade the rights of political protest for all citizens, regardless of political affiliation.¹⁸² Indeed, “some civil-liberties advocates have expressed concern that any new measures enacted in response to the Capitol riot will end up punishing Black and brown people more than the mostly White people who took part, just as laws passed after the Oklahoma City bombing . . . did.”¹⁸³

If lawmakers choose to rethink our anti-terrorism measures, it is critical that they consider the policy goals meant to be accomplished by these tools. The essential question lawmakers must ask is: What public policy is furthered by increased criminalization of terrorism? Put another way, is the aim of the terrorism enhancement to protect civilians from mass harm and panic, or to facilitate the punishment of political dissidents? As currently utilized by the judiciary, the terrorism enhancement readily achieves the latter. However, using the terrorism enhancement in service of this policy goal has the effect of quelling political protest.¹⁸⁴ Thus, any federal effort to expand the

179. Press Release, Adam Schiff, *supra* note 176.

180. See NAT’L SEC. COUNCIL, *supra* note 28.

181. Discussing Representative Schiff’s proposal, Faiza Patel, co-director of the Brennan Center’s Liberty and National Security Program, said that if Rep. Schiff’s domestic terrorism bill had been law during the racial justice protests of 2020, Attorney General Barr — openly hostile to the protests — “would have had the discretion to treat property damage from the anti-racism protests as terrorism. And I don’t think we want to leave that kind of discretion to the attorney general, even when you trust the attorney general.” Emmons, *supra* note 178.

182. See *id.*

183. Eli Hager, *White Terrorism Often Leads to Harsher Punishment for People of Color*, MARSHALL PROJECT (Jan. 14, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/01/14/white-terrorism-often-leads-to-harsher-punishment-for-people-of-color> [<https://perma.cc/7UP5-4BCZ>].

184. See, e.g., Lucien Bruggeman et al., *Climate Activist’s Fight Against “Terrorism” Sentence Could Impact the Future of Protests*, ABC NEWS (Apr. 28, 2022, 5:11 AM), <https://abcnews.go.com/US/climate-activists-fight-terrorism-sentence-impact-future->

state’s anti-terrorism power without a critical analysis of how doing so impacts legitimate political protest may further exacerbate the problem.

III. CRIMINALIZING TERRORISM: RATIONALES AND ABUSES

Given this potential for abuse, is there any value in criminalizing “terrorism?” Or is it better understood as a term of politics, with no legal significance? Answering this question requires an exploration of the policy goals that underlie our terrorism laws.

This Part discusses two public policies that are served by criminalizing terrorism. Section III.A explores how the term “terrorism” emerged as a label for political enemies. This Part argues that using terrorism as a political bludgeon is an illegitimate policy goal and cannot justify the criminalization of terrorism. Section III.B examines the second policy goal served by terrorism laws: vindicating the inherent right of American citizens to be free from fear of existential threats to their safety. Defining terrorism as acts that infringe on this right — but no more — would allow prosecutors to go after individuals who pose a legitimate threat to public safety, while still protecting the right of individuals to engage in civil disobedience.

A. Criminalizing Terrorism to Counter Political Opposition

Much of the discourse around terrorism is highly political. Analyst Brian Jenkins described terrorism as “what the bad guys do.”¹⁸⁵ Often, people on one side of a political divide will describe their opponent’s moves as terrorism.¹⁸⁶ Doing so allows one to demonize their political enemies and legitimize one’s own actions.¹⁸⁷

protests/story?id=84345514 [https://perma.cc/3GJF-VURM] (when speaking about how “prosecutors and judges have increasingly branded eco-saboteurs as terrorists,” Senator Ed Markey stated “[w]hat the oil and gas industry wants is for these protesters to be charged as eco-terrorists, so that they are sentenced to longer time in prison as a deterrent against legitimate civil disobedience And that’s wrong”); Morris, *supra* note 5 (activists are “frightened by [the] precedent” set by Reznicek’s sentence, in “what they see as a decision allowing judges to impose terrorism enhancements “without accountability”).

185. Daniel L. Byman, *When to Call a Terrorist a Terrorist*, BROOKINGS (Oct. 29, 2018) [hereinafter Byman, *When to Call a Terrorist a Terrorist*], <https://www.brookings.edu/blog/order-from-chaos/2018/10/29/when-to-call-a-terrorist-a-terrorist/> [https://perma.cc/39RX-NXDV] (“[P]eople tend to use the label ‘terrorism’ to demonize their opponents while avoiding it for groups that they see as sympathetic . . .”).

186. *See id.*

187. *See id.*; see also Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489, 503, 552 (2022); Gregor Bruce,

The term first came into use in the 1970s by national security officials in the Western world as a way to frame the apparent threat posed by “Third World adversaries.”¹⁸⁸ The Cold War was an ideological struggle; it was a fight for domination between two competing sociopolitical world orders.¹⁸⁹ Terrorism thus emerged as a way for the West to re-frame the political violence of their foes.¹⁹⁰ While earlier discourse labeled Third World insurgents as rational, this nascent moral judgment suddenly labeled insurgents as “evil, pathological, irrational actors, fundamentally different from us.”¹⁹¹ If one’s political opponents are labeled irrational, then any attacks against them must be rational and justified.¹⁹² By framing international disputes in this manner, the Western world successfully alienated their adversaries and justified their own attacks.

Soon, this term seeped its way into domestic politics. Before the 1990s, the U.S. criminal justice system punished political violence “repressively — but without generally framing the problem as terrorism.”¹⁹³ For example, in the 1960s, the FBI began to infiltrate and suppress “civil rights groups, the Black Panther Party, and leftist student antiwar groups” as well as the Ku Klux Klan.¹⁹⁴ While the FBI framed the purported danger of these groups as one of ideology, these defendants were charged under ordinary criminal statutes; they were not charged as domestic terrorists.¹⁹⁵ However, after the Oklahoma City bombing, framing political violence as domestic terrorism became far more common.¹⁹⁶ Under new domestic terrorism statutes, ideology became legally significant.¹⁹⁷ The political context of particularly

Definition of Terrorism Social and Political Effects, 21 J. MIL. & VETERANS’ HEALTH 26, 28 (2013) (“[G]overnments and politicians can use definitions of terrorism to repress, victimize, or demonize their opponents, civilians, political bodies and religions.”).

188. Sinnar, *supra* note 187, at 515.

189. *See id.* at 517.

190. *See id.*

191. *Id.* at 516 (quoting LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM” 5 (2013)).

192. *See id.*

193. *Id.* at 520.

194. *Id.* at 521.

195. *Id.*

196. *See id.*

197. *See generally* 18 U.S.C. § 2332b(g)(5)(A) (terrorism statutes passed in the 1990s criminalize behavior that is “calculated to influence or affect” or “retaliate against” government conduct).

“sensational or violent . . . conduct” suddenly began to “affect the nature of the sentence.”¹⁹⁸

The shift towards describing political violence in the context of terrorism had a profound effect on how the nation perceived political activists. Because the term originally developed to describe acts committed by international rivals,¹⁹⁹ using it in a domestic setting allowed the government to target subversive actors within its own population. And the stigma that comes with this label is significant. After the Oklahoma City bombing, Americans began to link instances of domestic terror to “cultural images of international terrorists.”²⁰⁰ Terrorists, in the popular American psyche, are some of the most abhorrent, anti-American characters in existence.²⁰¹ Thus, the potential to apply that label to citizens as retaliation for advocating for unpopular political beliefs becomes a powerful tool for oppressing minority views.

This policy goal — insulating the government from political resistance — is served by an ambiguously broad terrorism enhancement because the enhancement is conceivably applicable to a wide variety of criminal acts. The Center for Constitutional Rights warns that “traditional means of civil resistance” are at risk under the broad language of the terrorism enhancement.²⁰² This danger suggests that actions meant to persuade the government and arouse public consciousness through political activism should not fall under the purview of the terrorism enhancement.²⁰³ Nevertheless, the Center for Constitutional Rights argues that governments may “undercut civil liberties and civil rights by defining terrorism in an overly broad manner, allowing them to unfairly punish those who would not, in the

198. Said, *supra* note 55, at 494.

199. See Sinnar, *supra* note 187, at 515–17.

200. *Id.* at 521–22. For example, in the initial aftermath of the Oklahoma City bombing, news media “initially blamed the attack on Middle Eastern terrorists,” and once it was clear that McVeigh was an American, “it continued to link militias to cultural images of international terrorists.” *Id.*

201. See, e.g., Remarks on Signing the USA PATRIOT Act of 2001, 37 WEEKLY COMP. PRES. DOC. 1550 (Oct. 26, 2001) (in signing the PATRIOT Act, President Bush says that terrorists “recognize no barrier of morality. They have no conscience. The terrorists cannot be reasoned with.”).

202. Brief for Center for Constitutional Rights and Dean Sudha Setty as Amici Curiae Supporting Appellant at 23, *United States v. Reznicek*, No. 21-2548, 2022 WL 1939865 (8th Cir. Nov. 5, 2021), 2021 WL 5451223 [hereinafter *Reznicek* Brief as Amici Curiae] (“[A] sit-in style protest near train tracks, a demonstration at a military exercise, or opposition to government immigration policies at airports around the country might next be subject to the label of terrorism.”).

203. See *id.* at 25.

ordinary course, be considered by the international community as ‘terrorists.’”²⁰⁴

This cannot and should not be the underlying motivation of our terrorism laws. While it may be a helpful political rhetorical device, our criminal laws should not be based on a definition of terrorism that penalizes political opposition. It is integral that our criminal justice system protects the civil liberties that keep us free.²⁰⁵ An overly broad terrorism enhancement that is used to undermine political resistance fails to do so.

B. Criminalizing Terrorism to Protect Public Safety

The second policy goal potentially served by criminalizing terrorism is to punish actions that intend to instill mass panic and fear in the general public.²⁰⁶ This Part argues that focusing on protecting the public, rather than government interests, correctly conceptualizes the goal of terrorism prosecution. Anti-terrorism efforts should focus on maintaining the public’s right to be free from persistent threats to their safety. This policy focus prioritizes “civilian inviolability”²⁰⁷ and re-oriens law enforcement away from the perpetrator and towards the victim. As a victim-related adjustment, the terrorism enhancement should be understood as an attempt to reduce this risk, rather than as a means of punishing political dissent.²⁰⁸

Defining terrorism in this manner is more in line with the working definition of terrorism used by the United Nations following the September 11th attacks, categorizing terrorism as actions “meant to inflict dramatic and deadly injury on civilians and to create an

204. *Id.* at 7 (citing U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 26–27, U.N. Doc. E/CN.4/2006/98 (Dec. 28, 2005)).

205. 142 CONG. REC. H4,556 (daily ed. Mar. 13, 1996) (statement of Rep. Deborah Pryce) (“This Congress, and this House in particular, have faced the challenge of defining the appropriate Federal response to the threat of domestic terrorism . . . in the fight against terrorism, government must balance the need for public safety and security with individual rights and liberties. Ideally, what keeps us safe from violent crimes, such as terrorism, should not negate those constitutional restraints which also keep us free.”).

206. *See, e.g.*, Byman, *Who is a Terrorist, Actually?*, *supra* note 29; *see also* 142 CONG. REC. H4,593 (daily ed. Mar. 13, 1996) (statement of Rep. Rick Lazio) (noting that terrorism’s goal is “to create a paralyzing fear in a targeted populace”).

207. Michal Buchhandler-Raphael, *What’s Terrorism Got to Do With It? The Perils of Prosecutorial Misuse of Terrorism Offenses*, 39 FLA. ST. U. L. REV. 807, 814 (2012).

208. *See* U.S. SENT’G GUIDELINES MANUAL §§ 3A1.1–3A1.4 (U.S. SENT’G COMM’N 2018).

atmosphere of fear, generally for a political or ideological . . . purpose.”²⁰⁹ This definition illuminates that terrorist acts are characterized by an intent to create mass fear. In this sense, the criminal infringement comes from the act’s intent to inflict psychological pain on a civilian population. This is what “gives terrorism its power, inspiring fear in individuals far from the blast zone.”²¹⁰ Intent to inspire wide-spread fear is what distinguishes terrorism from political protest. Protest can push for, and even demand, social change.²¹¹ But when this demand is achieved through criminal act that is *intended* to frighten a broad sect of the population into thinking their lives are in danger, this is terrorism.²¹²

Centering the analysis on civilian inviolability will permit the terrorism enhancement to further focus on one of the hallmarks of political violence: “targeting of civilians on the basis of their group identity, rather than individual behavior or personal characteristics.”²¹³ Curtailing the enhancement’s scope to acts that target civilians based on identity, committed with the specific intent to instill widespread fear in that population, would protect the right of individuals in minority groups to exist free from fear of violent attack because of their affiliation with that group.

For example, many have argued that Dylann Roof and Robert D. Bowers should have been charged under the terrorism enhancement.²¹⁴ In 2015, Dylann Roof shot and killed nine Black Americans at a Bible study meeting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina.²¹⁵ Before the massacre, he said that he was there “to shoot black people,” and that “[y]’all are raping our

209. U.N. Secretary-General, *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., ¶ 13, U.N. Doc. A/57/273-S/2002/875 (Aug. 6, 2002).

210. Byman, *Who is a Terrorist, Actually?*, *supra* note 29.

211. *See, e.g., Reznicek* Brief as Amici Curiae, *supra* note 202, at 23–24.

212. *See* Byman, *Who is a Terrorist, Actually?*, *supra* note 29 (“Part of the psychological effect is also a high degree of intentionality. Shootings at an anti-racism rally may scare others in another city, but for it to count as terrorism the shootings needed to be intended to have a broader effect — the purpose of violence at the rally, in other words, is to shape opinion far outside the city in question. It’s not enough for the violence to inadvertently scare (‘terrorize’) people far away from it. Rather, such fear must be the goal.”).

213. Buchhandler-Raphael, *supra* note 207, at 814–15.

214. *See* Jesse J. Norris, *Why Dylann Roof Is a Terrorist under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259, 264–65 (2017); Byman, *When to Call a Terrorist a Terrorist*, *supra* note 185.

215. *See* Norris, *supra* note 214, at 260.

women and taking over the country. This must be done.”²¹⁶ He later stated that he committed the shooting because he wanted to start a “race war.”²¹⁷ Similarly, in 2018, Robert D. Bowers killed eleven congregants of the Tree of Life synagogue in Pittsburgh, Pennsylvania.²¹⁸ Before the attack, he had repeatedly posted anti-Semitic slurs to social media.²¹⁹ Before shooting indiscriminately into the crowd of congregants, he was heard saying “[a]ll Jews must die.”²²⁰

Neither of these violent, hateful acts were charged under the terrorism enhancement, but they could have been.²²¹ A narrower enhancement statute that focuses on civilian inviolability would still retain that option. These were violent acts committed by individuals who believe that minority groups do not deserve equal footing in our society.²²² They intended to make that message known to all Americans — Roof said that his actions were done in order to start a “race war.”²²³ Similarly, Bowers’ indiscriminate violence was meant to instill fear in the Jewish community at large.²²⁴ Under a civilian inviolability model, these ideologies would rightfully be criminalized as terrorist motive. The crimes were done with the intent to lessen the ability for Black and Jewish Americans to exist in their day-to-day lives free from a persistent threat of violence.

IV. AMENDING THE TERRORISM ENHANCEMENT

Part IV of this Note argues that the terrorism enhancement and the definition of “federal crime of terrorism” under Section 2332b(g)(5) must be amended to strike the proper balance between protecting the right to protest and ensuring the public is free from existential fear. An amendment of such character necessarily requires narrowing both the triggering criminal act and the motivational element. Additionally, the terrorism enhancement’s drastic effect on sentence duration should be

216. *Id.*

217. *Id.* at 261.

218. See Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/7QJH-MTQX>].

219. See Byman, *When to Call a Terrorist a Terrorist*, *supra* note 185.

220. *Id.*; see Robertson et al., *supra* note 218.

221. See generally U.S. SENT’G GUIDELINES MANUAL § 3A1.1 (U.S. SENT’G COMM’N 2018).

222. See *supra* Section II.A.2 and accompanying text.

223. Norris, *supra* note 214, at 261 (Roof said that his actions were done in order to start a “race war”).

224. See Byman, *When to Call a Terrorist a Terrorist*, *supra* note 185.

reined in. Section IV.A surveys these changes in turn. Section IV.B subsequently reviews the political roadblocks these proposed amendments may face.

A. Rewording the Statute

The terrorism enhancement should be amended to apply to a far narrower set of criminal acts, triggering only when defendants perpetuate violence, or commit a very narrow set of property destruction crimes, with the requisite intent to undermine the public's ability to live free from persistent fear of bodily harm. This definition shifts the focus away from actions that put pressure on the government to those that legitimately cause fear in the hearts of Americans.

1. Reducing the Enhancement's Triggering Acts

Congress should strike all acts that are not violent in nature, except the limited number of property crimes discussed below, from the enumerated list of offenses in Section 2332b(g)(5)(B). Minor acts of property damage or other lesser criminal offenses should not fall within the statute's purview.²²⁵ Additionally, Congress must direct the Sentencing Commission to strike Application Note Four from § 3A1.4, which stipulates that the terrorism enhancement may be invoked in cases where a defendant's actions were meant to intimidate, coerce, or retaliate against the government but is not one of the offenses specifically enumerated within Section 2332b(g)(5)(B).²²⁶ Congress should make clear that this is a legislative overruling of the broad reading in *Graham, Manhai, Arnaout*, and *Awan*.

Limiting the list of offenses to mostly those that are violent in nature would better align the terrorism enhancement with other legal definitions of terrorism within the U.S. Code. U.S. federal law defines "domestic terrorism" in 18 U.S.C. Section 2331(5) as acts that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or any State;
- (B) appear to be intended —
 - (i) to intimidate or coerce a civilian population;

225. See generally *How the USA Patriot Act Redefines "Domestic Terrorism,"* ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism> [https://perma.cc/U8YS-HN57] (last visited Jan. 31, 2023).

226. See U.S. SENT'G GUIDELINES MANUAL § 3A1.4 cmt. n.4 (U.S. SENT'G COMM'N 2018).

- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.²²⁷

This definition of domestic terrorism is narrower than the one used in the enhancement: it is limited to acts that threaten human life. Section 2331(5) illustrates that Congress envisioned that sentences involving domestic terrorism should involve some element of violent crime.²²⁸ However, Section 2331(5) is a “statutory oddity” because it attaches no criminal punishments to domestic terrorism;²²⁹ it merely contains a definition. Thus, when sentencing cases of domestic terrorism, prosecutors are more likely to use the terrorism enhancement.²³⁰ And because the enhancement can be used on a wider subset of defendants, it allows prosecutors to target non-violent crimes that Congress did not deem domestic terrorism under Section 2331(5). The discrepancy between these two definitions implies that Congress never intended the terrorism enhancement to be applied so broadly against Americans who engage in non-violent civil disobedience.

Section 2332b(g)(5)(B) should be sufficiently narrowed to ensure the enhancement is only triggered by violent offenses and a narrow set of property destruction crimes that target critical infrastructure. Attacks on “industrial control systems like power utilities, water, and manufacturing”²³¹ that could potentially leave the public without heat, water, communication lines, and medical care²³² should be included in

227. 18 U.S.C. § 2331(5).

228. The enhancement uses the terrorism definition set out in 18 U.S.C. § 2332b(g)(5), which states that a federal crime of terrorism is an offense that is (A) “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” and (B) a violation of one of a list of offenses, both violent and non-violent in nature.

229. Hanna & Halliday, *supra* note 30, at 784.

230. *See id.*

231. Andy Greenberg, *How Power Grid Hacks Work, and When You Should Panic*, WIRED (Oct. 13, 2017, 12:00 PM), https://www.wired.com/story/hacking-a-power-grid-in-three-not-so-easy-steps/?redirectURL=https%3A%2F%2Fwww.wired.com%2Fstory%2Fhacking-a-power-grid-in-three-not-so-easy-steps%2F%3Futm_source%3DWIR_REG_GATE&utm_source=WIR_REG_GATE [<https://perma.cc/BBY9-8V32>].

232. *See Ukraine: Russian Attacks on Energy Grid Threaten Civilians*, HUM. RTS. WATCH (Dec. 6, 2022, 12:01 AM), <https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians> [<https://perma.cc/38E7-86ND>].

the terrorism enhancement's enumerated list of triggering actions. While these actions may not cause violence directly, they have the potential to cause such extreme distress in the population that their effect is akin to violence. For example, a 2014 study by the Federal Energy Regulatory Commission warned that the United States could be out of power for months if as little as nine of the nation's 55,000 electrical substations were attacked.²³³ Targeted attacks on critical energy infrastructure may leave civilians without "food, water, medical care, telecommunications, investments" and many other critical infrastructure that "depend heavily on the energy grid."²³⁴ These attacks on infrastructure put human life at risk on a mass scale.

It is possible that prosecutors will attempt to use this narrow property destruction exception to sneak in lesser non-violent property crimes, such as blowing up a bulldozer, or setting fire to SUVs.²³⁵ Further, former National Security Agency (NSA) analyst Rob Lee explains that not every intrusion into the energy grid should be met with an "equal sense of alarm," because the consequences of the events may have "vastly different consequences, from mere data theft to a potentially catastrophic infrastructure failure."²³⁶ In order to avoid using this provision as a way to criminalize smaller property damage offenses, the amended enhancement should require prosecutors to prove that the effects of the attack were intended to make life unsustainable.²³⁷ The enhancement should only be applied to property attacks that intend to cause widespread system failure, leaving people without basic necessities.

233. See Mark Memmott, *Small-Scale Attacks Could Bring Down U.S. Power Grid, Report Says*, NPR (Mar. 13, 2024, 9:43 AM), <https://www.npr.org/sections/thetwo-way/2014/03/13/289779344/report-small-scale-attacks-could-cause-national-blackout> [<https://perma.cc/ACT4-4PTP>]. A string of recent attacks on electrical grids in the Pacific Northwest has put law enforcement on edge that the risk of a large-scale, life-threatening blackout is increasing. See Conrad Wilson & John Ryan, *String of Electrical Grid Attacks in Pacific Northwest is Unsolved*, OPB (Dec. 8, 2022, 7:06 PM), <https://www.opb.org/article/2022/12/08/string-of-electrical-grid-attacks-in-pacific-northwest-are-unsolved/> [<https://perma.cc/H3SM-P52V>].

234. Chuck Brooks, *Three Alarming Threats to the U.S. Energy Grid — Cyber, Physical, and Existential Events*, FORBES (Feb. 15, 2023, 10:14 PM), <https://www.forbes.com/sites/chuckbrooks/2023/02/15/3-alarming-threats-to-the-us-energy-grid—cyber-physical-and-existential-events/?sh=5ecb7988101a> [<https://perma.cc/UJC9-LUA8>] (statement of former CIA Director, James Woolsey, before the Cybersecurity and EMP Legislative Working Group).

235. See Reznicek Brief as Amici Curiae, *supra* note 202, at 25–26; see also Dowell Brief, *supra* note 158, at 12.

236. Greenberg, *supra* note 231.

237. *Ukraine: Russian Attacks on Energy Grid*, *supra* note 232.

2. *Re-Centering the Harm of the Enhancement's Motivational Element*

Congress should further amend Section 2332b(g)(5) and instruct the U.S. Sentencing Commission to repeal Application Note Four from section 3A1.4 to reflect a narrower motivational requirement. This Note proposes that the language of the motivational element be changed from “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” or “intimidate or coerce a civilian population” to “intending to severely undermine the ability of the public to live free of a persistent fear of bodily harm.” The statute should further clarify that a “persistent fear of bodily harm” exists if “the defendant’s actions would create a persistent state of fear for an objective person within the defendant’s targeted population.”

Changing “calculation” to “intention” creates a much more stringent motive requirement for acts of terrorism. This is critical. Simply committing one of the enumerated acts should not be enough to qualify a criminal defendant’s sentence for the terrorism enhancement; they must also have the requisite *intent*. Terrorism is “more than mere criminality,”²³⁸ it is criminality with intent to cause harm. Thus, intent to commit a felony that causes harm should not necessarily satisfy the motivational element, since this does not guarantee that the defendant themselves intended the resultant harm.²³⁹

For example, the *Awan* court held that reading the motive element out of the statute was “common sense.”²⁴⁰ They gathered that “a person who murders a head of state . . . sure in the knowledge that his crime will influence or affect the conduct of government, satisfies the terms of Section 2332b(g)(5)(A) even if his particular motivation in committing the murder is to impress a more established terrorist with his abilities.”²⁴¹ However, if someone murders the head of state without the requisite mental state, it is unjust to label this an act of terrorism merely because of the importance of the victim. If someone acts violently without motivation to inspire mass panic, it should not be deemed terrorism.

Moreover, shifting the focus of harm avoidance from the government to citizens will protect the people from an undue fear of danger. Under this Note’s proposed amendment, determining if a

238. U.N. Secretary-General, *supra* note 209, at ¶ 13.

239. *Cf.* United States v. Awan, 607 F.3d 306, 315 (2d Cir. 2010).

240. *Id.*

241. *Id.* at 317.

“persistent state of fear” exists requires analysis under a subjective-objective test; an appropriate level of fear is decided by placing oneself in the shoes of an objective person within the targeted demographic victim. For example, when analyzing if Roof’s actions constitute terrorism, courts would consider if an objective person in the shoes of Roof’s target population — Black Americans²⁴² — would feel less safe to go about their daily lives after hearing of Roof’s actions. Likely so, subjecting Roof to the enhancement.²⁴³

This subjective-objective test functions similarly for those who are targeted for more mutable identities. For example, in *United States v. Jordi*, the Eleventh Circuit found that a staunch anti-abortion supporter’s plan to bomb abortion clinics throughout Florida satisfied the motivational requirements imposed by the terrorism enhancement, and remanded the case back to the district court to ensure the upward departure was applied to his sentence.²⁴⁴ The defendant believed that the bombings would “dissuade other doctors from performing abortions.”²⁴⁵ Under the subjective-objective test for harm, the terrorism enhancement would still apply. Here, the defendant used the threat of violence in order to create a persistent state of fear for a class of people — doctors providing abortions — trying to perform the day-to-day tasks of their job.²⁴⁶ These doctors may reasonably fear a threat to their life after the bombing, thus subjecting the defendant to the enhancement.²⁴⁷

However, the subjective-objective test still requires that the fear be an objectively reasonable one. Otherwise, disapproval of political dissidents disguised as fear may undercut the right to protest. For example, if a white person claims that Black Lives Matter protestors have created a perpetual state of fear of bodily harm for white Americans, this will likely not be deemed an objectively rational thought. An overwhelming majority of the Black Lives Matter protests were peaceful; no reasonable actor would conclude that a largely non-violent protest movement created a perpetual state of fear akin to acts

242. See Norris, *supra* note 214, at 260–61.

243. See *id.* at 266 (“[T]he Department of Justice said that ‘This heartbreaking episode was undoubtedly designed to strike fear and terror into this community.’ . . . President Obama suggested that the attack . . . ‘drew on a long history of bombs and arson and shots fired at churches, not random, but as a means of control, a way to terrorize and oppress.’”).

244. 418 F.3d 1212, 1214 (11th Cir. 2005).

245. *Id.*

246. See *id.*

247. See *id.*

of terrorism.²⁴⁸ Additionally, the fear terrorists cause may not be merely incidental. For example, if “[s]hootings at an anti-racism rally . . . scare others in another city,” this is not enough to deem the action terrorism.²⁴⁹ The violence cannot merely “inadvertently scare . . . people far away from it.”²⁵⁰ Rather, instilling fear “must be the goal.”²⁵¹

3. *Lessening the Enhancement’s Penalties*

Lastly, the enhancement’s penalties should be reduced so that they parallel those of section 3A1.1, the hate crime enhancement. The terrorism and hate crime enhancements are grouped together in Chapter 3 Part A in the Guidelines, which addresses “victim related” adjustments.²⁵² It is appropriate, therefore, to equalize the severity of these enhancements. When applied, the hate crime enhancement increases a sentence by two to three levels, with no categorical criminal history increase unless the defendant’s criminal history includes conviction for an offense involving the selection of a vulnerable victim.²⁵³

Decreasing the terrorism enhancement to the level of the hate crime enhancement is appropriate because the terrorism and hate crime enhancements are both victim-related adjustments.²⁵⁴ Terrorism and hate crime laws are meant to protect individuals’ right to exist

248. See Lois Beckett, *Nearly all Black Lives Matter Protests are Peaceful Despite Trump Narrative, Report Finds*, GUARDIAN (Sept. 5, 2020), <https://www.theguardian.com/world/2020/sep/05/nearly-all-black-lives-matter-protests-are-peaceful-despite-trump-narrative-report-finds> [https://perma.cc/B2TV-SP7G]. Further, a majority of white Americans supported the Black Lives Matter protests, making it even more unlikely that a sentencing judge would find that white American reasonably felt that the protests created a perpetual state of fear. See Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), <https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [https://perma.cc/UF6J-PXZY] (60% of White Americans supported the Black Lives Matter Protests).

249. Byman, *Who is a Terrorist, Actually?*, *supra* note 29.

250. *Id.*

251. *Id.*

252. See U.S. SENT’G GUIDELINES MANUAL § 3A1.1 (U.S. SENT’G COMM’N 2018).

253. See *id.* at § 3A1.1; see also *id.* § 3A1.1 cmt. n.4 (“If . . . the defendant’s criminal history includes a prior sentence for an offense that involved the selection of a vulnerable victim, an upward departure may be warranted.”).

254. See *id.* at § 3A.

peacefully without being attacked for group identity.²⁵⁵ The main difference between the two offenses is that hate crimes are focused on immutable characteristics,²⁵⁶ whereas this Note’s definition of terrorism refers to a “targeted population,” which may include groups with both mutable and immutable characteristics.²⁵⁷ However, this difference is non-consequential under the subjective-objective standard of the amended terrorism definition.²⁵⁸

Permitting discretionary increases in category level in response to the defendant’s criminal history will allow judges to properly acknowledge and account for the individual circumstances of the defendant’s prior contact with the criminal justice system. Automatic placement of a defendant’s criminal history in the highest category is part of what leads to such extreme sentences under the terrorism enhancement. It treats all criminal defendants under the enhancement as alike, without any nuanced perception of the underlying crime being charged and the individual perpetrator.²⁵⁹ Under the amendment proposed here, if a criminal defendant being sentenced under the terrorism statute is a first-time offender, they are still treated as such.

B. Political Realities: The Difficulty of Reducing a “Tough-on-Crime” Statute

Amending the text of the bill will be, admittedly, a difficult process. Attempting to undo criminal sanctions is politically toxic. For example, an attempt to liberalize New York State’s bail system buoyed tough-on-crime Republican lawmakers in a state that reliably votes for Democrats.²⁶⁰ Further, many Democratic lawmakers in Congress, though typically reliable advocates against inequitable criminal justice measures, have opted to double down on efforts to criminalize domestic terrorism after the January 6th incident.²⁶¹ The opportunities

255. See Sinnar, *supra* note 187, at 492 (noting that both terrorism and hate crimes involve violence that “often targets victims on the basis of their race, religion, ethnicity, or other legally defined characteristics”).

256. See U.S. SENT’G GUIDELINES MANUAL § 3A1.1 (U.S. SENT’G COMM’N 2018).

257. See generally *supra* Section IV.A.2.

258. See *supra* Part IV.A(ii).

259. Brown, *supra* note 82, at 48.

260. See Jerry Zremski, *Crime Has Become a Key Issue in the New York Governor’s Race. Here’s What Experts and the Numbers Say*, BUFFALO NEWS (Dec. 2, 2022), https://buffalonews.com/news/local/govt-and-politics/crime-has-become-a-key-issue-in-the-new-york-governors-race-heres-what-experts/article_90054820-56cb-11ed-89a9-0fe640414a8b.html [<https://perma.cc/8A87-9LFY>].

261. See generally Press Release, Adam Schiff, *supra* note 176.

for a nuanced conversation about the unintentional ramifications of such an impulse seem slim.

In the face of these challenges, another potential option is for sentencing judges to invoke judicial discretion. Under *Booker*, the Guidelines are merely advisory.²⁶² Judges, therefore, need not be bound by the terrorism enhancement in cases where the defendant “may technically qualify for a terrorism enhancement, but such application would work a profound injustice.”²⁶³ Judge O’Toole, sitting in the District of Massachusetts, has opted for this solution, choosing to ignore the terrorism enhancement altogether and calling it “too blunt an instrument to have genuine analytical value.”²⁶⁴

This solution, however, is untenable, as it relies on the mercy of sentencing judges. Whether or not a terrorism enhancement is applied to a defendant’s case largely depends on what judge they appear in front of. Still, judicial discretion offers a temporary solution for those who face the enhancement before the guidelines are amended. Sentencing judges are empowered to “disagree with the Guidelines as a matter of policy.”²⁶⁵ They should be encouraged to do so.

In the long term, however, advocating for a Congressional amendment to Section 2332b(g)(5) and a Congressional directive to the Sentencing Commission to amend section 3A1.4 is a more viable option. While we live in an era of near-perpetual political gridlock, there may be some room for a potential bipartisan coalition on this matter. If framed as an issue of free expression, it may bring together advocates for reducing mass incarceration on the left and those with more libertarian leanings on the right. Because the right to political protest is held by all Americans, the fight to reduce the terrorism enhancement’s scope should generate support on both sides of the political aisle. Protests are an integral aspect of American civil society. The fight to protect it should, in theory, cut across partisan lines.

CONCLUSION

The terrorism enhancement gives government actors a powerful weapon to silence civil disobedience. Rather than using the enhancement to punish defendants who hope to challenge the status quo, prosecutors should focus their anti-terrorism efforts on prosecuting those that intend to instill fear among the American public.

262. See *United States v. Booker*, 543 U.S. 220, 246 (2005).

263. *Reznicek* Brief as Amici Curiae, *supra* note 202, at 24.

264. Powers, *supra* note 149, at 953.

265. Said, *supra* note 55, at 492.

A world free of terrorism implies a world where people are free from the fear of mass violence, not political discord. Reducing the scope and severity of the terrorism enhancement allows us to get closer to that reality.

This Note answers one problem inherent in the terrorism enhancement. Much more can be said about its punishing effects on defendants accused of materially supporting international terrorism.²⁶⁶ Further, many other anti-terrorism provisions in the AEDPA and the Patriot Act have resulted in a nearly uncountable number of injustices. The erosion of privacy, extreme prejudice against Muslims, and more than two decades of the Global War on Terrorism have done profound damage to American society, as well as other societies around the globe. This Note hopes to add to the extensive scholarship of those who advocate for an overhaul of our terrorism laws, in the service of a more just world.

266. See generally Brown, *supra* note 82; McLoughlin, *supra* note 42.