

# **ARTICLE: WHY DYLANN ROOF IS A TERRORIST UNDER FEDERAL LAW, AND WHY IT MATTERS**

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## **Reporter**

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## **Highlight**

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After white supremacist Dylann Roof killed nine African-Americans at a Charleston, South Carolina church, authorities declined to refer to the attack as terrorism. Many objected to the government's apparent double standard in its treatment of Muslim versus non-Muslim extremists and called on the government to treat the massacre as terrorism. Yet the government has neither charged Roof with a terrorist offense nor labeled the attack as terrorism.

This Article argues that although the government was unable to charge Roof with terrorist crimes because of the lack of applicable statutes, the Charleston massacre still qualifies as terrorism under federal law. Roof's attack clearly falls under the government's prevailing definition of domestic terrorism. It also qualifies for a terrorism sentencing enhancement, or at least an upward departure from the sentencing guidelines, as well as for the terrorism aggravating factor considered by juries in deciding whether to impose the death penalty.

Labeling Roof's attack as terrorism could have several important implications, not only in terms of sentencing, but also in terms of government accountability, the prudent allocation of counterterrorism resources, balanced media coverage, and public cooperation in preventing terrorism. For these reasons, this Article contends that the government should treat the Charleston massacre, and similar ideologically motivated killings, as terrorism.

This Article also makes two policy suggestions meant to facilitate a more consistent use of the term terrorism. First, the Article proposes a new federal terrorism statute mirroring hate crime statutes, which would enable every terrorist to be charged with a terrorism offense. Second, simplifying the definition of terrorism to encompass any murder or attempted murder meant to advance an ideology would avoid the obfuscation invited by current definitions. However, even without such changes, the government still has the authority and responsibility to treat attacks such as Roof's as terrorism for nearly all purposes.

**[\*259]**

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## Text

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[\*260]

### I. Introduction

At about 9:00 PM on June 17, 2015, a 21-year old white man named Dylann Storm Roof shot and killed nine African-Americans at a Bible study meeting at Emanuel African Methodist Episcopal Church, a historic church in Charleston, South Carolina.<sup>2</sup> Witnesses reported that immediately before the attack, Roof announced he was there "to shoot black people," and during the shooting, he said "Y'all are raping our women and taking over the country. This must be done."<sup>3</sup> Roof was apprehended in North Carolina the [\*261] next morning.<sup>4</sup> He later admitted to authorities that he intended the shooting to provoke a "race war."<sup>5</sup>

Within days, it emerged that Roof had posted a white supremacist manifesto on his website.<sup>6</sup> As the manifesto explains, his exposure to white supremacist ideology began after his Internet research on black-on-white crime led him to white supremacist websites, such as that of the Council of Conservative Citizens.<sup>7</sup> He had also posted pictures of himself posing with the Confederate flag, as well as emblems of Apartheid-era South Africa and Rhodesia.<sup>8</sup> He named his website The Last Rhodesian, indicating his strong identification with the brutal minority-white rule of that regime.<sup>9</sup>

Roof had carefully researched the history of slavery and the Confederacy prior to the shooting, photographing himself at famous slavery-related landmarks.<sup>10</sup> The church had a historical role in slave rebellions and the Civil

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<sup>2</sup> Jason Horowitz, Nick Corasaniti & Ashley Southall, Nine Killed in Shooting at Black Church in Charleston, N.Y. Times (June 17, 2015), <http://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html> [<https://perma.cc/9A97-T4ZM>]; Nick Corasaniti, Richard Peretz-Pena & Lizette Alvarez, Church Massacre Suspect Held as Charleston Grieves, N.Y. Times (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html> [<https://perma.cc/4JAC-QG3K>].

<sup>3</sup> Richard Fausset et al., A Hectic Day at Charleston Church, and Then a Hellish Visitor, N.Y. Times (June 20, 2015), <http://www.nytimes.com/2015/06/21/us/a-day-at-the-statehouse-and-a-night-of-slaughter.html> [<https://perma.cc/9NZD-XJKK>]; Charles M. Blow, In Charleston, a Millennial Race Terrorist, N.Y. Times (June 21, 2015), <http://www.nytimes.com/2015/06/22/opinion/charles-blow-in-charleston-a-millennial-race-terrorist.html> [<https://perma.cc/C9ZP-BG6D>]; Lisa Wade, How "Benevolent Sexism" Drove Dylann Roof's Racist Massacre, Wash. Post (June 21, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/06/21/how-benevolent-sexism-drove-dylann-roofs-racist-massacre/?utm\\_term=.765e163f30ac](https://www.washingtonpost.com/posteverything/wp/2015/06/21/how-benevolent-sexism-drove-dylann-roofs-racist-massacre/?utm_term=.765e163f30ac) [<https://perma.cc/4ACS-FF7P>].

<sup>4</sup> Corasaniti, Peretz-Pena & Alvarez, *supra* note 2.

<sup>5</sup> Blow, *supra* note 3.

<sup>6</sup> Frances Robles, Dylann Roof Photos and a Manifesto Are Posted on Website, N.Y. Times (June 20, 2015), <http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-web> [<https://perma.cc/4DMA-3NG4>], [site-charleston-church-shooting.html](https://perma.cc/4DMA-3NG4)

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Rights Movement. <sup>11</sup> Roof may have timed the attack precisely to correspond with the 193rd anniversary of a famous slave rebellion associated with the church, which was planned to begin at midnight on June 16, 1822. <sup>12</sup>

The Charleston massacre spurred widespread discussion about the use of the term terrorism. <sup>13</sup> FBI Director James Comey's initial statement after the shooting was that the attack did not seem to be "political," making him doubt that it qualified as terrorism. <sup>14</sup> However, some commentators demanded that the government treat the shooting as a terrorist attack, particularly once Roof's white supremacist manifesto clarifying his motivations was **[\*262]** revealed. <sup>15</sup> The government has never done so, and instead opted for charging him with hate crimes, which the Attorney General described as "the original domestic terrorism." <sup>16</sup>

This passing remark is an appropriate acknowledgement of the country's history of racist terrorism. Yet it obscures the fact that the term hate crimes, unlike terrorism, tends to refer to attacks that are unplanned and unconnected to broader ideological objectives. <sup>17</sup> While the lack of applicable statutes explains why Roof was not charged with terrorism, the government has no excuse for not officially categorizing and publicly referring to the attack as terrorism.

<sup>11</sup> Greg Grandin, The Charleston Massacre and the Cunning of White Supremacy: He didn't just target Denmark Vesey's church--it was the anniversary of Vesey's suppressed uprising, *Nation* (June 18, 2015), <https://www.thenation.com/article/the-charleston-massacre-and-the-cunning-of-white-supremacy/> [<https://perma.cc/LTV3-PAKJ>].

<sup>12</sup> *Id.*

<sup>13</sup> Rick Gladstone, Many Ask, Why Not Call Church Shooting Terrorism?, *N.Y. Times* (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/charleston-shooting-terrorism-or-hate-crime.html> [<https://perma.cc/7F5B-3GNS>]; Katie Rogers, Charleston Shooting Reignites Debate About Confederate Flag, *N.Y. Times* (June 19, 2015), <http://www.nytimes.com/2015/06/20/us/charleston-shooting-reignites-debate-about-confederate-flag.html> [<https://perma.cc/5D2H-HHFU>].

<sup>14</sup> Paul Lewis, Amanda Holpuch & Jessica Glenza, Dylann Roof: FBI probes website and manifesto linked to Charleston suspect, *Guardian* (June 21, 2015), <https://www.theguardian.com/us-news/2015/jun/20/dylann-roof-fbi-website-manifesto-charleston-shooting> [<https://perma.cc/7WT2-KPD2>]. State and local authorities do not appear to have labeled the attack as terrorism either. This Article focuses on the federal government because of its dominant role in the country's counterterrorism policy.

<sup>15</sup> Marcy Wheeler, Dylann Roof should be tried as a terrorist: America's disturbing double-standard on political violence (and why it matters), *Salon* (July 24, 2015), [http://www.salon.com/2015/07/24/dylann\\_roof\\_should\\_be\\_tried\\_as\\_a\\_terrorist\\_americas\\_disturbing\\_double\\_standard\\_on\\_political\\_violence\\_and\\_why\\_it\\_matters/](http://www.salon.com/2015/07/24/dylann_roof_should_be_tried_as_a_terrorist_americas_disturbing_double_standard_on_political_violence_and_why_it_matters/) [<https://perma.cc/NM9C-YV5Z>].

<sup>16</sup> *Id.*

<sup>17</sup> Colleen Mills, Joshua D. Freilich, & Steven M. Chermak, Extreme Hatred: Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are "Close Cousins" or "Distant Relatives," *Crime & Delinquency*, Dec. 21, 2015, at 6, 11. For example, the attack by Omar Mateen in Orlando has been widely described as terrorism, because of his stated ideological motive. Specifically, in his conversations with police during the attack, he claimed to be carrying out the attack in support of ISIS. Jeff Sparrow, Terror and rage: what makes a mass murderer different to a terrorist?, *Guardian* (Aug. 4, 2016), <https://www.theguardian.com/commentisfree/2016/aug/04/terror-and-rage-what-makes-a-mass-murderer-different-to-a-terrorist> [<https://perma.cc/A6UL-LFRC>] ("During the rampage Mateen declared his allegiance to ISIS and its leader Abu Bakr al-Baghdadi--and, for that reason, was widely described as a terrorist."). By contrast, crimes in which the only evidence about the motive for the crime comes from the perpetrator's use of slurs or admission that he or she was prejudiced against the victim's group are typically treated as hate crimes rather than terrorism. As an example, a man was recently convicted of a hate crime in Wisconsin after shouting racial slurs at and then attacking African-Americans. Barbara Lyon, Washington state man convicted of hate crime in Dunn County, *Dunn County News* (July 11, 2016), [http://chippewa.com/dunnconnect/news/local/washington-state-man-convicted-of-hate-crime-in-dunn-county/article\\_d908726e-ba53-57b2-84ed-c6e2c26ad03d.html](http://chippewa.com/dunnconnect/news/local/washington-state-man-convicted-of-hate-crime-in-dunn-county/article_d908726e-ba53-57b2-84ed-c6e2c26ad03d.html) [[perma.cc/F29E-ZBR4](https://perma.cc/F29E-ZBR4)]. The suspect admitted to police that he did not like African-Americans and that the suspect's race motivated the attack, but there was no indication that he intended the attack to achieve a broader ideological goal. *Id.*

This Article argues that the attack unambiguously fits the FBI's and USA Patriot Act's definition of domestic terrorism (relevant for administrative and surveillance purposes), which encompasses all actions dangerous to human life meant to "intimidate or coerce a civilian population" or "influence the policy of a government by intimidation or coercion."<sup>18</sup> Roof's attack was, without any doubt, intended to intimidate the African-American community, and as this Article will demonstrate, it is quite clear he intended to intimidate the government as well.

It may be tempting to conclude that this is much ado about nothing, since Roof will receive a harsh sentence regardless of his crime's label. Others might minimize the importance of this debate, ascribing it to what they believe to be a left-wing fixation with portraying right-wing extremists [**\*263**] as terrorists. Yet the issue of whether Roof is a terrorist is an important one, providing an opportunity to clarify widespread confusion about government definitions of terrorism, and to establish standards for consistent employment of the term. Properly identifying Roof (and attackers like him) as terrorists could lead to several positive results, including more balanced media coverage, greater government accountability in the War on Terror, increased public vigilance against non-jihadi extremists, more attention to the country's history of racist terrorism, less support for Islamophobia and racism, and a more rational distribution of counterterrorism resources.

Admittedly, the term terrorism is problematic for numerous reasons.<sup>19</sup> Critics have long noted the highly inconsistent and politicized deployment of the term.<sup>20</sup> Another complication is that the label itself sometimes gives more attention and importance to a crime than the crime itself warrants. In a sense, calling ideologically motivated violence terrorism allows small-time ideological murderers to "win" by scaring the population more than they would have been able to otherwise.<sup>21</sup>

Indeed, at least in contemporary America, terrorism is ultimately only a small, relatively insignificant slice of our murder problem.<sup>22</sup> As many as 475 Americans were killed in mass shootings in 2015 alone, and in recent years at least 14,000 murders have occurred in the United States per year, but only 142 Americans have been killed by domestic terrorism in the 15 years since September 11, 2001.<sup>23</sup> Treating terrorism as a routine police matter, and

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<sup>18</sup> Pub. L. 107-56, Oct. 26, 2001, **115 Stat. 272**.

<sup>19</sup> See, e.g., Tung Yin, *Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism*, 4 Ala. C.R.-C.L. L. Rev. 33 (2013); Will Potter, *Green Is the New Red* (2011).

<sup>20</sup> See, e.g., Glenn Greenwald, *Refusal to Call Charleston Shootings "Terrorism" Again Shows It's a Meaningless Propaganda Term*, Intercept (June 19, 2015), <https://theintercept.com/2015/06/19/refusal-call-charleston-shootings-terrorism-shows-meaningless-propaganda-term/> [<https://perma.cc/WQN9-GCDB>]; Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, *61 Buff. L. Rev.* 461, 461 (2013); Wadie Said, *The Message and Means of the Modern Terrorism Prosecution*, *21 Transnat'l L. & Contemp. Probs.* 175 (2012).

<sup>21</sup> Conor Friedersdorf, *Why It Matters That the Charleston Attack Was Terrorism: The term clarifies what took place last week, but not what the response should be*, Atlantic (June 22, 2015), <http://www.theatlantic.com/politics/archive/2015/06/was-the-charleston-attack-terrorism/396329/> [<https://perma.cc/2TKN-SKJV>] ("Without pretending to have a comprehensive answer, I'd suggest that after any terrorist attack, observers should work to deny terrorists one of their core aims: to terrorize people far out of proportion to the threat that their actions actually pose.").

<sup>22</sup> John E. Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them* (2006).

<sup>23</sup> Peter Bergen et al., *Terrorism in America After 9/11: Part IV. What is the Threat to the United States Today*, New America, <http://securitydata.newamerica.net/extremists/deadly-attacks.html> [<https://perma.cc/J3WZ-4CGN>]; Abby Oldham, 2015: The Year of Mass Shootings, PBS (Jan. 1, 2016), <http://www.pbs.org/newshour/rundown/2015-the-year-of-mass-shootings> [<https://perma.cc/775M-2E9C>].

referring to it by a more descriptive, less loaded term--such as "ideologically motivated crime"--could dampen terrorists' motivation, discourage exaggerated government responses, and prevent disproportionate public fear. <sup>24</sup>

**[\*264]** Realistically, however, the government will continue employing the term "terrorism" for at least some ideologically motivated violence, and, more troublingly, even for ideologically motivated property damage by left-wing and animal rights activists. <sup>25</sup> If the term is going to be used, it should at least be used consistently. This Article argues that all ideologically motivated violence against people--particularly murder and attempted murder--should be treated as terrorism for all legal, policy, and publicity purposes. <sup>26</sup>

To encourage this development, one helpful step would be to streamline the government definition of terrorism, so that any ideologically motivated killings are regarded as terrorism, without having to specifically prove that the crime was intended to coerce or intimidate a government or civilian population. Although Roof's attack plainly falls within current definitions, the intimidation/coercion requirement invites unnecessary and obfuscating debate about the precise causal sequences the terrorist imagined the attack would set into motion.

In addition, new federal and state laws, mirroring hate crime statutes, should label as "terrorism" any murders or attempted murders that fall within statutory definitions of terrorism. This would create a simple and straightforward way to charge all terrorists with committing terrorism, just as we can easily charge perpetrators of hate crimes with committing hate crimes. However, even without these policy changes, the government has the authority and responsibility to label attacks such as Roof's as terrorism, devote appropriate resources toward preventing them, and seek terrorism penalties where appropriate under current federal law.

As this Article argues, that should include applying the terrorism sentencing enhancement in Roof's case. Yet even if courts find the enhancement inapplicable, the U.S. Sentencing Commission calls for an upward departure from guidelines that is equivalent to the terrorism sentencing enhancement for crimes such as Roof's meant to intimidate a civilian population. Moreover, current federal law allows Roof's terrorist motive to be considered as an **[\*265]** aggravating factor in determining whether to impose the death penalty. This may have practical relevance for Roof's prosecution, because the government has chosen to seek capital punishment in this case. <sup>27</sup>

Part II reviews government, academic and other reactions to the question of whether the Charleston massacre qualifies as terrorism, provides background on the controversy over the alleged double-standards in the application of the term terrorism, and discusses the country's long history of describing white-supremacist violence as terrorism. In Part III, the Article demonstrates that Roof's attack qualifies as terrorism under federal definitions. Part

<sup>24</sup> Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* 94 (2011); Friedersdorf, *supra* note 21 ("The ideal solution would be rational efforts to combat terrorists of all kinds that are transparent, unlikely to create more radicals, and consistent with the Bill of Rights.").

<sup>25</sup> See generally Potter, *supra* note 19; Jesse J. Norris, *Terrorism and Entrapment on the Left: An Analysis of Post-9/11 Cases*, 19 *New Crim. L. Rev.* 236 (2016).

<sup>26</sup> Property damage, perhaps aside from particularly extreme cases, should not be referred to as terrorism. This cheapens the term, enabling it to be used against nonviolent protesters, and blurs the crucial normative distinction between violent crimes against people and other crimes. While there may be a case for calling certain extreme property crimes (such as large-scale arson) terrorism, the term terrorism should generally be limited to violent crimes against people, to avoid the slippery slope in which minor property crimes such as vandalism, or even constitutionally protected activity like picketing or sidewalk-chalking, are depicted and prosecuted as terrorism. While such an eventuality may seem far-fetched, some abuses under the Animal Enterprise Terrorism Act demonstrate that this is not the case. See Norris, *supra* note 25. If the term "terrorism" were abandoned and replaced with "ideologically motivated crime", then it might make sense to have a uniform sentencing enhancement which would allow any crime (including property crimes) to be sentenced at a higher level if it were committed to advance some ideological goal. Even so, this may not be advisable for nonviolent crimes, to avoid draconian penalties for relatively minor protest-related property damage.

<sup>27</sup> Alan Blinder, *Death Penalty is Sought for Dylann Roof in Charleston Church Killings*, N.Y. Times (May 24, 2016), <http://www.nytimes.com/2016/05/25/us/dylann-roof-will-face-federal-death-penalty-in-charleston-church-killings.html> [<https://perma.cc/VFW6-DY6E>].

IV describes why it matters that Roof's attack is treated as terrorism, detailing the benefits in terms of, among other things, accurate reporting, government accountability, optimal distribution of public safety resources, and public cooperation in fighting extremist crime. In Part V, the Article briefly presents two additional policy recommendations that would facilitate the consistent treatment of all ideologically motivated murderers as terrorists. Part VI concludes, summarizing the Article's arguments and calling for further research on efforts to prevent all types of ideologically motivated violence.

## II. Background

### A. Terrorism or Not? Responses So Far

Two days after the shooting, FBI Director James Comey was asked whether Roof's attack constituted terrorism. By that point, witnesses' accounts of his statements during the shooting, and his Facebook page featuring apartheid-era South African flags, were already available, though his racist manifesto explaining the motivation for the attack was not to appear until a day later.<sup>28</sup> Comey replied that, "Terrorism is [an] act of violence done or threatens to [sic] in order to try to influence a public body or citizenry, so it's more of a political act and again based on what I know so... I don't see it as a political act."<sup>29</sup>

A month later, the Huffington Post asked him the same question. "I don't know yet," he replied. "I was asked about that a day or so after and said that, based on what I knew at that point, I didn't see it fitting the definition. Since then, we've found the so-called manifesto online, so I know the **[\*266]** investigators and prosecutors are looking at it through the lens of hate crime, through the lens, potentially, of terrorism."<sup>30</sup> Although Comey leaves the door open for labeling it as terrorism at a later date, his hesitancy is remarkable, in comparison with the typical pattern of calling a jihadi attack terrorism once the ideological motive of the attack is clear.<sup>31</sup> Comey claimed that whether it was called terrorism "doesn't impact the energy that we apply to it,"<sup>32</sup> but this ignores the fact that language matters, particularly in this context.<sup>33</sup> Former FBI agent Michael German, now a terrorism expert, notes that "Calling it a hate crime instead of terrorism seems to suggest it's less serious...Rhetoric is important."<sup>34</sup>

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<sup>28</sup> Jeremy Stahl, Alleged Charleston Shooter Dylann Roof Was Wearing an Apartheid Flag in His Facebook Profile, Slate (June 18, 2015), [http://www.slate.com/blogs/the\\_slateist/2015/06/18/alleged-charleston-shooter-dylann-roof-was-wearing-an-apartheid-flag-in.html](http://www.slate.com/blogs/the_slateist/2015/06/18/alleged-charleston-shooter-dylann-roof-was-wearing-an-apartheid-flag-in.html) [<https://perma.cc/MDN8-3GKS>].

<sup>29</sup> Andrew Husband, FBI Director Says Charleston Shooting Not Terrorism, Mediaite (June 20, 2015), <http://www.mediaite.com/tv/fbi-director-says-charleston-shooting-not-terrorism/> [<https://perma.cc/DS33-G4DC>].

<sup>30</sup> Ryan J. Reilly, FBI Director James Comey Still Unsure if White Supremacist's Attack in Charleston was Terrorism, Huff. Post (July 9, 2015), [http://www.huffingtonpost.com/2015/07/09/james-comey-charleston-terrorism- n\\_7764614.html](http://www.huffingtonpost.com/2015/07/09/james-comey-charleston-terrorism- n_7764614.html) [<https://perma.cc/PAF5-MWZC>].

<sup>31</sup> For example, the FBI labeled the San Bernardino attack on December 2, 2015, as terrorism only two days after the attack, and President Obama referred to it as "an act of terrorism designed to kill innocent people" only four days after the attack. Paloma Esquivel, Joseph Tanfani, Louis Sahagun, & Sarah Parvini, Obama: 'This was an act of terrorism designed to kill innocent people', L.A. Times (Dec. 6, 2015), <http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-terror-probe-widens-as-obama-set-to-speak-20151206-story.html> [<https://perma.cc/3J6K-UXPR>]; Michael S. Schmidt & Richard Perez-Pena, F.B.I. Treating San Bernardino Attack as Terrorism Case, N.Y. Times (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html> [<https://perma.cc/JD2D-MVY3>]. By that point, not much was known about the perpetrators and their precise motives and backgrounds, but FBI investigators believed that they were inspired by Islamic radicalism.

<sup>32</sup> Reilly, *supra* note 30.

<sup>33</sup> See Wheeler, *supra* note 15.

<sup>34</sup> Jenna McLaughlin, Why Wasn't Dylann Roof Charged With Terrorism?, Intercept (July 22, 2015), <https://theintercept.com/2015/07/22/departments-justice-didnt-charge-dylan-roof-domestic-terrorism/> [<https://perma.cc/YF7A-AUNJ>].

The office of Attorney General Loretta Lynch initially raised the possibility that the attack would be labeled terrorism, explaining that the Department of Justice was investigating the massacre as both "a hate crime and as an act of domestic terrorism."<sup>35</sup> Remarkably, as part of the same statement, the Department of Justice said that "This heartbreaking episode was undoubtedly designed to strike fear and terror into this community."<sup>36</sup> Acknowledging at the outset of the investigation that the attack was intended to "strike fear and terror into this community" is very close to admitting that it fits the definition of terrorism. Yet the government has never described the attack as terrorism in any straightforward and unambiguous manner.

In contrast, former U.S. Attorney General Eric Holder had no qualms about referring to the attack as terrorism.<sup>37</sup> He even remarked that the same attack, if committed by a Muslim against white churchgoers, would have been universally called terrorism, and decried the nation's relative lack of [\*267] attention to "the domestic threat," an apparent reference to homegrown terrorists.<sup>38</sup>

Former federal prosecutor Michael Sullivan also concluded that the Charleston attack "easily" qualified as terrorism, because it was "done to provoke a race war," and "put a segment of the population in a state of fear."<sup>39</sup> President Obama suggested the attack was meant to "terrorize," though fell short of labeling it as terrorism: "It was an act that 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."<sup>40</sup> Senator Lindsey Graham called the Charleston shootings "domestic terrorism," while at the same time depicting it as less important than ISIS, an active organization that held territory.<sup>41</sup>

A week after the attack, Attorney General Lynch brushed off questions about terrorism, claiming that "Hate crimes are the original terrorism."<sup>42</sup>

Asked about the issue a month after the shootings, Attorney General Lynch acknowledged that the government's failure to label the act terrorism may give the impression that the government "doesn't consider those crimes as serious."<sup>43</sup> Yet she insisted that "nothing could be further from the truth," noting that "racially motivated violence,

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<sup>35</sup> Ryan J. Reilly, *Feds: Charleston Shooting a Potential Act of "Domestic Terrorism,"* Huff. Post (June 19, 2015), <http://www.huffingtonpost.com/2015/06/19/charleston-shooting-domestic-terrorism> n 7623704.html [<https://perma.cc/A3RY-S5ST>].

<sup>36</sup> *Id.*

<sup>37</sup> Ryan J. Reilly, *Eric Holder: "Act of Terrorism" in Charleston Should Serve as "Wake-Up Call,"* Huff. Post (July 7, 2015), <http://www.huffingtonpost.com/2015/07/07/eric-holder-charleston-terrorism> n 7745964.html [<https://perma.cc/5RYK-CR47>].

<sup>38</sup> *Id.*

<sup>39</sup> Phillip Martin, *How do we define domestic terrorism? The legal meaning of a loaded term,* Pub. Radio Int'l. (July 21, 2015), <http://www.pri.org/stories/2015-07-21/how-do-we-define-domestic-terrorism-legal-meaning-loaded-term> [<https://perma.cc/RQQ2-R6PL>].

<sup>40</sup> *Id.*

<sup>41</sup> Phillip Martin, *Domestic terrorism: Conservative politicians play down threat from the far right,* Pub. Radio Int'l (Jan. 6, 2016), <http://www.pri.org/stories/2016-01-06/domestic-terrorism-conservative-politicians-play-down-threat-far-right> [<https://perma.cc/L6EB-68ZR>].

<sup>42</sup> Kevin Johnson, *Attorney General Lynch: "Hate Crimes are the Original Terrorism,"* USA Today (June 24, 2015), <http://www.usatoday.com/story/news/nation/2015/06/24/loretta-lynch-baptist-church-birmingham/29238615/> [<https://perma.cc/LUM5-96DJ>].

<sup>43</sup> Timothy M. Phelps, *Dylann Roof indicted on federal hate-crime charges* *Hate-Crime Charges in Charleston church shooting*, L.A. Times (July 22, 2015), <http://www.latimes.com/nation/la-na-roof-hate-crimes-20150722-story.html> [<http://perma.cc/6CDZ-G7QX>].

for which a federal law was specifically enacted to cover, is of grave importance." <sup>44</sup> She noted that even if "since 9/11 there has been a great focus on" terrorism, that "should in no way signify that this particular murder or any federal crime is of lesser significance." <sup>45</sup> While her point about the importance of hate crimes is well taken, it ignores the greater policy importance given to terrorism, and the fact that Roof's attack clearly fits the government's prevailing definitions of terrorism. Moreover, it also suggests a false dichotomy between hate crimes and terrorism. As President Obama argued in the case of the Orlando attacks, [\*268] and as academics also point out, a single attack can qualify as both a hate crime and terrorism. <sup>46</sup>

Two weeks after the massacre, six U.S. Senators released a public letter to Senate Judiciary Committee chair Charles Grassley calling for hearings "on the threat posed by domestic terrorism and homegrown hate groups." <sup>47</sup> The Senators noted that "if this same act had been perpetrated by someone claiming a desire to harm Americans in the service of Islamist principles, it would immediately be labeled an act of terror," and argued that "[a] violent act motivated by a racist desire to intimidate a civilian population falls squarely within the definition of domestic terrorism." <sup>48</sup>

Terrorism scholars, for their part, were nearly unanimous in calling the Charleston massacre terrorism. Two days after the attack, Professor Brian Phillips said it was "clearly a terrorist act," given its racist motivation and the fact that Roof left one person alive specifically to let people know why he had done it. <sup>49</sup> Professor Daniel Medwed argued that Roof's acts fit the definition of terrorism because they were "meant to intimidate the African American community and arguably influence government policy in the area of race relations." <sup>50</sup> Professor Max Abrahms also said he felt "comfortable calling this church massacre an act of terrorism," because it was "premeditated and politically motivated." <sup>51</sup> Under what has been described as the most widely-accepted academic definition of terrorism--"an act of violence carried out by a non-state actor against a civilian target with some political aim"-- it is clear that the Charleston attack was terrorism, since Roof was driven by political ideology. <sup>52</sup>

It appears that the only academic demurring from the application of the terrorism label is doing so for purely nominalist reasons, deferring to the FBI as the ultimate arbiter of what is and is not terrorism. "The FBI has

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<sup>44</sup> Id.

<sup>45</sup> Id.

Jenna McLaughlin, Why Wasn't Dylann Roof Charged With Terrorism?, Intercept (July 22, 2015) <https://theintercept.com/2015/07/22/departments-justice-didnt-charge-dylan-roof-domestic-terrorism/> [<https://perma.cc/CM84-B6E3>].

<sup>46</sup> Christopher Woolf, What Do We Call the Attack in Orlando? "Hate Crime" or "Terrorism?" Pub. Radio Int'l (June 13, 2016), <http://www.pri.org/stories/2016-06-13/what-do-we-call-attack-orlando-hate-crime-or-terrorism> [<http://perma.cc/UM8V-4JJ9>].

<sup>47</sup> Senators Push for Hearings on Homegrown Terrorists Like the Charleston Shooter, ThinkProgress (July 2, 2015), <https://thinkprogress.org/senators-push-for-hearings-on-homegrown-terrorists-like-the-charleston-shooter-9fd6458e8c3b#.n5kxt8q4u>.

<sup>48</sup> Id.

<sup>49</sup> Brian J. Phillips, Was what Happened in Charleston terrorism? Wash. Post (June 18, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/18/was-what-happened-in-charleston-terrorism/> [<http://perma.cc/64BZ-S65Z>].

<sup>50</sup> Martin, supra note 39.

<sup>51</sup> Elias Groll, Was the Charleston massacre an Act of Terrorism?, Foreign Pol'y Passport (June 18, 2015), [http://foreignpolicy.com/2015/06/18/was-the-charleston-massacre-an-act-of-terrorism/?wp\\_login=login&wp\\_redirect=0/](http://foreignpolicy.com/2015/06/18/was-the-charleston-massacre-an-act-of-terrorism/?wp_login=login&wp_redirect=0/) [<http://perma.cc/6KFJ-RDSP>].

<sup>52</sup> Id.



exclusive jurisdiction to investigate acts of terror in the U.S.," said Professor Brent Smith, who heads the Terrorism Research Center at the University of [\*269] Arkansas, "[if] the FBI labels it as terrorism, it is terrorism. If they don't, it isn't." <sup>53</sup>

Numerous media analysts also quickly identified the attack as terrorism. <sup>54</sup> Authors writing for publications such as, Salon.com, Foreign Policy, The Atlantic the New Yorker argued the attack deserved to be called terrorism under government and academic definitions, and assailed the government for its reticence to call white attackers terrorists. <sup>55</sup> Two journalists, Glenn Greenwald and Philip Bump, have argued against calling Roof a terrorist, but their arguments are based on objections to the term terrorism in general, rather than a conclusion that the attack did not fit a neutral definition of terrorism. <sup>56</sup>

## B. Discrepancies in Media and Government Treatment of White Terrorists

Journalists and academics have long criticized the government for its overwhelming focus on jihadi (and sometimes left-wing) terrorism, and its relative neglect of the threat of terrorism from white supremacists, anti-government extremists, and pro-life radicals. <sup>57</sup> From the 1950s to the early 1970s, the FBI's illegal COINTELPRO program disrupted various social movements associated with minorities and the Left, and only sought to undermine [\*270] Klan violence in its later years, under considerable pressure from the President, and after being criticized by Martin Luther King, Jr. and others for insufficient attention to Southern white terrorism. <sup>58</sup>

Although there was an initial burst of law enforcement interest in monitoring anti-government extremism following the Oklahoma City bombing in 1995, it was never a major priority of the federal government. <sup>59</sup> After 9/11,

<sup>53</sup> Margaret Hartmann, Will Dylann Roof Face Terrorism or Hate-Crime Charges?, N.Y. Mag (June 25, 2015), <http://nymag.com/daily/intelligencer/2015/06/will-roof-face-terrorism-or-hate-crime-charges.html> [<http://perma.cc/MMC5-4FCB>].

<sup>54</sup> For example, see Peter Bergen & David Sterman, Call it terrorism in Charleston, CNN (June 19, 2015), <http://www.cnn.com/2015/06/18/opinions/bergen-charleston-attack-terrorism> [<http://perma.cc/W5D9-DB8F>].

<sup>55</sup> See Wheeler, supra note 15; Groll, supra note 51; Friedersdorf, supra note 21; Jelani Cobb, Terrorism in Charleston, New Yorker (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/terrorism-in-charleston> [<http://perma.cc/B6NR-HBBB>].

<sup>56</sup> See Philip Bump, Why we shouldn't call Dylann Roof a terrorist, Wash. Post, (June 19, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/19/why-we-shouldnt-call-dylann-roof-a-terrorist> [<http://perma.cc/SF2Q-M5CD>]. Bump argues that employing the term terrorism would give Roof the notoriety he desired, in effect admit that he "scared" us, and imply that the fact he instilled fear was more significant than the murders themselves. Greenwald contends that terrorism is a "meaningless propaganda term" that is "definition-free" and used mainly to describe violence committed by Muslims. See Greenwald, supra note 20. As mentioned earlier, despite problematic aspects of the term terrorism (such as its uneven use or its potential to exaggerate the seriousness of security threats), it is not realistic to cease employing the term at all. Part IV argues that applying terrorism definitions in a consistent fashion, to cover the Charleston attack and other similar crimes, could have several important benefits for counter-terrorism policy and for society more generally. Bump's concerns about the fear-related implications of the term terrorism appear to be misplaced, because the term does not detract from the significance of non-terrorist murder or admit that the crime terrified us. On the contrary, the terrorism label refers to the intent of the offender, not the crime's actual effect on society.

<sup>57</sup> At the other end of the political spectrum, many have also criticized the government for its disproportionate focus on eco-terrorism and left-wing terrorism, even though not a single person since 9/11 has been killed in the US by people motivated by left-wing or environmental radicalism. See Potter, supra note 19. The FBI even described eco-terrorism as the nation's "number-one domestic terrorism threat" in recent years. *Id.* at 44-45.

<sup>58</sup> David Cunningham, There's Something Happening Here: The New Left, The Klan, and FBI Counterintelligence (2004); John Drabble, To Ensure Domestic Tranquility: The FBI, COINTELPRO-WHITE HATE and Political Discourse, 1964-1971, 38 J. of Am. Stud. 297 (2004); Michael Newton, The FBI and the KKK: A Critical History 12-13 (2005).

<sup>59</sup> Tom Landsford, Homeland Security from Clinton to Bush: An Assessment, in *The Global War on Terrorism: Assessing the American Response* 1, 4-5 (John Davis ed., 2004).

however, preventing jihadi terrorism quickly became a policy obsession, with vast resources poured into nearly every conceivable counterterrorism measure, yet with little attention to anti-government extremists and white supremacists.<sup>60</sup>

A database of fatal domestic terrorist attacks after 9/11 by the New America Foundation demonstrates that (at least until 49 were killed in the 2016 mass shooting in Orlando) right-wing terrorists caused more deaths than had jihadi terrorists.<sup>61</sup> Yet a study of post-9/11 terrorism sting operations found that there were far more sting operations targeting jihadi terrorism, and that left-wing and jihadi terror suspects had far more indicators of entrapment than did right-wing terrorists.<sup>62</sup> These findings suggest that the [\*271] government has deployed far fewer informants among potential right-wing terrorists and has been less aggressive in seeking convictions or trying to prevent attacks by right-wing extremists.<sup>63</sup>

Indeed, it seems clear that far fewer resources are put into investigating anti-government and white supremacist extremists. After a 2009 report about right-wing extremism set off a firestorm of protest by mainstream conservatives, the government reportedly shifted even more resources away from investigating these homegrown terrorists.<sup>64</sup> Despite this stark policy imbalance at the national level, a 2014 survey of 382 law enforcement agencies found that 74% considered anti-government extremists such as militias and Sovereign Citizens to be among the top-three terrorism threats, and 24% considered racist violent extremists to be among the top-three

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<sup>60</sup> See Pete Simi, *Cycles of Right-Wing Terror in the US*, in *Right-Wing Radicalism Today: Perspectives from Europe and the US* 144-45 (2013, Ed., Sabine von Mering, Timothy Wyman McCarty eds., 2013).

<sup>61</sup> Bergen, *supra* note 23.

<sup>62</sup> See Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 104 *J. Of Crim. L. & Criminology* (forthcoming 2016); see also Wadie E. Said, *Crimes of Terror: The Legal and Political Implications of Federal Terrorism Prosecutions* 30-49 (2015); Marc Sageman, *Misunderstanding Terrorism* 56 (2016); Marc Sageman, *The stagnation in terrorism research*, 26 *Terrorism & Pol. Violence* 565, 575 (2014); Ctr. for Hum. Rights & Global Just., NYU L. School, *Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* (2011); Trevor Aaronson, *The Terror Factory: Inside the FBI's Manufactured War on Terrorism* (2013); Jon Sherman, "A Person Otherwise Innocent:" Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, [11 U. Pa. J. Const. L. 1475, 1489-99 \(2009\)](#); Sahar Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 *Gonz. L. Rev.* 429 (2012); 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. 1 (2012)**; Kendall Coffey, *The Lone Wolf--Solo Terrorism and the Challenge of Preventative Prosecution*, [7 FIU L. Rev. 1 \(2011\)](#); Joshua L. Dratel, *The Literal Third Way in Approaching "Material Support for Terrorism": Whatever Happened to 18 U.S.C. § 2339B(c) and the Civil Injunctive Option?*, [57 Wayne L. Rev. 11 \(2011\)](#); Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, [43 Gonz. L. Rev. 513 \(2008\)](#); Kent Roach, *Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches*, [80 Miss. L. J. 1455 \(2011\)](#); Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, [21 Transnat'l L. & Contemp. Probs. 175 \(2012\)](#); Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, [34 Cardozo L. Rev. 1401 \(2013\)](#); Wadie E. Said, *The Terrorist Informant*, [85 Wash. L. Rev. 687, 715-32 \(2010\)](#); Human Rights Watch, *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions*, Hum. Rts. Watch (July 21, 2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [<https://perma.cc/EP3E-38M6>].

<sup>63</sup> Norris & Grol-Prokopczyk, *supra* note 62; see Norris, *supra* note 25; see also Jesse J. Norris, *Why the FBI and the Courts are Wrong about Entrapment and Terrorism*, [84 Miss. L.J. 1257 \(2015\)](#).

<sup>64</sup> R. Jeffrey Smith, *Homeland Security Department Curtails Home-Grown Terror Analysis*, Wash. Post (June 7, 2011), [https://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH\\_story.html](https://www.washingtonpost.com/politics/homeland-security-department-curtails-home-grown-terror-analysis/2011/06/02/AGQEaDLH_story.html) [<http://perma.cc/C3S3-G2FL>].

threats.<sup>65</sup> The law enforcement agencies surveyed evaluated the local threat from non-jihadi terrorism to be significantly higher than the threat from jihadi terrorism.<sup>66</sup>

There appears to be a similar imbalance in media coverage. Murders committed by non-Muslim extremists are less likely to be labeled as terrorist by the media.<sup>67</sup> In addition, these terrorist attacks are less likely to make the national news, more commonly remaining local news stories. These patterns powerfully shape public consciousness regarding terrorism and the national policy discourse about counterterrorism policy, keeping both focused on the [\*272] threat of jihadi terrorism rather than treating all threats with the attention they deserve.

### C. White-Supremacist Violence as "The Original Terrorism"

Despite Attorney General Lynch's failure to label clearly the Charleston attack as terrorism, she made the astute remark that hate crimes were the "original terrorism." Indeed, there is a long history in America of describing white-supremacist violence as terrorism. In fact, the country's first anti-terrorism legislation was directed against Klan violence in the Reconstruction period.<sup>68</sup> This may be surprising to many today, given the widespread perception that the public, media, and politicians are quick to describe Muslim violence as terrorism and less likely to describe white violent extremists as terrorists.

Yet the word terrorism was very commonly used to depict Klan violence, starting in the late 19th century, and throughout much of the 20th century. For example, a history journal in 1921 noted that, "to the average American the mention of the name [the Ku Klux Klan] suggests terrorism."<sup>69</sup> Similarly, an 1885 book recounting Klan tactics repeatedly used the term "terrorism."<sup>70</sup> Klan-related crimes were described as terrorism as early as 1863, though in the late 19th century, "reign of terror" or simply "terror" were more common terms for Klan violence, which ranged from threats and whipping on one end of the spectrum of severity to torture and murder on the other.<sup>71</sup> As another example, in the 1940s the governor of Virginia denounced Klan "intimidation" and "terrorism."<sup>72</sup> In 1965, President

<sup>65</sup> Charles Kurzman & Davis Schanzer, Law Enforcement Assessment of the Violent Extremism Threat 54 (2015), [https://sites.duke.edu/tcths/files/2013/06/Kurzman\\_Schanzer\\_Law\\_Enforcement\\_Assessment\\_of\\_the\\_Violent\\_Extremist\\_Threat\\_final.pdf](https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf) [<http://perma.cc/7WKA-QXW6>]; Charles Kurzman & Davis Schanzer, The Growing Right-Wing Terror Threat, N.Y. Times (June 16, 2015), <http://www.nytimes.com/2015/06/16/opinion/the-other-terror-threat.html> [<https://perma.cc/GP9T-44M5>].

<sup>66</sup> Id.

<sup>67</sup> See Tung Yin, Were Timothy McVeigh and the Unabomber the Only White Terrorists?: Race, Religion, and the Perception of Terrorism, *4 Ala. C.R. C.L. L. Rev.* 33, 47 (2013); Amanda Anthea Butler, Shooters of color are called "terrorists" and "thugs." Why are white shooters called "mentally ill"?, Wash. Post (June 18, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/18/call-the-charleston-church-shooting-what-it-is-terrorism/?postshare=2271434651509011> [<http://perma.cc/4LXK-SA4U>]. These discrepancies may be explained by a number of factors, among them the tendency (documented in psychological research) for people to have greater and more unreasonable fears of those who are seen as foreign or otherwise in an outgroup. See James A. Piazza, Terrorist Suspect Religious Identity and Public Support for Harsh Interrogation and Detention Practices, *36 Pol. Psychol.* 667 (2015). This could partially explain greater government and media focus on jihadi terrorists, since even if some of them are American citizens, the fact that they are Muslim and typically inspired by terrorists in other countries, makes them appear more "foreign" and thus more threatening.

<sup>68</sup> Julia Craven, Dylann Roof Wasn't Charged with Terrorism Because He's White, Huff. Post (July 23, 2015), <http://www.huffingtonpost.com/entry/dylann-roof-terrorism> us 55b10 7c9e4b07af29d57a5fc [<http://perma.cc/H4G3-G35M>].

<sup>69</sup> Frank Parker Stockbridge, The Kuklux Klan Revival, *14 Current Hist.* 19 (1921).

<sup>70</sup> See Samuel Sullivan Cox, Union--Disunion--Reunion: Three Decades of Federal Legislation, 1855-1885, at 16, 451, 453, 465, 475 (1885).

<sup>71</sup> See U.S. House, Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, Georgia Volume 6 55, at 5, 233, 454 (1872).

<sup>72</sup> David Mark Chalmers, Hooded Americanism: The History of the Ku Klux Klan 333 (1981); Douglas M. Fraleigh & Joseph S. Tuman, Freedom of Expression in the Marketplace of Ideas 143 (2010).

Johnson said, in reaction to the Klan's murder of a white activist, "we will not be intimidated by the terrorists of the Ku Klux Klan any more than the terrorists of the Viet Cong ... I shall continue to fight [the Klan] because I know their loyalty is not to the United States but to a hooded society of bigots." <sup>73</sup>

As cited in the US Supreme Court case *Virginia v. Black*, a 1991 encyclopedia of the Klan described the Klan as the "the world's oldest, most persistent terrorist organization." <sup>74</sup> In his dissent from that decision, Justice [\*273] Clarence Thomas said that the Klan was "a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods." <sup>75</sup>

Klan violence, and other white supremacist violence, such as lynchings, were largely group-based. In contrast, Roof's mass shooting was a "lone wolf" or "stray dog" terrorist attack. <sup>76</sup> Yet the general intent was the same: to reestablish complete white supremacy through violence. The very purpose of inciting a "race war" would be to win the war, either by complete genocide (as imagined in *The Turner Diaries*, the white supremacist novel that inspired Timothy McVeigh) or by establishing a Jim Crow-or Apartheid-style regime (which is what the Klan succeeded in doing through its terrorism). <sup>77</sup> Either way, this would involve violence meant to force changes in the civilian population and the government, as the Article argues in detail in the next Part.

### III. Why Dylann Roof is a Terrorist Under Federal Law

For several statutory and administrative purposes, Dylann Roof qualifies as a terrorist under federal law. First, Roof's attacks without any doubt fit the definition of terrorism in the USA PATRIOT Act, which is also the FBI's official definition of domestic terrorism. Second, a strong argument can be made that Roof's attack qualifies for the terrorism sentencing enhancement. Third, even if it does not qualify for the sentencing enhancement, the U.S. Sentencing Commission's notes in establishing the terrorism enhancement make clear that an upward deviation from the sentencing guidelines would be warranted in this case. Finally, since the Charleston massacre fits standard federal definitions of terrorism, the fact that it was a terrorist offense can be used as an aggravating factor under federal law, as part of the jury's decision whether to impose the death penalty.

#### A. The USA PATRIOT Act's and FBI's Definition

Under the USA PATRIOT Act, "domestic terrorism" is defined as including all "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;" and which "(B) appear to be intended (i) to intimidate or coerce a civilian population; [\*274] (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction,

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<sup>73</sup> Cunningham, *supra* note 58, at 74.

<sup>74</sup> *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) (citing M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* vii (1991)).

<sup>75</sup> *Id.* at 389.

<sup>76</sup> Brian Michael Jenkins, *Stray Dogs and Virtual Armies: Radicalization and Recruitment to Jihadist Terrorism in the United States Since 9/11*, Rand Corp. (2011), [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2011/RAND\\_OP343.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP343.pdf) [<http://perma.cc/JF9E-76VF>]. The advantage of the term "stray dog" is that it lacks the noble or romantic connotation of "lone wolf." A more neutral and common alternative to "lone wolf" is "lone actor terrorism." Paul Gill, John Horgan & Paige Deckert, *Bombing Alone: Tracing the Motivations and Antecedent Behaviors Lone-Actor Terrorists*, 59 J. Forensic Sci. 425 (2014).

<sup>77</sup> See Nancy Egan, *The Turner Diaries*, in *The SAGE Encyclopedia of Terrorism* 591 (2d ed. 2011).

assassination, or kidnapping;" and which "(C) occur primarily within the territorial jurisdiction of the United States."<sup>78</sup> This definition is prominently featured by the FBI as the official government definition of domestic terrorism.<sup>79</sup>

It is important to note that due to the "or" under "(B)," any one of the three options (relating to a civilian population, influencing government policy, and mass destruction) is enough to qualify a crime as terrorism. In the case of Roof's attack, it qualifies without any doubt under the first option, and also qualifies under the second option. The third option may be relevant, since Roof technically assassinated an official who was among the church members he killed, but it is unclear whether he knew she was an elected official.

### 1. Intimidating or Coercing a Civilian Population

Obviously, murder is dangerous to human life and against the law, and Roof's attack took place within the United States. The first real question is thus whether Roof intended his murders to intimidate or coerce a civilian population. The answer is yes, without any conceivable doubt. Any murder motivated by a racist ideology is inherently intimidating to the hated population, and any attacker committing such murder clearly intends for that intimidation to occur.

Not only did Roof post a manifesto outlining his white supremacist views, he also blamed blacks for "raping our women" and taking over "our country," likely indicating that his act was motivated by the desire to intimidate blacks from committing crimes against whites and from having influence in general on American society. In addition, he specifically left one victim alive so that she would report what happened.<sup>80</sup> Roof may have feared his manifesto would never be found and thus hoped his statements during the killing would be disseminated in order would terrorize (i.e., intimidate or coerce) the black population.

### 2. Influencing Government Policy Through Intimidation or Coercion

An alternative option for qualifying as terrorism is applicable if Roof's attack was intended "to influence the policy of a government by intimidation or coercion."<sup>81</sup> It is clear that Roof would like to replace the present multicultural model of government with a white supremacist regime. He prominently **[\*275]** displayed not only the Confederate flag but also the flags of other racist regimes, such as Apartheid-era South Africa and white minority-rule Rhodesia, and Nazi symbols popular among white supremacists, such as the numbers eighty-eight and fourteen. Brutal white-only rule was obviously his preferred mode of government, and he must have intended his attack to contribute toward changing the government's policies to resemble these virulently racist regimes. He even posted pictures of himself burning and stamping on the American flag and wrote in his manifesto that "modern American patriotism is an absolute joke" because "White people are being murdered daily in the streets."<sup>82</sup> From this quote alone, it is clear that he intended his attack to intimidate the government into cracking down on the supposed scourge of black-on-white crime.

His manifesto said that it is not "too late for America or Europe," since even if whites "made up only 30 percent of the population we could take it back completely," but cautioned against "waiting any longer to take drastic action."<sup>83</sup> This clearly indicates that his "drastic action" is meant to stimulate a white supremacist movement that will take

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<sup>78</sup> [18 U.S.C. § 2331](#) (2012).

<sup>79</sup> Definitions of Terrorism in the U.S. Code, FBI, <http://www.fbi.gov/about-us/investigate/terrorism/terrorism-definition> [<http://perma.cc/2QSR-EN86>].

<sup>80</sup> Phillips, *supra* note 49.

<sup>81</sup> [18 U.S.C. § 2331](#) (2012).

<sup>82</sup> Brendan O'Connor, Here Is What Appears to be Dylann Roof's Racist Manifesto, Gawker (June 20, 2015), <http://gawker.com/here-is-what-appears-to-be-dylann-roofs-racist-manifest-1712767241> [<http://perma.cc/ULE9-LK7Z>].

<sup>83</sup> *Id.*

over the government. Needless to say, we can safely assume that such a takeover would be accomplished at least at some level by violence, intimidation, and coercion.

As if the manifesto could be any clearer that it is meant to outline his motivations for the attack, he goes on to write that "We have no skinheads, no real KKK, no one doing anything but talking on the internet. Well someone has to have the bravery to take it to the real world, and I guess that has to be me." <sup>84</sup> This demonstrates that he thought his attack would lead to white supremacist ideals being put into action. He ends by lamenting that he has no time to write some of his "best thoughts," but ends on a hopeful note, that there are "enough great White minds are out there already," suggesting that they will take up where he left off, inspired by his massacre. <sup>85</sup>

Thus, it is clear Roof planned his act to have maximum symbolism, and intended it to lead to political change. However, this second element--the desire to intimidate or coerce the government into changing policies--might be questioned because of the indirect nature of the causal sequence he might have imagined. Did he really think that a single terrorist attack would intimidate the government into enacting white supremacist government policies?

Yet the same question could be asked of any terrorist attack. Simply because it is absurd to believe that a single mass murder--as in Chattanooga or San Bernardino--would immediately lead to a shift toward the terrorists' preferred government policies, this does not mean that they did not seek to intimidate or coerce the government. Many terrorists would probably admit **[\*276]** that their attack was meant to intimidate the government and eventually achieve political change (such as a worldwide Caliphate as in the case of current ISIS-inspired jihadists), while at the same time acknowledging that their ultimate goal will not result from their actions alone. Rather, most terrorists probably imagine that their attack will foment change only in concert with later developments, such as further attacks inspired by theirs.

In fact, ISIS's causal imagination is if anything more fraught with magical thinking than that of white supremacists such as Roof. ISIS adherents encourage and commit attacks on the West in large part to stimulate Western armies to come and fight ISIS, since their messianic prophecies foretell a ground war of many countries against them, which they will miraculously win and go on to dominate the world. <sup>86</sup> Yet no one would seriously question the idea that ISIS-inspired attacks in the US are meant to intimidate or coerce the government.

In addition, it is important to note that terrorists such as Roof could never succeed in intimidating or coercing the civilian population without also affecting government policies through their violence. For blacks to be too afraid to vote or enter the political arena (an intimidated/coerced civilian population), as they were at the historical height of Klan terror, the government would have to be convinced, or afraid, to enforce the law (influencing government policy through intimidation/coercion). In a democracy with a functional security and legal apparatus, one cannot effectively intimidate or coerce the population (at least more than a minimal amount) without intimidating or coercing the government as well.

Roof told his friend and confessed to the government that he intended for the attack to spark a "race war." <sup>87</sup> At first glance, this may seem to complicate matters a bit on the question of whether he meant to change government policy through intimidation or coercion. Perhaps he did not care about the government policy, but only wanted to stimulate war between different races? Yet such a "war" could not take place without government being too scared

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<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Graeme Wood, What ISIS Really Wants, The Atlantic (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/> [<https://perma.cc/XC52-CMY8>]; Rukmini Gallimachi, U.S. Seeks to Avoid Ground War Welcomed by Islamic State, N.Y. Times (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/world/middleeast/us-strategy-seeks-to-avoid-isis-prophecy.html> [<https://perma.cc/Q5RV-5JJQ>].

<sup>87</sup> Blow, supra note 3.

to intervene (through intimidation or coercion) or actually joining in the fight on one side or the other (either way, as a policy change in reaction to violent intimidation).

In fact, "race war" as it has been depicted in the most popular white supremacist novel, *The Turner Diaries*, involves a separatist racist state which eventually takes control of the federal government through a campaign of mass killings.<sup>88</sup> The concept of race war is thus closely intertwined with the goal of achieving complete power over the government. A "race [\*277] war" should thus be understood as a way of referring to a violent white supremacist revolution which will prominently feature interracial battles, particularly whites killing blacks.

Regardless, any ideologically motivated attack on civilians should be understood as also intended to affect government policy by intimidation or coercion. Any ideological attacker can be presumed to intend their act to send a message to authorities, which they hope will influence policy in their favor. This is not as unrealistic as it may seem. It is conceivable (though perhaps not especially likely) that an attack like Roof's could cause some government officials or politicians, fearing additional attacks by white supremacists, to lean toward more racist policies or avoid anti-racist policies or messages.

Moreover, going further, any ideologically motivated violence can be presumed to be intended to intimidate or coerce both civilian populations and the government. This is because it is implausible to intimidate or coerce only one and not the other, at least beyond a de minimus amount. Any successful intimidation of the government into changing policies will not succeed without also intimidating the public against protesting and reversing the government's policy change. Any successful intimidation of the population will not succeed without intimidating the government from protecting the population.

Thus, any violent attack (like Roof's) intended to advance a particular ideology is necessarily intended to intimidate the government and civilian populations. Once the intention to advance an ideology through the attack is demonstrated (as in the case of Roof's manifesto explaining his motive and his statements during the shooting), this should be sufficient to establish that the attacker meant to coerce or intimidate both the government and civilian populations.

### 3. Mass Destruction, Assassination and Kidnapping

The final of the definition's three options is that the attack was intended to "affect the conduct of a government by mass destruction, assassination, or kidnapping."<sup>89</sup> This is the only prong of the definition that does not initially appear to be applicable. One of the murdered congregants was an elected official, and given all the research Roof did prior to the attack, it is possible he knew this. Yet his writings show no indication of this knowledge, or any specific plan to assassinate black officials (though that would certainly be a classic Klan tactic, and a necessary part of any race war). A race war as he probably envisioned it would involve such things as mass destruction (as in the *Turner Diaries*), but the statute appears to require that the defendant actually commit these acts. The only one he committed was assassination, and it may have been unknowingly.

**[\*278]**

### 4. Practical Consequences

Thus, the Charleston massacre definitely fits the government's definition of terrorism because it was clearly intended to intimidate or coerce black Americans. Roof also intended to influence government policy through intimidation, fulfilling the second alternative prong of the definition, since he wanted his attack to lead to a "race war" and the establishment of a white supremacist regime, and since it is evident that any ideologically motivated attack on civilians is also meant to send a message to the government. But what does this mean, as a practical matter? If all this is true, why was he not charged with terrorism?

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<sup>88</sup> Egan, *supra* note 77 at 592.

<sup>89</sup> [18 U.S.C. § 2331](#) (2012).

The answer is simple: he could not have been charged with terrorism, because the USA Patriot Act did not create a new crime of "committing terrorism" encompassing all crimes that fit within its definition of terrorism.<sup>90</sup> Even though a crime may qualify as terrorism under this definition, that does not mean the crime can be prosecuted as a terrorist crime. However, any crime fitting within this definition is classified as terrorism for administrative and investigative purposes. Since the Patriot Act expanded some of the government's surveillance powers, these powers are relevant for all terrorism investigations.<sup>91</sup>

Since Roof's attack clearly fits within the above definition, authorities should not hesitate to describe him as a terrorist and state that they are treating the murders as a terrorist attack in every respect. They could further explain that they would charge him with a terrorist crime, but none of the criminal statutes defining terrorist crimes apply specifically to his crime, since there are a limited number of such statutes, and they are all very specific. Authorities might even note that historically, many laws were passed to crack down on terrorists, such as the Ku Klux Klan Acts in the 1870s, but these laws did not use the term terrorism.<sup>92</sup> The absence of the word terrorism in a charging document and the applicable offense does not mean the government cannot officially classify and publicly refer to a crime as terrorism.

## B. The Terrorism Sentencing Enhancement

Under current U.S. Sentencing Guidelines, any felony that "involved, or was intended to promote, a federal crime of terrorism" is to be sentenced under a much higher guideline range.<sup>93</sup> This sentencing enhancement can dramatically increase the recommended penalty in many cases.<sup>94</sup> For example, [\*279] an offense that would normally only be punished with 10 years' imprisonment could qualify for a life sentence after application of the enhancement.<sup>95</sup>

Although since the Supreme Court's decision in *United States v. Booker*, sentencing guidelines are not mandatory, judges typically sentence defendants within the guideline range.<sup>96</sup> Even without any terrorism enhancement, Dylann Roof will undoubtedly receive either a life sentence without possibility of parole or the death penalty. After all, he killed nine people, which surely calls for the maximum penalties available under law.<sup>97</sup> However, for the sake of principle, and due to potential applications to similarly-motivated cases with less certain sentencing outcomes, this Article demonstrates that the terrorism enhancement should apply to Roof. It further argues that government should seek the enhancement at trial, as a symbolic gesture demonstrating that they consider Roof's killings an act of terrorism as well as a hate crime.

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<sup>90</sup> McLaughlin, *supra* note 34.

<sup>91</sup> *Id.*

<sup>92</sup> See Pub. L. No. 42-22, [17 Stat. 13 \(1871\)](#).

<sup>93</sup> U.S. Sentencing Guidelines Manual § 3A1.4 (2015).

<sup>94</sup> James P. McLaughlin, Jr., Deconstructing United States Sentencing Guidelines Section 3a1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations, [28 Law & Ineq. 51, 75-76 \(2010\)](#). For this reason, McLoughlin aptly describes the enhancement as "draconian." *Id.* at 54. Particularly in cases involving less serious crimes, applying the enhancement could potentially lead to disproportionate punishments. *Id.* at 57-58. This Article argues that the prosecutors should seek the enhancement in Roof's case chiefly due to its symbolic significance. See *infra* note 94 and accompanying text.

<sup>95</sup> Francesca Laguardia, Terrorists, Informants, and Buffoons: The Case for Downward Departure As a Response to Entrapment, [17 Lewis & Clark L. Rev. 171, 174 n.19 \(2013\)](#).

<sup>96</sup> Michael W. McConnell, The Booker Mess, [83 Denv. U. L. Rev. 665, 673 \(2006\)](#).

<sup>97</sup> Under federal sentencing guidelines, the presumptive sentence for a single count of first-degree murder is a life sentence. U.S. Sentencing Guidelines Manual § 2A1.1.a, 404 (2015).



To qualify for the terrorism sentencing enhancement, a crime must involve or be intended to promote a federal crime of terrorism. A federal crime of terrorism, for the purposes of the sentencing guidelines, is any crime which "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and which is enumerated under [18 U.S.C. 2332b\(g\)\(5\)](#).<sup>98</sup> The offenses listed under 2332b(g)(5) include numerous specific statutes, covering such topics as assassinating federal government officials, employing weapons of mass destruction, bombing public places or facilities, providing material support for foreign terrorist organizations, and using incendiary devices on aircraft.<sup>99</sup>

This definition of a "federal crime of terrorism" is quite different from the Patriot Act's general definition of domestic terrorism, even though the sentencing enhancement was updated with the intention of encompassing domestic terrorism. First, it requires that the crime have been meant to influence the conduct of government through intimidation or coercion, or retaliate against government conduct, and fails to include another option regarding the intimidation and coercion of civilian populations. Second, the use of a limited list of offenses, each of which is itself very specific, has the effect of covering some crimes but not others. At first blush, it may seem **[\*280]** unlikely that the enhancement would apply to Roof's attack, given that he does not seem to have committed any of the crimes in the enumerated list.

Yet two factors make it possible to apply the enhancement in this case. First, the offense need only intend to "promote" one of the enumerated crimes, and it is clear that the "race war" he meant his killings to promote would involve commission of at least some of these crimes. As noted above, a "race war" as imagined by contemporary white supremacists necessarily involves battling the government as well as minority civilians. Certainly, any white supremacist insurgency against the government would involve, at a minimum, killing some federal government officials, and it is likely that many of the other listed offenses would be committed as well, such as bombing government property, or committing murder during an attack on a federal facility. The most famous depiction of a race war, the highly influential Turner Diaries, dubbed "the bible of the racist right,"<sup>100</sup> involves killing numerous politicians, and even using nuclear weapons against the government.<sup>101</sup>

Second, the facts needed for the application of the enhancement need only be proven by a preponderance of the evidence. Thus, if a fact finder can conclude by a preponderance of the evidence that Roof intended to influence or retaliate against government conduct through intimidation or coercion, and that he intended to promote any of the enumerated crimes, the enhancement can be applied. As argued above, there is ample reason to conclude that Roof meant to affect government conduct, and to promote a race war that would necessarily entail some of the enumerated federal terrorist crimes. For these reasons, it seems clear that the offense can be applied.

If it can be applied, it should. As noted by Professor Wadie Said, the terrorism enhancement provides a "vehicle of an expressive nature, to comment on [prosecutors' and courts'] deep disapproval and condemnation of terrorism."<sup>102</sup> Certainly, charging someone with hate crimes serve a similar purpose. Yet since the Charleston shootings fit the federal definition of domestic terrorism, as established above, it would seem inappropriate, and would denigrate the seriousness of the offense, to avoid even attempting to apply the enhancement. A failure to try, even if in fact motivated by legal uncertainty about its application, would be easily interpreted as suggesting that white supremacist terrorism is less important or blameworthy than jihadi terrorism (where the enhancement is more commonly applied).

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<sup>98</sup> [18 U.S.C. § 2332b\(g\)\(5\)\(A\)](#) (2012).

<sup>99</sup> *Id.*

<sup>100</sup> Camille Jackson, *The Turner Diaries, Other Racist Novels, Inspire Extremist Violence*, Southern Poverty Law Center Intelligence Rep., Oct. 14, 2004, <https://www.splcenter.org/fighting-hate/intelligence-report/2004/turner-diaries-other-racist-novels-inspire-extremist-violence> [<https://perma.cc/PS3B-YJC8>].

<sup>101</sup> *Id.*; Bruce Hoffman, *Inside Terrorism* 113 (2006).

<sup>102</sup> Wadie E. Said, *Sentencing Terrorist Crimes*, [75 Ohio St. L. J. 477, 480 \(2014\)](#).

In fact, the enhancement has been successfully applied in various non-jihadi contexts, including cases involving conspiracies to bomb abortion [\*281] clinics.<sup>103</sup> This record of success provides further reason for seeking the enhancement. Even if the result of the enhancement would be a recommended sentence of 400 years instead of 200 years, which would make no practical difference, the symbolism is important. The public must be assured that the government takes racist terrorism as seriously as jihadi terrorism.

### C. Upward Departure from the Sentencing Guidelines

Even if the sentencing enhancement for some reason cannot be applied, the U.S. Sentencing Commission, in its notes accompanying the sentencing enhancement, provides that an upward departure from the standard guidelines, as high as the top of the guideline range that would have resulted from an application of the enhancement, is warranted under two conditions.<sup>104</sup>

The first condition for upward departure is that the offense was intended to influence government conduct through intimidation or coercion or to retaliate against the government, but did not involve or intend to promote any of the enumerated offenses.<sup>105</sup> This would allow a sentence as high as that provided under the sentencing enhancement, if the court found that Roof meant to influence or retaliate against the government but fails to find that he meant to promote any of the offenses. Thus, if for some reason the court does not consider the implications of Roof's desire to start a race war, then they can still seek an upward departure as long as the court concludes he meant to influence or retaliate against the government.

This should not be difficult to prove by a preponderance of the evidence. At the very least, Roof's manifesto and statement during the shooting indicates that he sought to draw attention to what he saw as the problem of black-on-white crime, including murder and rape. It can be safely assumed from this that he meant to send a message to the government that they should do more to prevent or harshly punish black-on-white crime. It is implausible that he meant his murders to intimidate only civilians, and not the government. His message of white supremacy in his manifesto was clearly meant as a message to all society, not simply those who are not part of the government.

The second condition for upward departure is that the defendant intended to promote one of the enumerated defenses, but intended to intimidate or coerce a civilian population rather than affect the government's conduct or retaliate against the government.<sup>106</sup> If the court acknowledges that Roof sought to intimidate African-Americans, and accepts the argument that he meant to promote a race war that would necessarily involve some of the enumerated offenses, but is somehow unable to conclude that he meant to [\*282] intimidate the government, then the court could impose the same penalties as would be available under the sentencing enhancement.<sup>107</sup>

### D. The "Terrorism" Aggravating Factor for Death Penalty Purposes

Roof also qualifies for the "terrorism" aggravating factor used by judges or juries as part of the decision whether to impose the death penalty in federal trials. Without venturing any opinion on whether the death penalty is appropriate in general or in this specific case, the Article simply shows the applicability of this aggravating factor to document another way in which the Charleston massacre qualifies as terrorism under federal law.<sup>108</sup> Since state and federal

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<sup>103</sup> McLoughlin, *supra* note 94, at 61-62.

<sup>104</sup> See U.S. Sentencing Guidelines Manual § 3A1.4 cmt. n.2, n.4 (2015).

<sup>105</sup> *Id.* § 3A1.4.

<sup>106</sup> See *id.* § 3A1.4 cmt. 4 (2015).

<sup>107</sup> In short, the only circumstance in which the court could not apply the enhanced penalties is if the court concluded that Roof meant to intimidate the civilian population and not the government, and did not intend to promote any of the enumerated offenses.

<sup>108</sup> Some, including Hillary Clinton, have supported the decision to seek the death penalty on Roof, see Abby Phillip, Hillary Clinton Supports Death Penalty for Accused Charleston Shooter Dylann Roof, *Wash. Post* (June 2, 2016),

prosecutors have decided to seek the death penalty for Roof, this could potentially have practical consequences for the jury's decision of whether to impose the death penalty.<sup>109</sup>

Under the constitutionally-required bifurcation of death penalty procedure, the defendant first has a trial on the question of guilt, and then has a separate proceeding to determine whether the jury will apply the death penalty.<sup>110</sup> The jury then must consider all the statutory aggravating and mitigating factors.<sup>111</sup> In federal trials, if the jury unanimously decides that the aggravating factors outweigh the mitigating factors and votes for the death penalty, the judge must abide by this decision.<sup>112</sup>

Under federal law, one of the aggravating factors is that "the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism."<sup>113</sup> Since no particular definition for terrorism is specified in the statute, the definition of the [\*283] Patriot Act is probably applicable. This aggravating factor was applied by the jury in the capital trial of John Muhammed, one of the "D.C. Snipers." The Virginia Supreme Court upheld the application of the terrorism aggravating factor in that case.<sup>114</sup>

In the Roof case, since his crime qualifies as terrorism under federal statutes, this would be one aggravating factor the jury could find applicable and consider as part of its death penalty decision. This would perhaps have more of an impact if there were a separate aggravating factor for terrorism, rather than a factor lumping terrorism together with general premeditated murder. Nonetheless, the jury's conclusion that Roof's crime qualifies as terrorism and thus qualified for that prong of this aggravating factor could possibly sway the jury toward imposing the death penalty. That is, if the jury finds that the aggravating factor applies both because the attack was premeditated and because it was an act of terrorism, this could enhance the significance of this aggravating factor for the jury and influence it to vote for capital punishment.

#### IV. Why It Matters

Why does it matter that Roof is a terrorist under federal law? It matters because recognizing his crime as terrorism would promote more effective counterterrorism policies, and could have positive societal consequences for race relations and terrorism prevention. It would promote more effective counterterrorism policy by making it clear that Roof's crime is policy-relevant (rather than a one-off, idiosyncratic event with no particular relevance to policy), by promoting government accountability by making the government take responsibility for failing to prevent the attack

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<https://www.washingtonpost.com/news/post-politics/wp/2016/06/02/hillary-clinton-supports-death-penalty-for-accused-charleston-shooter-dylann-roof> [<https://perma.cc/TV34-WKFL>], while others (including Senator Bernie Sanders and prominent African-American journalist Ta-Nehisi Coates) have opposed it, see Sam Stein, Bernie Sanders Opposes Death Penalty for Dylann Roof, huff. post (May 25, 2016), <http://www.huffingtonpost.com/entry/bernie-sanders-opposes-death-penalty-for-dylann-roof> us 57458ec7e4b0dacf7ad3719c [<https://perma.cc/ZK4H-SKKH>]; Ta-Nehisi Coates, Killing Dylann Roof: A year after Obama saluted the families for their spirit of forgiveness, his administration seeks the death penalty for the Charleston shooter, Atlantic (May 26, 2016), <http://www.theatlantic.com/politics/archive/2016/05/dylann-roof-death-penalty/484274/> [<https://perma.cc/J9UV-A5B7>]. See also Julianne Malveaux, Dylann Roof Doesn't Deserve the Death Penalty, Daytona Times (June 2, 2016), <http://daytonatimes.com/2016/06/dylann-roof-doesnt-deserve-the-death-penalty/> [<https://perma.cc/7HVL-246J>].

<sup>109</sup> See Blinder, *supra* note 27 and accompanying text.

<sup>110</sup> Jesse Cheng, Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense, *35 Law & Soc. Inquiry* 39, 40-42 (2010).

<sup>111</sup> [18 U.S.C. § 3592](#) (2012).

<sup>112</sup> [18 U.S.C. § 3594](#) (2012).

<sup>113</sup> [18 U.S.C. § 3592\(c\)\(9\)](#) (2012).

<sup>114</sup> *Muhammed v. Com. of Va.*, 611 S.E.2d 537, 553, 558 (2005), superseded *269 Va. 451*; Adam Liptak, Virginia Justices Set Death Sentence in Washington Sniper Case, N.Y. Times (Apr. 23, 2005), <http://www.nytimes.com/2005/04/23/us/virginia-justices-set-death-sentence-in-washington-sniper-case.html> [<https://perma.cc/ZG8W-7SXV>].

(and other similar terrorist attacks), and by stimulating a more reasonable distribution of counterterrorism resources, in which more resources are put into preventing white-supremacist and anti-government terrorism. It could have other positive societal consequences as well, by acknowledging the long history of white supremacist terrorism in the U.S., placing additional moral opprobrium on racist violence, reducing Islamophobia by disentangling the stereotypical conflation of terrorism and Islam, and ensuring that citizens understand the importance of non-Muslim terrorism, so that they will be more likely to report to the government any extremist with violent plans.

## **[\*284]**

### A. Counterterrorism Policy

#### 1. Establishing Policy Relevance

Labeling the Charleston massacre as terrorism is important because it makes it clear that it is relevant to policymaking, rather than an isolated, random event with no connection to larger ideological trends and security concerns. Many have noted a tendency in the media to immediately ascribe mass shootings by white males to mental illness, rather than examining ideological motives that may have been present.

Even Senator Lindsey Graham, who did call Roof's shooting "domestic terrorism" rather than a "random act of violence," appeared to minimize its importance, describing Roof as "a whacked out kid who follows the teachings of whacked out people," rather than a member of an "organized effort to hold territory and expand power," as with ISIS terrorists.<sup>115</sup> On another occasion, he dismissed Roof as "one of these whacked out kids," saying that he did not "think it's anything broader than that," just a "young man who is obviously twisted."<sup>116</sup>

While it is true that Roof was a lone terrorist with no clear connections to an organized terrorist group, it is not helpful to suggest that mental illness rather than ideological conviction was the primary driver of the attack. It is well-documented that there are thousands of hate groups across the country, and many internet forums featuring radical white supremacists. He was inspired by a movement, by no means an extremely successful one that is fomenting mass terror with collectively-organized attacks, but certainly a significant movement that has the potential to inspire additional terrorist attacks. Indeed, as noted above, since 9/11 there were more domestic fatalities from white-supremacist or anti-government domestic attacks than from jihadi attacks (that is, until Omar Mateen killed 49 people in Orlando). This alone should establish beyond any doubt the policy relevance of attacks like Roof's.

President Obama's remarks about the attack stressed that it drew inspiration from a history of racist violence that was "not random," and urged that the public respond by removing the Confederate flag and working toward eliminating racial disparities in employment and the criminal justice system.<sup>117</sup> Of course, another important way to acknowledge the fact that this attack is "not random" is to treat it as terrorism, and evaluate its relevance **[\*285]** for various aspects of government policy, which could potentially be adjusted to prevent such attacks.

#### 2. Promoting Accountability

Acknowledging that the Charleston massacre was a terrorist attack would also promote government accountability, since it would force the government to admit that a terrorist attack occurred on its watch, and they failed to prevent it. This could serve as an appropriate spur toward reexamining current policy and determining whether further efforts can be made to prevent similar attacks. Avoiding the terrorist label, by contrast, amounts to playing politics with the victims' lives, skirting reality in order to avoid political embarrassment.

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<sup>115</sup> Martin, *supra* note 41.

<sup>116</sup> Maeve Reston, Lindsey Graham: Niece Went to School With Shooting Suspect, CNN (June 18, 2015), <http://www.cnn.com/2015/06/18/politics/lindsey-graham-charleston-shooting/> [<https://perma.cc/F37F-5QJU>].

<sup>117</sup> President Barack Obama, Remarks by the President in Eulogy for the Honorable Reverend Clementa Pinckney, (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> [<https://perma.cc/2V2W-4KLL>].

Indeed, as a purely political or strategic matter, it is in the interests of executive branch officials to maximize the number of criminal convictions that are classified as terrorism (to exaggerate their success in catching terrorists), while minimizing the number of actual attacks that are labeled as terrorism (to understate their failure to prevent attacks).<sup>118</sup> This latter tendency, and not only the perceptions that jihadi terrorism is uniquely serious or that right-wing terrorism is a less grave threat, may be one of the reasons why the Roof attack has not clearly been called terrorism.

As an example, critics have commonly lambasted the government for classifying Nidal Hasan's shooting at an Army base at Fort Hood, Texas as "workplace violence" rather than terrorism.<sup>119</sup> Oddly, even though President Obama eventually described Hasan's shooting as a terrorist attack,<sup>120</sup> and the Army classified the act as terror-related in order to enable it to award Purple Hearts to the victims,<sup>121</sup> other elements of the government have refrained from switching their classification from "workplace violence" to terrorism.<sup>122</sup>

This reticence to call terrorist attacks what they are, apart from making the government seem disingenuous, can be seen as an attempt to avoid accountability, to avoid having to explain why they were not able to prevent this attack and detail what they will do to ensure it does not happen again. At [\*286] least in the case of Hasan, since the target was a branch of the government, lengthy and detailed reports have been filed analyzing the incident and the possible ways in which it could have been prevented.<sup>123</sup> Attacks on civilians like Roof's, however, do not appear to have galvanized the same level of self-reflection. Clearly labeling the shooting as a terrorist attack would give impetus to a greater effort to understand this incident and prevent further acts of racist terrorism.

### 3. Improving Counter-Terrorism Resource Allocation

Another possible result of classifying the Charleston massacre as a terrorist attack would be the acknowledgement that counterterrorism resources need to be better balanced in proportion to the actual threats different forms of terrorism demonstrably pose. Thus, not only would designating the attack as terrorism establish its policy relevance in general, but it could also potentially lead to rational resource allocation changes and other important policy shifts.<sup>124</sup>

Such policy changes could have the effect of preventing terrorist attacks. Previous research has documented the paucity of resources the government devotes to investigating anti-government or white supremacist extremists, and has shown that informants are used much more aggressively in jihadi and left-wing terrorism investigations than in

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<sup>118</sup> See Jesse J. Norris, Why the FBI and the Courts are Wrong about Entrapment and Terrorism, *84 Miss. L.J.* 1257 (2015).

<sup>119</sup> Anita Belles Porterfield and John Porterfield, Death on Base: The Fort Hood Massacre 167 (2015).

<sup>120</sup> See Politics in the News: Obama Urges Americans Not to Give in to Fear, Nat. Pub. Radio (Dec. 6, 2015), <http://www.npr.org/2015/12/07/458742090/politics-in-the-news-Obama-White-House-address-on-terrorism> [https://perma.cc/U6S3-H5HU].

<sup>121</sup> The classification change was made in reaction to new legislation broadening the definition of attacks by foreign terrorist organizations. See U.S. Dept. of Defense, Army Approves Awards for Victims of 2009 Fort Hood Attack, Feb. 6, 2015, <http://www.defense.gov/News/News-Releases/News-Release-View/Article/605373> [https://perma.cc/KX5F-A2JV].

<sup>122</sup> See Susan Crabtree, Fort Hood Victims See Similarities to Benghazi, Wash. Times (Oct. 18, 2012), <http://www.washingtontimes.com/news/2012/oct/18/fort-hood-victims-see-similarities-to-benghazi> [https://perma.cc/DYE5-9XJ8].

<sup>123</sup> See Final Report of the William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas, on November 5, 2009 <https://www.hsdl.org/?view&did=717443> [https://perma.cc/CM2T-V6Y8].

<sup>124</sup> Wheeler, supra note 15 ("Whatever we call crimes targeting African Americans by terrorists--allegedly including Roof--who want to reinstitutionalize white supremacy, resources matter. That means these names matter, because the resources are tied to that word, 'terrorism.'").

white supremacist or anti-government terrorism investigations.<sup>125</sup> In addition, it has been documented that not only have white supremacist or anti-government terrorist attacks resulted in more deaths than jihadi terrorism since 9/11 (before the Orlando attack), but also the white supremacist and anti-government terrorists **[\*287]** were much more likely to have been armed and to have procured the arms themselves (rather than through an informant).<sup>126</sup>

As mentioned above, the fierce conservative reaction to a 2009 Homeland Security report on right-wing terrorism prompted the government to reduce what little resources were already devoted to this threat. It seems clear that more resources need to be focused on the threat of white supremacist and anti-government terrorism, while at the same time ensuring that investigations do not result in entrapment, as seems to have occurred to a significant extent in the jihadi and left-wing contexts.<sup>127</sup> In addition, it is possible that fewer resources are needed to prevent jihadi terrorism, since the over-emphasis on this area has led to a number of questionable convictions and resource allocation decisions.<sup>128</sup> Scholars have argued for years that cost-benefit analysis would not justify the vast levels of current spending to prevent jihadi terrorism.<sup>129</sup>

## B. Societal Consequences

### 1. Confronting Racism and the History of Racist Terrorism

Correctly identifying Roof's attack, and other premeditated white supremacist violence, as terrorism could help undermine racism in America in two ways. First, calling the attack terrorism is a convenient springboard for publicly acknowledging and exploring the current implications of the long history of racist terrorism inflicted by whites against blacks, particularly in the South between the Civil War and the 1970s.<sup>130</sup> Second, publicly and consistently referring to such attacks as terrorism can help further delegitimize racism in the public consciousness, by demonstrating how it can lead to the ultimate evil of murderous terrorism.

In an eloquent eulogy for one of Roof's victims, President Obama called for taking this opportunity to remove the Confederate flag from South Carolina's state capitol, because doing so would acknowledge that slavery, Jim Crow, and "resistance to civil rights for all people" were wrong, and would thus "be one step in an honest accounting of America's history; a **[\*288]** modest but meaningful balm for so many unhealed wounds."<sup>131</sup> President Obama

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<sup>125</sup> See Norris & Grol-Prokopczyk, *supra* note 62; Norris, *supra* note 25. It should be noted that aggressive informant operations are not necessarily desirable, since they may induce people to commit crimes they would not have otherwise committed, resulting in entrapment or entrapment-type abuses. More resources should be expended to prevent white-supremacist and anti-government terrorism, and increasing the number of informants infiltrating these groups is presumably necessary as part of that effort. Yet care needs to be taken to ensure that these informants are not manufacturing crime that would not otherwise exist. A greater reliance on purely passive forms of surveillance, such as informants paid whether or not their work leads a conviction, or the use of electronic surveillance when legally permitted, would help avoid entrapment-type abuses by informants. As advocated elsewhere, authorities should carefully analyze each proposed and ongoing informant operation to ensure it is targeted toward people already planning violence, rather than passive sympathizers who had shown no signs of being committed to acting on their violent beliefs. See Norris, *supra* note 63, at 1318.

<sup>126</sup> See Bergen et al., *supra* note 23.

<sup>127</sup> See generally Norris & Grol-Prokopczyk, *supra* note 62; Norris, *supra* note 25.

<sup>128</sup> *Id.*

<sup>129</sup> See generally John Mueller & Mark G. Stewart, *Terror, Security, and Money* (2011).

<sup>130</sup> As an illustration, people commonly refer to the Oklahoma City bombing as the worst act of terrorism in American history until that point, but in fact, it may not have even been the worst act of terrorism in Oklahoma history. See Cobb, *supra* note 55. The 1921 Tulsa race riots, for example, were an ideologically inspired mass attack of whites against blacks, which killed as many as 300 people (though many estimates are lower), injured at least 800, and destroyed enormous amounts of property. See *id.* Scott Ellsworth, *Death in a Promised Land: The Tulsa Race Riot of 1921*, 67-69 (1992); Cobb, *supra* note 55.

also saw removing the flag as "an expression of the amazing changes that have transformed this state and this country for the better," perhaps a reference to the lack of open racism and the cross-racial collaboration sometimes seen in current Southern politics.<sup>132</sup>

Similarly, referring to racist killings like Roof's as terrorism can help the country understand and come to terms with the long history of racist terrorism, which is largely unknown and ignored. Certainly, Attorney General Lynch's description of "hate crimes" as the "original terrorism" acknowledges the terroristic history of the South, yet this is just an isolated statement, merely the beginning in what needs to be a national conversation.

Law professor, attorney, and racial justice activist Bryan Stevenson has argued that the Charleston attack illustrates "our failure to deal more effectively" with "our racial history of violence and terror directed at black people," and the "narrative of white supremacy" that still permeates the culture in insidious ways.<sup>133</sup> For example, he identifies the Southern "counter-narrative" of Confederate pride, in which Confederate memorials abound, yet without any honest and self-critical historical references to the region's brutal history of slavery and racial terrorism.<sup>134</sup> He also noted that racist attitudes still permeate the country, including but not limited to the South, leading to a "presumption of dangerousness" that drives the vast and unjustified racial disparities in the criminal justice system.<sup>135</sup> Stevenson suggested these attitudes might have created the context in which Roof's white supremacist beliefs were tolerated or at least never challenged in his day-to-day conversations.<sup>136</sup>

As Professor Stevenson seems to argue, correctly describing the Charleston shooter as a terrorist is one way to begin a conversation about the appalling extent of such terrorism in the history of the South, the legacy of that terrorism today, and the continuing existence of the same attitudes that justified that terrorism. Public conversations about these important issues could undermine the racism-tinged counter-narrative that permeates the minds of many in the South, and also elsewhere, such as those who perceive efforts to address racism as an anti-white conspiracy.

**[\*289]** More generally, referring to Roof's massacre, and attacks like it, as terrorism and not only as hate crimes places additional moral opprobrium on all violence motivated by racist ideology. This is entirely appropriate, since attacks from within, attempting to justify and worsen America's most glaring form of inequality are just as vile, just as worthy of wholehearted societal condemnation, as attacks meant to advance obscure ideologies from across the world.<sup>137</sup>

As Professor Daniel Medwed has expressed it, hate crimes are seen as a "crime against some," while terrorism is understood as a "crime against us all."<sup>138</sup> He notes that "there is this symbolic idea that a hate crime is more personal and it doesn't relate to broader issues in society. Whereas an act of terrorism is often associated with a larger political movement. And by classifying it as a hate crime someone might diminish its larger implication that

<sup>131</sup> President Barack Obama, Remarks by the President in Eulogy for the Honorable Reverend Clementa Pinckney (June 26, 2015), <https://www.whitehouse.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> [<https://perma.cc/2V2W-4KLL>].

<sup>132</sup> Id.

<sup>133</sup> Corey G. Johnson, Bryan Stevenson on Charleston and Our Real Problem with Race, Marshall Project (June 24, 2015), <https://www.themarshallproject.org/2015/06/24/bryan-stevenson-on-charleston-and-our-real-problem-with-race#.ovlgRNSr3> [<https://perma.cc/C8EU-PXQR>].

<sup>134</sup> Id.

<sup>135</sup> Id.

<sup>136</sup> Id.

<sup>137</sup> Obama, *supra* note 131.

<sup>138</sup> Martin, *supra* note 39.

surely this was an individual act by Dylan [sic] Roof." <sup>139</sup> This is a compelling rationale for using the terrorism label in cases such as Roof's. Terrorism is reasonably seen as a crime against society as a whole, since it uses violence in an attempt to move society toward a certain ideological goal, while hate crimes may often simply be seen as isolated and impulsive acts against a disliked group, with fewer implications for society in general. <sup>140</sup>

## 2. Balancing Media Coverage

If government officials consistently refer to all ideologically motivated killings as terrorism, including those by white supremacists and anti-government groups, this will likely influence the media to give greater attention to these crimes. This would result in a greater balance in terrorism coverage, so that jihadi and other forms of terrorism are given more equal coverage. As [\*290] noted above, white supremacist and anti-government attackers are less likely to be labeled as terrorists in the media, and are less likely to be covered by national news outlets. As briefly described in the Introduction, there is a case to be made for treating ideologically motivated crimes quietly and avoiding the use of the term terrorism altogether, thus avoiding unreasonable fears and denying violent ideologues the publicity and fear they desire. <sup>141</sup>

Yet if the term terrorism is going to continue to be used, and realistically it is clear that it will, then every instance of ideologically-inspired murder or attempted murder should be national news. The country has made it a priority to prevent such attacks, and the public as a whole deserves to be informed regarding all of them. This is important for correcting the misperception that terrorism is primarily committed by jihadists, and for encouraging accountability and a rational distribution of counterterrorism resources.

## 3. Countering Islamophobia

The government's accurate portrayal of attacks such as Roof's as terrorism, and the more balanced media attention to different varieties of terrorism, could potentially have the salutary effect of reducing Islamophobia. If Americans understand that non-Muslim terrorists are just as serious of a threat, and perhaps even a bigger threat, than jihadi terrorists, then they may be less likely to associate all Muslims with terrorism, and single Muslims out for discrimination or violence. Associating the term terrorism primarily with Muslims, as do most politicians and media commentators, is itself arguably Islamophobic, since it employs a neutral definition in a biased manner against a particular group and encourages Islamophobia among the general public.

Islamophobia is a serious social problem, as numerous Muslim-Americans have experienced hate crimes and/or terrorist attacks such as mosque arsons and shootings. <sup>142</sup> In fact, one unintended consequence of the FBI's sting

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<sup>139</sup> Id.

<sup>140</sup> Hate crimes may be driven by ideology or societal goals in many instances, but when all the available evidence shows is that the offender chose the target based on race, then the crime only legally qualifies as a hate crime. See [18 U.S.C. § 249](#) (2012). When there is evidence that a particular ideological goal motivated the crime against a member of a particular group, such as desire to re-establish white supremacy in general as in Roof's case, or a more specific goal such as to racially segregate a neighborhood or discourage interracial dating, then the crime should qualify as both a hate crime and an act of terrorism. In such a case, failing to properly acknowledge that the crime is terrorism detracts from the crime's significance and gravity. Hate crimes are certainly worthy of the greatest societal condemnation, but acts of terrorism, unlike individual hate crimes, are often meant in effect as acts of war against society, giving them a greater potential for leading to repeated attacks or large-scale massacres. This is not to say that terrorism is always "worse" than hate crimes; perhaps it would be possible to imagine examples in which a hate crime (that does not also qualify as terrorism) would be more reprehensible than a terrorist attack (which was not also a hate crime). In any case, even if terrorism is not necessarily always worthy of stronger condemnation than hate crimes, the fact is that combating terrorism is a national priority, and appropriately labeling all crimes fitting the definition as terrorism is a way of stimulating additional preventative efforts against such attacks. See *supra* Part IV.A.

<sup>141</sup> See *supra* note 25 and accompanying text.



operation in Oregon involving Mohamed Osman Mohamud, which was criticized by some as a possible example of entrapment, was to inspire a firebomb attack on a mosque in the same city as the defendant.<sup>143</sup> Perhaps a more balanced terrorism discourse in the media and government, instead of a single-minded focus on jihadi terrorism, would play some role in preventing anti-Muslim hate crimes and terrorism, as well as other forms of discrimination and mistreatment experienced by many Muslim-Americans today.

#### [\*291]

#### 4. Enhancing Public Cooperation in Terrorism Prevention

Once the public understands the threat posed by white supremacist and other non-jihadi terrorists, and sees them as terrorists just as dangerous and worthy of condemnation and vigilance as jihadi terrorists, they will hopefully be more likely to help prevent terrorist attacks such as Roof's. There are two ways in which this could occur. First, if someone is simply speaking approvingly of racist violence, and these views are harshly condemned as terroristic by the person's friends or acquaintances, the person may be dissuaded from holding or acting upon such views. It is conceivable that Dylann Roof would have been less likely to go through with his attack if he did not get the sense that there was significant passive support among his fellow white Southerners for racist violence.<sup>144</sup>

*Second*, and more directly, if someone speaks of plans to commit a terrorist attack, such as a white supremacist attacking minorities, and such attacks are commonly understood as terrorism, then the people who hear these threats will be more likely to take them seriously and report them to the police.<sup>145</sup> Dylann Roof's friends have recounted that he told them he was going to kill African-Americans with the hope of starting a war.<sup>146</sup> On one occasion, they even took away his gun and hid it from him.<sup>147</sup> Yet for some reason, they neglected to report him to the government. It is difficult to imagine they would have not reported him if Roof had been a Muslim who was planning on detonating a bomb on a bus to protest U.S. foreign policy. If racist terrorism was the subject of the same consistent and vocal societal condemnation as jihadi terrorism, then his friends would have been more likely to report him.

In addition, violence from anti-government militias and similar groups, such as sovereign citizens and Oath Keepers, is a serious problem in many areas of the country.<sup>148</sup> Recognizing their violence as terrorism may be an

<sup>142</sup> See Muneer I. Ahmad, A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion, *92 Cal. L. Rev.* 1259, 1266 (2004); Romtin Parvaresh, Prayer for Relief: Anti-Muslim Discrimination as Racial Discrimination, *87 S. Cal. L. Rev.* 1287, 1315 (2014).

<sup>143</sup> Nigel Duara, Oregon Neighbor Arrested in Oregon Mosque Firebombing Suspect Arrested on Hate Crime Charges, NBC News (Aug. 25, 2011), <http://www.nbcnews.com/id/44274926/ns/us-news-crime-and-courts/t/neighbor-arrested-ore-mosque-firebombing/> [<https://perma.cc/5Z8N-EYPV>].

<sup>144</sup> This is also a reason for avoiding the public display (especially by government institutions) of the Confederate flag, since displaying the flag risks giving virulent racists (and potential terrorists) the impression that there is significant societal sympathy for their views, making them more likely to act in accordance with their ideology.

<sup>145</sup> At the same time, experience has shown that heavy-handed government responses to potential right-wing terrorism, as at Ruby Ridge, may make terrorism worse, by inspiring revenge attacks. Indeed, the Oklahoma City bombing on April 19, 1995, was timed to coincide with the botched Waco raid that killed 76 people on April 19, 1993. *United States v. McVeigh*, 153 F.3d 1166, 1177 (10th Cir. 1998). It is important to stress that it is certainly possible to label acts as terrorism without committing abuses that would endanger civil liberties or inspire more terrorism. Friedersdorf, *supra* note 21.

<sup>146</sup> Frances Robles, Jason Horowitz & Shaila Dewan, Dylann Roof, Suspect in Charleston Shooting, Flew the Flags of White Power, N.Y. Times (June 18, 2015), <http://www.nytimes.com/2015/06/19/us/on-facebook-dylann-roof-charleston-suspect-wears-symbols-of-white-supremacy.html?r=0> [<https://perma.cc/T92C-67KV>].

<sup>147</sup> *Id.*

<sup>148</sup> See *supra* notes 64, 65 and accompanying text.

important step in helping would-be sympathizers understand the odiousness [\*292] of any ideologically motivated violence, and report any concrete violent plans to authorities.

#### V. Additional Policy Recommendations

The primary purpose of this Article is to demonstrate that Dylann Roof is a terrorist under federal law, and to establish the importance of the government publicly recognizing and acknowledging this fact. However, the Article also argues that two policy changes could enhance the ability of the government to treat all ideologically motivated killers as terrorists. These changes are by no means necessary for the government to treat white supremacist and anti-government violent extremists as terrorists, but they would potentially help by overcoming the symbolic and semantic problems current law creates.

##### A. A New Terrorism Statute

First, the government should consider creating a new terrorism statute that would closely mirror hate crime statutes. This statute would label as terrorism any murder or attempted murder that is motivated by a desire to advance or promote a particular ideology. One of the hate crime statutes that Dylann Roof is being charged with provides for up to a life sentence for "willfully causing bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device" in "attempting to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person."<sup>149</sup>

A terrorism statute along the same lines could have the same exact wording, except that the last phrase would read, "with the intent to advance, publicize or express an ideology."<sup>150</sup> Another option, closer to the language of the federal government's current terrorism definitions, would be to have the last phrase read, "with the intent to intimidate or coerce civilians or the government."

This would enable nearly any domestic terrorist to be charged with terrorism in a straightforward and transparent manner. An even simpler statute, which does not limit the type of weapon involved, would encompass an even larger proportion of terrorists. It may be appropriate, however, to limit the statute to murder or attempted murder, to avoid having the statute applied to relatively minor physical injuries or non-violent crimes. Thus, the statute [\*293] could potential read as follows: "Anyone who kills another person or attempts to kill another person with the intent to advance, publicize or express an ideology is guilty of a terrorist attack."

Currently, an odd assortment of narrowly-defined federal crimes (such as hijacking), sentencing provisions (such as sentencing enhancements), and administrative definitions (such as the Patriot Act definition) serve to officially label crimes as terrorism. One result of this scattershot legislative approach is that some very minor and questionable offenses, such as giving peacemaking advice or teaching English to designated Foreign Terrorist Organizations, can be prosecuted as a terrorist offense (material support for terrorism), even if there were no ideological motive for the defendant's conduct.<sup>151</sup> Even more strangely, certain crimes (such as those featuring specific weapons or

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<sup>149</sup> [18 U.S.C. § 249](#) (2012); Indictment, United States v. Dylann Storm Roof, No. 2:15CR00472, 2015 WL 4461565.

<sup>150</sup> First Amendment challenges to such a statute would have little or no chance of success, since the U.S. Supreme Court, in upholding hate crime statutes, has held that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." [Wisconsin v. Mitchell, 508 U.S. 476, 489 \(1993\)](#). See also [United States v. Cannon, 750 F.3d 492, 508 \(5th Cir. 2014\)](#).

<sup>151</sup> See 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, 810 \(2012\)](#). For example, the government charged a homeless Iranian widow with material support for terrorism for teaching English to a dissident Iranian group listed as a foreign terrorist organization. Homeless Widow Fights Terrorism Charge, United Press Int'l (July 9, 2008), [http://www.upi.com/Top News/2008/07/08/Homeless-widow-fights-terrorism-charge/20901215544270/](http://www.upi.com/Top%20News/2008/07/08/Homeless-widow-fights-terrorism-charge/20901215544270/) [<https://perma.cc/6XYE-JXL7>]. Strangely, this occurred even though some within the U.S. government support the dissident group's aims, and high-level establishment figures such as Rudy Giuliani, Michael Mukasey, and Tom Ridge have openly and enthusiastically supported the group, without ever being threatened with terrorism charges for

targets) are labeled as terrorism regardless of the motive, and regardless of any connection to terrorist organizations or activity. <sup>152</sup>

Yet for shooting attacks against civilians clearly intended to coerce or intimidate the government and civilians, which clearly qualify as terrorism under federal law, there is somehow no terrorist crime with which to charge them. Creating a simple statute mirroring the hate crime statute would prevent these absurd results, while sending a message that any ideologically motivated violence will be punished and condemned with the same seriousness as an attack that fits current stereotypes of terrorism (such as a jihadi-inspired hijacking or bomb attack).

Creating such a statute would be preferable to expanding current statutes to encompass domestic terrorism. For example, it would not be feasible to charge domestic terrorists with material support for terrorism (perhaps the most common charge among contemporary terrorism prosecutions) because designating domestic terrorist groups would pose considerable First Amendment [\*294] and administrative challenges. <sup>153</sup> Moreover, designating certain domestic groups as terrorist would still not enable authorities to charge many domestic violent extremists with terrorism, since many terrorists (like Dylann Roof and Timothy McVeigh) are lone actors with no formal organizational affiliations. <sup>154</sup>

It is important, however, that the new terrorism statute not be overly broad, to avoid inappropriately harsh punishments or hyperbolic depiction of more minor ideologically motivated crimes. Someone who breaks a storefront window during a protest should not be prosecuted as a terrorist and given a draconian prison sentence, even if the crime was ideologically motivated. Such an application would seem to cheapen the term terrorism, which has traditionally been used for the most serious crimes. That is one reason why this Article recommends that the new statute be limited to murder or attempted murder. <sup>155</sup>

If legislatures nevertheless decide to create new criminal statutes that label behavior other than murder and attempted murder as terrorism, they could provide for higher maximum penalties than are available for the same crime when it is not labeled as terrorism. In such a case, an obvious alternative to creating numerous new terrorism statutes would be to simplify and broaden the use of the terrorism enhancement so that it can be applied to a wider

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their support. Glenn Greenwald, Leading Conservatives Openly Support a Terrorist Group, Salon (Jan. 3, 2011), [http://www.salon.com/2011/01/03/fran\\_townsend\\_terrorism/](http://www.salon.com/2011/01/03/fran_townsend_terrorism/) [<https://perma.cc/74MA-TDVN>]. Due to the proven potential for abuse in material support prosecutions, it is important that Congress not pass current versions of criminal justice reform bills, which include mandatory-minimum sentences for those convicted of material support. See Sentencing Reform and Corrections Act of 2015, S. 2123, § 108.

<sup>152</sup> See Buchhandler-Raphael, *supra* note 151, at 817; Carissa Byrne Hessick, Motive's Role in Criminal Punishment, *80 S. Cal. L. Rev.* 89, 128 (2006) (noting that the treatment of motive in criminal offenses, including but not limited to terrorism, is often "incomplete or inconsistent").

<sup>153</sup> See Julia Harte, Julia Edwards & Andy Sullivan, U.S. Eyes Ways to Toughen Fight Against Domestic Extremists, Yahoo! News (Feb. 4, 2016), <https://ca.news.yahoo.com/u-eyes-ways-toughen-fight-against-domestic-extremists-060402478.html> [<https://perma.cc/K3F2-SV9E>]. See generally Emma Sutherland, The Material Support Statute: Strangling Free Speech Domestically?, 23 *Geo. Mason U. C. R. L. J.* 229 (2012-2013).

<sup>154</sup> Beau D. Barnes, Confronting the One-Man Wolf Pack: Adapting Law Enforcement and Prosecution Responses to the Threat of Lone Wolf Terrorism, *92 B.U. L. Rev.* 1613, 1616 (2012).

<sup>155</sup> However, perhaps a case could also be made that particularly dangerous or large-scale attacks on property alone, such as ideologically motivated bombings or arson of large buildings, should be labeled as terrorism by criminal statutes that allow for higher maximum sentences. Even so, it seems possible that this could lead to disproportionate sentences in some cases. For example, though arson is a serious crime, it might be disproportionate to sentence someone to life in prison for an ideologically motivated arson, particularly if the defendant made sure to avoid any risk to human life. In addition, some argue that the definition of terrorism should only encompass violent crimes, and exclude property crimes that do not harm people. See Rachel Meeropol, Non-violent "Terrorism?" Huff. Post (Apr. 21, 2015), <http://www.huffingtonpost.com/the-center-for-constitutional-rights/non-violent-terrorism> b 67099 96.html [<https://perma.cc/4VLH-TBBL>].

range of crimes.<sup>156</sup> In either case, the purpose of the enhanced maximum penalty would be to express society's special condemnation of crimes carried out in service of ideological goals, and to account for the greater threat to public safety that defendants ideologically committed to violence might often pose.

This Article argues against such an approach, however, because it could lead to unreasonably high penalties for relatively minor crimes. For example, [\*295] breaking into a fur farm to release captive animals in the name of animal rights may be a serious property crime, but labeling the act as terrorism and imposing lengthy prison sentences may be inappropriate.<sup>157</sup> Given the traditional association between terrorism and violence, designating the theft of animals as terrorism would seem problematic. Similarly, if the definition of terrorism were not limited to very serious crimes, even ideological graffiti or light vandalism could be labeled as terrorism and punished harshly.

However, for murder or attempted murder prosecuted under terrorism statutes, it may be appropriate to set higher maximum penalties when relevant. Legislatures might reasonably decide to set higher maximums for such terrorism offenses in some instances, such as by raising the number of years before someone with a terrorism life sentence can be considered for parole, or increasing the maximum penalty for attempted murder.<sup>158</sup> In the federal system or states with sentencing guidelines, conviction of murder or attempted murder as a terrorist offense could lead to a higher presumptive sentencing range.<sup>159</sup> Higher maximum penalties may be appropriate because they express the societal conviction that murder calculated to advance an ideology or force changes in society is even more blameworthy, and poses a potentially greater public safety threat, than a murder committed because of impulsive anger or other typical motives.<sup>160</sup>

## B. Simplifying the Definition of Terrorism

Second, although Part III demonstrated that any ideologically motivated murder is necessarily intended to coerce or intimidate both the government and civilian populations, it would be simpler to replace this statutory language with a general requirement that the attack be ideologically motivated, or "intended to advance, publicize or express some ideology." The specific requirement to have intended to intimidate or coerce the government or a civilian population (in the Patriot Act's definition), or have intended to change government policy through intimidation or coercion (in the sentencing [\*296] enhancement), in practice invites obfuscation and denial by authorities who,

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<sup>156</sup> That is, prosecutors would charge offenders under traditional criminal statutes, and then seek the terrorism enhancement, instead of charging offenders under specific terrorism statutes.

<sup>157</sup> See Center for Constitutional Rights, Rights Group Challenges Law that Punishes Animal Rights Activists as "Terrorists" (May 9, 2016), <https://ccrjustice.org/home/press-center/press-releases/rights-group-challenges-law-punishes-animal-rights-activists> [<https://perma.cc/5DLL-L77W>].

<sup>158</sup> For example, if a state's normal life sentence is 25 years to life, judges imposing life sentences on terrorism offenders could be permitted to raise the number of years to 30 before the offender is eligible for parole. See [Cal. Pen. Code § 190\(a\)](#) (2016).

<sup>159</sup> See Neal B. Kauder & Brian J. Ostrum, National Center for State Courts, State Sentencing Guidelines: Profiles and Continuum (2008), [https://www.ncsc.org/media/Microsites/Files/CS/State Sentencing Guidelines.ashx](https://www.ncsc.org/media/Microsites/Files/CS/State%20Sentencing%20Guidelines.ashx) [<https://perma.cc/49RJ-DS6E>].

<sup>160</sup> Even so, it is possible that in some cases, a murder or attempted murder might qualify as terrorism but for some reason, such as the defendant's mental illness or remorse, the higher penalty may be disproportionate to their level of blameworthiness or public safety threat. Downward departure from the guidelines' sentencing range may sometimes be appropriate under such circumstances. See generally Patricia H. Brown, Considering Post-Arrest Rehabilitation of Addicted Offenders Under the Federal Sentencing Guidelines, 10 Yale L. & Pol'y Rev. 520 (1992).

whether for reasons of damage control or due to the tendency to downplay non-jihadi terrorism, want to avoid labeling an attack as terrorism. <sup>161</sup>

Oddly enough, authorities could even avoid calling the Oklahoma City bombing terrorism under the main federal definition of domestic terrorism. McVeigh's own explanation for his attacks stresses that they were meant as retaliation for what he saw as the government abuses at Waco and Ruby Ridge, and do not explicitly mention a specific desire to change government policy. <sup>162</sup> Of course, such retaliation can easily be construed as meant to affect government policy, since it would send a message that the government should never again commit these kinds of abuses. But an official who for whatever reason did not want to consider an attack by a white American as terrorism could plausibly argue that it was not intended to intimidate or coerce the government.

Indeed, at least one homeland security official has declined to describe McVeigh's bombing as terrorism, instead saying he was "just very angry with the U.S. government." <sup>163</sup> Needless to say, such obfuscation reinforces the perverse racialization of counterterrorism policy, in which Muslim violence is essentially racialized as terrorism while non-Muslim extremist violence is treated as a less serious security threat and less worthy of the harshest condemnation.

In the Roof case, the FBI director's initial remarks after the attack illustrate the problem with the definition. At that point, Roof's racist statements during the shooting and his photographs with the confederate flag had already been made public. Yet the FBI director said he did not see the attack as "political," <sup>164</sup> and thus he doubted that it qualified as terrorism, stressing that terrorism has a legal definition that determines his use of the label. Remarkably, the idea that it must be "political" misrepresents the definition, privileging the prong of the definition that relates to influencing a government through intimidation or coercion.

Essentially, the complexity and specificity of the current definition allows authorities to hide behind the definition, implausibly asserting that there is no proof for one of the elements, instead of labeling all ideologically [\*297] motivated killings as terrorism in a straightforward and transparent manner. As emphasized in Part II, any ideologically motivated killing must have been intended to intimidate or coerce both civilians and the government. Ideologically motivated violence is inherently intimidating, and no such intimidation could be the slightest bit effective in achieving the terrorist's aims without affecting both the government and civilians.

Furthermore, it is pointless (and sometimes absurd) to require a precise inquiry into the killer's thought process, beyond the fact that they committed the attack to advance, promote, or express an ideology in some manner. Terrorist ideologies are often infused with highly unrealistic, even quite ridiculous beliefs about cause and effect, enabling them to believe that a single violent act will somehow lead to the ultimate triumph of their radical vision for society. (Note that an anarchist's desire to abolish the state and capitalism by assassinating Archduke Ferdinand resulted instead in the advent of World War I, leading to some of the worst state-based violence in the history of humankind.)

Even if terrorists' causal imagination provides for a complex and indirect pathway from their act to the enactment of their policy goals, that is no less reason to label their act as terrorism and punish it accordingly. As noted in Part II,

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<sup>161</sup> Definitions based on the intention to inflict "terror" or "fear" on targets can prompt debates, which are inherently difficult to resolve, about whether a particular act is meant to instill fear. See Sivan Hirsch-Hoefler & Cas Mudde, "Ecoterrorism": Terrorist Threat or Political Ploy? 37 *Studies in Conflict & Terrorism* 586, 596-97 (2014) (arguing that attacks on property that do not directly threaten human lives do not qualify under their fear-based definition of terrorism because they do not instill fear).

<sup>162</sup> The McVeigh Letters: Why I Bombed Oklahoma, *Guardian* (UK) (May 6, 2001), <http://www.theguardian.com/world/2001/may/06/mcveigh.usa> [<https://perma.cc/7ZQU-ZAEM>].

<sup>163</sup> Will Potter, *Homeland Security Says Timothy McVeigh Isn't a Terrorist, But Peace Activists Are, Green is the New Red* (Oct. 8, 2008), <http://www.greenisthenewred.com/blog/homeland-security-says-timothy-mcveigh-isnt-a-terrorist-but-peace-activists-are/701/> [<https://perma.cc/SA2P-U7AD>].

<sup>164</sup> See Husband, *supra* note 29.

ISIS-inspired lone terrorists' expectations for their attacks' impacts may be even more bizarre and far-fetched than those of white supremacists wishing to inspire a race war. <sup>165</sup> The strange ideologies underlying attacks should not preclude identifying them as terrorism, unless perhaps the ideology is unique to an individual and inseparable from the person's mental illness. <sup>166</sup>

In truth, it does not matter whether an ideologically motivated attack is meant to coerce or intimidate (to "terrorize") or to accomplish some other [\*298] goal (like revenge or inspiring other terrorists). The fact that terrorism is meant to advance an ideology is arguably the reason for its enhanced blameworthiness. This is because terrorism violates the bedrock provision of the democratic social contract that political and social change should result from free choice, deliberation and reasoned decision-making, rather than being driven by the fear of violence. <sup>167</sup>

As argued in the Introduction, it would be better to replace the term terrorism with "ideologically motivated crime." That is the core of what terrorism is, and why it deserves more additional condemnation and punishment. The intent to intimidate or coerce is no more blameworthy than the intent to retaliate. While as argued above, any ideologically motivated attack must have been intended to intimidate civilians and government officials, it is possible other motivations are the dominant ones in the minds of particular terrorists. Yet this makes no difference in terms of what they deserve. Either way, the message to the public, the expressive function of the terrorist label, and enhanced punishment should be the same. This message is simply that all people need to understand, in no uncertain terms, that society has no tolerance for any attempt to advance or promote any ideology through murder.

A critic might object that determining whether an attack was ideologically motivated could present the same evidentiary problems as the current definition. Yet in practice, it is likely to be simpler to establish that an attack was motivated by a desire to advance an ideology than to prove that the motivation was specifically to intimidate the civilian population or the government. <sup>168</sup> This Article's proposed definition of terrorism would require only a finding that the attack was motivated by some ideological goal, while current statutory definitions could potentially be seen

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<sup>165</sup> See supra note 84 and accompanying text. It could be seriously argued, by someone intent on minimizing terrorism classifications, that ISIS attacks are not terrorism, because rather than intending to intimidate or coerce the government or population into conforming with their beliefs, all they want is for the government to respond with the rational act of fighting ISIS, thereby triggering an apocalyptic war with the West. Such an argument could posit that calling this terrorism would be like calling a mentally-ill man who committed an offense in order to get mental health treatment a terrorist because he meant to "intimidate or coerce" the government into doing what the defendant wanted it to do. The problem with that, the argument would go, is that arresting him and providing him with appropriate treatment is the rational government response to the situation, just as fighting ISIS is a rational response to being attacked by ISIS. This argument is in fact faulty, because such attacks are also meant to intimidate and demoralize the population, and ultimately to enact ISIS's policy preferences. Yet the fact that such an argument can so easily be made underscores the obfuscatory potential of the definition and the benefits of a clearer alternative.

<sup>166</sup> For example, Luke Helder sent several mail bombs, hoping to make a smiley-face pattern of attacks on the map. He apparently intended the attacks to spread his beliefs, which involved such things as astral projection but also included political content. Walter Kim, Luke Helder's Bad Trip, *Time* (May 12, 2002), <http://content.time.com/time/magazine/article/0,9171,237036,00.html> [<https://perma.cc/PP8B-RWXU>]. Although he seems to have committed these attacks with the hope of advancing his ideology, and thus may qualify as a terrorist under some definitions, his mental illness and the uniqueness of his self-styled ideology raises the question of whether terrorism is the right label.

<sup>167</sup> See Robert E. Goodin, *What's Wrong With Terrorism* 158 (2013). The phrase "unarmed truth," which originated with Martin Luther King, Jr. but recently appeared in President Obama's State of the Union address, can perhaps be understood as a pithy expression of this ideal, that truth unaided by force will eventually win. Amy Davidson, *Obama's Last, Hopeful State of the Union*, *New Yorker* (Jan. 13, 2016), <http://www.newyorker.com/news/amy-davidson/obamas-last-hopeful-state-of-the-union> [<https://perma.cc/9UE6-UU5R>].

<sup>168</sup> For most terrorist attacks, the perpetrators make their ideological motive known in some manner, such as through manifestos, statements during the attack, statements to others before the attack, or statements to the police after being arrested. If a perpetrator wants a crime to promote or express a particular ideology, he or she would be unable to achieve that end without revealing the motive for the crime.

as necessitating a consideration of who exactly the attacker meant to intimidate, the precise definition of intimidation, and perhaps even what the attacker wanted the intimidated people to do in response.<sup>169</sup>

**[\*299]**

## VI. Conclusion

In short, this Article argues that the Charleston massacre qualifies as terrorism under federal law, and that it is important for a variety of reasons that authorities change course and acknowledge this in a consistent and straightforward manner. Dylann Roof qualifies as a terrorist under federal law because his attack fits the definition established by the USA Patriot Act, which is used by the FBI to determine whether to classify an act as terrorist. Roof's attack falls within the definition because he intended it to intimidate African-Americans and the government. The massacre also qualifies for the terrorism sentencing enhancement and a terrorism-related aggravating factor for death penalty purposes.

Properly labeling the attack as terrorism would establish its policy relevance, advance government accountability by forcing authorities to count it among the attacks they failed to prevent, and promote a more rational distribution of counter-terrorism resources, focused on all threats rather instead of an overwhelming concentration on jihadi terrorism. The correct use of the terrorism designation in this case could also have positive societal consequences, further delegitimizing racism, drawing needed attention to this country's history of racist terrorism, stimulating more balanced media coverage of terrorism, countering Islamophobia, and encouraging greater vigilance in preventing all types of terrorism.

While this is not necessary for treating Roof as a terrorist, the Article also argues that creating a simple terrorism statute enabling any ideologically-inspired murderer to be charged with terrorism would counter the mixed messages sent by the odd assortment of current terrorism statutes. In addition, although attacks such as Roof's amply fulfill the government's definition of terrorism, the Article argues for a more straightforward definition, less amenable to obfuscation due to bias or political strategy. This definition would dispense with the intimidation/coercion requirement, and replace it with a simpler requirement that the act be meant to advance or promote some ideology.

Future research should delve more deeply into the white supremacist and anti-government terrorism of recent years, investigating in detail how these attacks have been treated by the media and the government, and whether the attacks could have been prevented with better counterterrorism strategies. Understanding the reaction to these attacks can help us better understand how policy needs to change to most appropriately punish, and most effectively prevent, all types of ideologically-inspired violence.

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<sup>169</sup> As argued earlier, a correct understanding of current statutes would not lead to such superfluous considerations, but there is a potential for the statutes to be misconstrued in such a manner. This could allow subjective biases to guide whether a particular ideologically motivated attack is classified as terrorism.