

Lessons for Countering the Domestic Terrorism Threat 20 Years After 9/11

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INTRODUCTION

In April 1995, a white supremacist committed what was at that time the most deadly terrorist attack in U.S. history, bombing a federal building in Oklahoma City and killing 168 people, including 19 children. Although originally portrayed as motivated primarily by anti-government extremism rather than white supremacist ideology, the attack brought needed law enforcement attention to the threat of far-right terrorism.¹ But just six years later, this devastating act of domestic terrorism was dwarfed by the loss of life from the Islamist extremist terrorist attacks on September 11, 2001. Our nation’s law enforcement and intelligence apparatus understandably turned its focus toward international terrorism and, specifically, Islamist extremist terrorism. President George W. Bush announced a global war on terror and called on foreign leaders to help the United States defeat al Qaeda.

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1. FED. BUREAU OF INVESTIGATION, TERRORISM 2002-2005, <https://perma.cc/CHK4-EHT2>.

This effort included kinetic action abroad and a massive resource shift to investigations and prosecutions domestically. Some of the measures went too far and were rightfully criticized and in some cases struck down in court.² Others have proved to be effective not only in preventing additional terrorist attacks by al Qaeda adherents, but in more recent years in preventing attacks on the homeland encouraged by the Islamic State of Iraq and Syria (ISIS). The threat from both al Qaeda and ISIS, as well as from other Islamist extremist groups, remains, but today the greatest terrorist threat domestically comes from white racially motivated violent extremists like Timothy McVeigh.

Twenty years of counterterrorism strategy has shown that tools like law enforcement investigations and prosecution are important parts of any effective terrorism prevention scheme. Experience also has shown that the use of these tools can lead to distrust of law enforcement by those who feel targeted because of their race, ethnicity, or religion. Moreover, investigations and prosecutions do not address the root grievances that create vulnerability to the appeal of violent extremism.

In 2021, after a year of a global pandemic that impacted ordinary Americans' financial, health, and emotional stability; the murder of George Floyd that brought well-founded demands for racial justice across America's institutions; and a "Stop the Steal" disinformation campaign that resulted in an insurrectionist attack on the U.S. Capitol, there is ample fodder for ideological and other grievances. For those who seek to use violence to intimidate and coerce—the very definition of terrorism—these grievances are fertile soil in which to recruit and radicalize. Addressing the domestic terrorist threat requires more than investigations and prosecutions; it requires recognizing and addressing structural and cultural biases within the counterterrorism program, as well as recognizing and addressing the grievances that can lead Americans to radicalize to violence.

I. INVESTIGATIONS AND PROSECUTIONS

When someone is acquiring or building weapons, researching targets, and taking other preparatory steps for a terrorist attack in the United States, prosecution may be the most effective means of thwarting the attack. As I've written previously, however, there are weaknesses in the U.S. counterterrorism program when it comes to combating what U.S. law considers "domestic terrorism," meaning terrorism motivated by ideologies other than Islamist extremism, such as white supremacy, anti-government extremism, and animal rights/environmental extremism, just to name a few.³

2. *ACLU v. Clapper*, 785 F3d 787 (2d Cir. 2015).

3. Mary McCord, *Filling the Gap in Our Terrorism Statutes* (GW Program on Extremism Policy Paper Series, 2019), <https://perma.cc/MDW8-4LEE>.

A. *U.S. Law's Disparate Treatment of "International" Terrorism and "Domestic" Terrorism Can Contribute to a Misallocation of Resources and Perpetuation of Biases*

For starters, the labels “international” terrorism and “domestic” terrorism are neither accurate nor helpful. White supremacy does not stop at the U.S. borders, just as Islamist extremism does not arise solely outside of the United States. There is no reason to maintain a false distinction, which the public finds incomprehensible and confusing. Why should the El Paso shooter—a white supremacist who praised other white supremacist terrorist attacks outside the United States in the screed he published just before the attack⁴—be considered a “domestic terrorist” when someone who committed the same attack, but pledged *bayat* to the leader of ISIS first (as the San Bernardino shooters did),⁵ would be called an “international terrorist”? Both crimes occurred in the domestic United States. Arguably, both should be treated the same under U.S. law, but they’re not.

If the El Paso shooter had declared his allegiance to ISIS before killing 23 people, he almost certainly would have been charged with attempt to provide material support to a designated foreign terrorist organization (FTO),⁶ and possibly other terrorism offenses such as terrorism transcending national boundaries.⁷ But because there is no federal terrorism offense that applies to mass shootings *unless* done in furtherance of the goals of a designated FTO or committed against U.S. government officials or U.S. government property, there is no federal *terrorism* offense that applies to the El Paso shooter’s indisputable act of terrorism. This doesn’t mean he can’t be charged with a crime; in fact, he is charged with both state-law murder and federal hate crimes, among other charges.⁸ And it doesn’t mean that there are no investigatory tools available to try to thwart plots like his; law enforcement may open an investigation when there is an indication of planned violence or other unlawful activity. But there are other consequences from the disparate treatment of international and domestic terrorism.

The lack of a federal terrorism law that applies to the most common type of terrorism in the United States—a mass shooting—means that FBI agents and other law enforcement must predicate their investigations on other potential crimes rather than on the crime that would seem most applicable.⁹ This could mean

4. Tim Arango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 3, 2019), <https://perma.cc/Q4TD-ZTW3>.

5. Rukmini Callimachi, *Islamic State Says "Soldiers of Caliphate" Attacked in San Bernardino*, N.Y. TIMES (Dec. 5, 2015), <https://perma.cc/6MS4-5SCA>.

6. 18 U.S.C. § 2339B.

7. 18 U.S.C. § 2332b.

8. Julian Aguilar, *El Paso Shooting Suspect Faces Nearly 100 Federal Charges, Including Hate Crimes*, TEX. TRIB. (Feb. 6, 2020, 8:00 PM), <https://perma.cc/AZQ9-TMWE>.

9. FBI Director Christopher Wray has testified that white racially motivated violence presents the greatest terrorism threat in the United States right now, and that the Bureau will open investigations “when an individual uses, or threatens the use of, force, violence, or coercion, in violation of federal law and in the furtherance of a political or social ideological goal.” *Oversight of the Federal Bureau of Investigation: The January 6th Insurrection, Domestic Terrorism, and Other Threats Before the*

fewer resources and less expertise being directed to the threat. It also means that our federal criminal code perpetuates structural racial, ethnic, and religious biases through the lack of moral equivalency between Islamist extremism and white supremacist extremism, which in turn at least arguably perpetuates cultural racial, ethnic, and religious biases in its implementation.

Concern about the targeting of racial, ethnic, and religious minorities has led many civil rights advocates to oppose any new terrorism law, even one that would fill the current gap.¹⁰ They argue that it is unnecessary because there are over 50 crimes of “terrorism” in the U.S. Code, many of which would apply to “domestic” terrorism. But those crimes apply to specific situations that are far less common than mass shootings: they apply to using weapons of mass destruction (WMD); biological, radiological, or nuclear weapons; and attacks on mass transportation systems, to name a few.¹¹ We’ve seen successes when confidential sources and FBI undercover agents have thwarted plans to bomb a Muslim community, for example,¹² or a hospital treating COVID patients.¹³ But a potential WMD charge doesn’t drive investigations into the accumulation of firearms for the purpose of committing a series of mass shootings in the hope of accelerating the creation of a white ethno-state—the very thing that former U.S. Coast Guard Lieutenant Christopher Paul Hasson was doing when he was caught using his government computer for his planning.¹⁴ His plot was thwarted, and he is serving a 13-year sentence, but none of his crimes—unlawful possession of a silencer, possession of drugs, and unlawful possession of a firearm by a drug addict—reflects his terrorist intentions.¹⁵ If terrorism in the territorial United States were a crime applicable to *all* acts of terrorism in the United States—regardless of the ideology motivating them—then Hasson could have been charged with providing material support to terrorists under 18 U.S.C. § 2339A (not to be confused with material support to an FTO under 18 U.S.C. § 2339B), because Hasson was disguising the nature of resources (an arsenal of firearms), while knowing and intending to use them in a crime of terrorism. Critically, other investigations could be predicated on that same offense, which could prevent future white supremacist attacks.

S. Comm. on the Judiciary (2021) (statement of Christopher Wray, Director, Fed. Bureau of Investigation), <https://perma.cc/TSN3-2X9Y>.

10. Letter from the Leadership Conf. on Civ. and Hum. Rights to Members of Congress (Jan. 19, 2021), <https://perma.cc/MJB6-8NRK>.

11. See 18 U.S.C. § 2332b(g)(5) (defining “Federal crime of terrorism”).

12. Press Release, Dep’t of Justice, Three Southwest Kansas Men Sentenced to Prison for Plotting to Bomb Somali Immigrants in Garden City (Jan. 25, 2019), <https://perma.cc/C8PB-MXF4>.

13. Steve Vockrodt, *FBI Records Detail Cass County Man’s Plot to Bomb Hospital*, ‘Kick Start a Revolution,’ KAN. CITY STAR (Apr. 15, 2020), <https://perma.cc/Z8UM-5N62>.

14. Press Release, Dep’t of Justice, Christopher Hasson Sentenced to More Than 13 Years in Federal Prison on Federal Charges of Illegal Possession of Silencers, Possession of Firearms by an Addict to and Unlawful User of a Controlled Substance, and Possession of a Controlled Substance (Jan. 31, 2020), <https://perma.cc/3VSE-SKF5>.

15. *Id.*

*B. The Opposition to Gap-Filling Measures Exposes the Depth of Distrust
Between Law Enforcement and the Communities They Serve*

With history to back them up, civil rights advocates understandably fear that any new tool given to law enforcement will be misused against marginalized communities and people of color.¹⁶ In other words, the very people targeted by white supremacist violence prefer the status quo because of concerns about systemic racism in policing and in the country's criminal justice system. Efforts to ameliorate their concerns by requiring transparency and oversight in any legislation that would create a new offense have not assuaged those concerns.

Other efforts to integrate measures to combat domestic terrorism into the national counterterrorism program might also be met with similar opposition. Designating foreign white supremacist extremist organization as FTOs, for example, would drive resources to material support investigations. Indeed, the most common international terrorism charge, accounting in 2017 for nearly half of the federal terrorism-related prosecutions since 9/11, is material support to a designated FTO.¹⁷ But this charge often has been criticized for being used to unfairly target Muslim communities. Some in those communities would rather see a dismantling of the current counterterrorism statutory regime than add new foreign designations and new laws that could equalize the treatment of white supremacist extremists with Islamist extremists. That's an important lesson from 9/11 in and of itself. It means counterterrorism investigations and prosecutions likely will continue to be viewed by some with distrust. And it means the very notion of "counterterrorism" as a tool to battle the white supremacist threat likely will continue to generate criticism.

*C. Policymakers Must Appreciate and Account for This Trust Deficit as They
Consider New Approaches to Domestic Extremist Violence*

Community members who have felt targeted by counterterrorism efforts in the past must be part of the process of evaluating new approaches to domestic terrorism, whether it is the consideration of new laws or the implementation of new policies and priorities. That doesn't mean just hearing from this community; more people from this community should be represented among the policymakers themselves. Any new terrorism laws must come with rigorous public reporting and oversight requirements to ensure that resources are being put toward the most significant threats. Federal law enforcement must make a strong commitment to eradicating white supremacy from its ranks, and state and local law enforcement must be incentivized to do the same—again, taking into consideration the views and experiences of the communities they serve. White supremacist threats should be investigated as aggressively as Islamist extremist threats, within the rule of

16. See *supra* note 10.

17. Dep't of Justice, *Introduction to the National Security Division's Chart of Public/Unsealed International Terrorism and Terrorism-Related Convictions from 9/11/01 To 12/31/17*, MUCKROCK (Apr. 20, 2018), <https://perma.cc/4C7Q-WMLT>.

law. And although law enforcement officials should not open investigations based solely on First Amendment-protected activity, they must not close their eyes to white supremacist actions and propaganda that could indicate a trend toward violence.

II. ADDRESSING ROOT CAUSES OF EXTREMISM WITHOUT TARGETING AND ALIENATING

Our post-9/11 history has also taught us that it's not only investigations and prosecutions that have tended to alienate Muslim communities; even well-intentioned government efforts to counter extremist violence have been perceived as targeting those communities. Past government programs labeled "countering violent extremism" or "CVE" programs have been widely denounced for stigmatizing Muslim communities and being a pretext for intelligence collection.¹⁸ The very use of the term CVE connotes that the community itself is where violent extremism is born, thus painting with too broad a brush, leading to even greater distrust of government and, counterproductively, a greater vulnerability to extremist ideology.

A. Efforts To Counter Extremism Must Not Provide Fodder for Extremists to Recruit and Radicalize

When efforts to counter extremism are perceived to unfairly ostracize and vilify a broader community, violent extremists see opportunity. ISIS capitalized on this, propagandizing and recruiting based on claims that the United States was at war with Islam. Far-right extremists likewise use efforts to counter white supremacy and promote racial justice to create a narrative of white victimization and whip up fears of "the great replacement."¹⁹ It feels right to call these extremists out—their message is offensive, racist, and often violent. They've used social media and the internet to recruit, monetize, and propagandize. They've inspired lone actors who have taken the lives of innocents for no reason other than their race, ethnicity, or religion. But when calling out white supremacist violent extremists, just as when calling out Islamist violent extremists, we must be careful not to cast the net too broadly, undervaluing the grievances of those who are targeted, and potentially leaving them more vulnerable to the appeal of extremism.

I've seen people driven to join ISIS, or driven to violently storm the U.S. Capitol, based on ideologies that attracted them because of failures, insecurities, or circumstances in their own lives that they felt weren't being addressed. They often perceive discrimination directed at them and have a need to assess blame for that discrimination. Their social media and communications often tell a story of wanting to be a part of something bigger or more consequential than what their

18. See Coalition Letter to the Obama Administration (Dec. 18, 2014) (regarding federal support for countering violent extremism, or CVE, programs), <https://perma.cc/QM8E-NYAQ>; *Why Countering Violent Extremism Programs are Bad Policy*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://perma.cc/4YUZ-FDMW>.

19. "The Great Replacement: An Explainer," ADL, <https://perma.cc/2N6N-ZNWP>.

own lives are producing for them. Extremist ideologies allow them to be part of a community that puts a name on their enemy and, in some cases, encourages taking action against that enemy.

B. A Whole-of-Society Approach is Required to Counter the Influence of, Vulnerability to, and Impact From White Supremacist Violence

So how do we as a society address white supremacist extremism without causing people to feel unfairly targeted, potentially leading to more extremism? It will take actions, not just words, to counter the belief that creating opportunities for those who historically have been marginalized means that white people are being replaced. The government must support such actions through its policies and incentives, but it will also require leaders across all sectors to play a role. Businesses must adapt to changing conditions with new job opportunities, rather than remaining mired in dying industries that are no longer viable. Technology platforms must recognize that their algorithms contribute to polarization and extremism by channeling consumers into ever-narrowing silos where they aren't exposed to opposing views. Media must not allow themselves to become willing mouthpieces for politically divisive views. Citizens must learn to recognize and reject disinformation. Elected officials must spend more time on efforts to improve the lives of their constituents than on making sure their party wins a majority in the next election.

White supremacist violence did not begin or end with Timothy McVeigh and the Oklahoma City bombing, just as Islamist extremist violence did not begin or end with 9/11. The government will keep investigating and prosecuting terrorism as the threat warrants, but that will always be just a band-aid on the underlying wounds that only a whole-of-society approach can start to heal.
