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Winter 2019

## The Legal Divide Between Domestic and International Terrorism-- Do we need a domestic terror statute?

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# CRIMINAL LAW BULLETIN

## Volume 55, Number 6

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## From the Legal Literature

Francesca Laguardia, J.D., Ph.D.\*

### THE LEGAL DIVIDE BETWEEN DOMESTIC AND INTERNATIONAL TERRORISM—DO WE NEED A DOMESTIC TERROR STATUTE?

#### I. INTRODUCTION

There is an ongoing debate as to whether the federal government of the United States should pass a domestic terrorism statute.<sup>1</sup> This debate is founded on frustration with the current criminal legal mechanisms for addressing extremist violence. Mary McCord summarizes this frustration, asking why

are Islamist extremists who commit violent crimes in the United States with the intent to intimidate and coerce—or who merely send money or other support to Islamist extremist groups like al-Qaeda or the Islamic State—charged with crimes of international terrorism, while anti-Semites like Robert Bower and white supremacists like Dylann Roof—who killed nine black parishioners at a Charleston, South Carolina church in 2015—are charged with hate crimes but not domestic terrorism?<sup>2</sup>

Thus far, the discussion has occurred primarily in the realms of

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<sup>1</sup>See, e.g., Mary B. McCord & Jason Blazakis, *A Road Map for Congress to Address Domestic Terrorism*, LAWFARE (Feb. 27, 2019, 8:00AM), <https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism>; Jason M. Blazakis, *American Terrorists: Why Current Laws Are Inadequate for Violent Extremists at Home*, LAWFARE (Dec. 2, 2019, 10:00AM), <https://www.lawfareblog.com/american-terrorists-why-current-laws-are-inadequate-violent-extremists-home>; Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13AM), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime>; Susan Hennessey, *The Good Reasons to Not Charge All Terrorists with Terrorism*, LAWFARE (Dec. 5, 2015, 11:34AM), <https://www.lawfareblog.com/good-reasons-not-charge-all-terrorists-terrorism>; Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism Seriously*, BRENNAN CTR. FOR JUST. (Dec. 14, 2018), <https://www.brennancenter.org/blog/why-new-laws-arent-needed-to-ke-domestic-terrorism-more-seriously>; Adam Goldman, *F.B.I., Pushing to Stop Domestic Terrorists, Grapples With Limits on Its Power*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/us/politics/fbi-domestic-terrorism.html> (describing ongoing debate).

<sup>2</sup>McCord, *supra* note 1.

popular media and legal blogs.<sup>3</sup> Since August, federal legislators have begun considering a new domestic terrorism statute that would criminalize less specified terrorist activities.<sup>4</sup> While legal scholars have criticized unequal application of the label of terrorism in the media and in criminal prosecutions, few have ventured into the hard legal distinctions between “domestic” and “international” terrorism, and their ramifications.<sup>5</sup> The following two articles examine these distinctions in depth, and while they largely agree that the differences are problematic, they come to contradictory answers as to the proposed solution.

## II. WHY DYLANN ROOF IS A TERRORIST UNDER FEDERAL LAW, AND WHY IT MATTERS<sup>6</sup>

There are three main points to Norris’s argument. First, he clarifies the country’s interests in calling domestic extremist attacks “terrorism,” and doing so at the formal (criminal legal) level.<sup>7</sup> Second he describes several ways by which this could be accomplished—one option is to write a new domestic terrorism statute, however he also

<sup>3</sup>Most notably in the blog Lawfare. See sources cited *supra*, note 1.

<sup>4</sup>Republican Senator Martha McSally of Arizona has circulated a discussion draft of a possible domestic terrorism statute, <https://www.mcsally.senate.gov/sites/default/files/2019-08/Discussion%20Draft%20DT.pdf>. Democratic Rep. Adam Schiff of California has proposed H.R. 4192 Confronting the Threat of Domestic Terrorism Act 116th Congress (2019-2020) <https://www.congress.gov/bill/116th-congress/house-bill/4192/text?q=%7B%22search%22%3A%5B%22hr+4192%22%5D%7D=1=1>; Republican Representative Andy Weber Senior of Texas has proposed H.R.4187 - Domestic Terrorism Penalties Act of 2019 116th Congress (2019-2020) <https://www.congress.gov/bill/116th-congress/house-bill/4187/text?q=%7B%22search%22%3A%5B%22domestic+terrorism%22%5D%7D=3=1>.

<sup>5</sup>For criticisms of inequality, see Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 Nw. U. L. REV. 1213 (2018); Caroline Mala Corbin, Essay, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017); 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). For explorations of the legal divide, other than the two articles discussed here, see Dianne Webber, *Preparing to Commit Domestic Terrorist Activity: Does the United States Have Adequate Tools to Stop This?* 34 AM. U. INT’L L. REV. 205 (2018) (suggesting the United States needs a preparatory statute such as those used in the United Kingdom); Katie Dilts, *One of These Things Is Not Like the Other: Federal Law’s Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711 (2019); Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism*, 92 ST. JOHN’S L. REV. 393 (2018).

<sup>6</sup>See Jesse Norris, *Why Dylann Roof Is a Terrorist Under Federal law, and Why It Matters*, 54 HARV. J. ON LEGIS. 259 (2017).

<sup>7</sup>Norris, *supra* note 6, at 283–92.

suggests that there are routes in our existing legal framework.<sup>8</sup> Third, Norris suggests using a simplified definition of terrorism, to avoid the existing pitfalls.<sup>9</sup>

Norris begins with an emotional and moral appeal to equivalence between the two types of violence. Detailing the violence and horror of Dylann Roof's 2015 attack on a church in Charleston, Norris highlights and contextualizes the dilemma described by McCord—why should this attack be addressed as a hate crime rather than terrorism?<sup>10</sup> He argues that this decision has its roots in a history of systemic and purposeful racism, which continues in the comparative deprioritization of right-wing terrorism investigations as opposed to murders committed by Muslim extremists.<sup>11</sup> This is evident, he suggests, in the reluctance of journalists and federal officials to call such attacks “terrorism,”<sup>12</sup> as well as in the lack of resources offered to domestic terrorism investigations.<sup>13</sup>

Whatever the roots of the differences in language, investigation, charging, and sentencing decisions, the decisions have important practical consequences. Socially, Norris highlights the expressive nature of the criminal law. Failure to attempt to treat “white terrorism” as terrorism “denigrate[s] the seriousness of the offense . . . [and] would be easily interpreted as suggesting that white supremacist terrorism is less important or blameworthy than jihadi terrorism.”<sup>14</sup> In contrast, calling the crime terrorism and formally treating it as such could aid in

acknowledging the long history of white supremacist terrorism in the U.S., placing 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 be more likely to report [extremists] to the government.<sup>15</sup>

The decision also has important policy ramifications. Pursuing the case as a terrorism case highlights to the public that there is an ongoing issue to be addressed. Norris suggests that this is prefer-

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<sup>8</sup>Norris, *supra* note 6, at 273–83, 292–95.

<sup>9</sup>Norris, *supra* note 6, at 295–98.

<sup>10</sup>Norris, *supra* note 6, at 259–62.

<sup>11</sup>Norris, *supra* note 6, at 269–71.

<sup>12</sup>Norris, *supra* note 6, at 269–71.

<sup>13</sup>Norris, *supra* note 6, 271.

<sup>14</sup>Norris, *supra* note 6, at 280.

<sup>15</sup>Norris, *supra* note 6, at 283. In particular, see Section IV.B of Norris's article for a discussion of the potential social consequences of such a change, including confronting racism and racist terrorism, balancing media coverage, countering Islamophobia, and enhancing public cooperation in the prevention of terrorism. Norris, *supra* note 6, at 287–92.

able to dismissing such cases as repeated but somehow isolated outbursts by persons with mental illnesses (by which logic, Norris states, they are often set aside and forgotten).<sup>16</sup> Allowing this dismissal also takes pressure off of government agencies, and thereby lessens accountability.<sup>17</sup> Using the terrorism label reinforces the notion that the government has a responsibility to prevent these attacks and to formulate a coherent policy by which to do so.<sup>18</sup> Such pressure should also result in redirection of greater resources to investigate domestic terrorism (in sharp contrast to the diminishing of resources that has been recently reported).<sup>19</sup>

The question for Norris, however, is what the government can do about this; it is here where we begin to explore the legal distinctions between domestic and international terrorism, and the arguable inadequacy of the current framework to pursue domestic terrorists. As Norris points out, there is no federal crime of committing terrorism or of being a terrorist.<sup>20</sup>

Terrorism is defined in 18 U.S.C.A. § 2331, but no criminal penalties are attached to that definition. Instead, specific actions, such as use of weapons of mass destruction, attacks on federal facilities, or murder that transcends national boundaries are criminalized—with no terroristic intent necessary, even for those crimes listed under the Terrorism Chapter of the U.S. Code, or with “terrorism” in the name of the specific statute.<sup>21</sup> 18 U.S.C.A. § 2332b(g)(5) offers a list of “federal crimes of terrorism,” but conviction for those crimes does not rely on the definition of terrorism under § 2331. These crimes may be prosecuted independent of the terrorism label and they become crimes of terrorism for sentencing purposes when “calculated to influence the conduct of government by intimidation or coercion, or to retaliate against government conduct.”<sup>22</sup> These statutes often rely on transnational activity, attacks on federal facilities or employees, or large scale attacks using weapons of war<sup>23</sup>—

<sup>16</sup>Norris, *supra* note 6, at 284.

<sup>17</sup>Norris, *supra* note 6, at 285.

<sup>18</sup>Norris, *supra* note 6, at 285.

<sup>19</sup>Norris, *supra* note 6, at 286–87.

<sup>20</sup>Norris, *supra* note 6, at 278.

<sup>21</sup>See 18 U.S.C.A. §§ 2332a (“Use of weapons of mass destruction”); 18 U.S.C.A. § 844(f) (“Importation, manufacture, distribution and storage of explosive materials”); 18 U.S.C.A. § 2332b (“Acts of terrorism transcending national boundaries”).

<sup>22</sup>Norris, *supra* note 6, at 279 (quoting 18 U.S.C.A. § 2332b(g)(5)).

<sup>23</sup>Norris, *supra* note 6, at 279 (quoting 18 U.S.C.A. § 2332b(g)(5)); see also Jane Chong, *White Hate but Islamic Terror? Charleston, Hate Crimes and Terrorism Per Quod*, LAWFARE (June 21, 2015, 10:00PM), <https://www.lawfareblog.com/white-h>

all of which are more frequent in classic terrorism overseas and less frequent in contemporary domestic terrorism.<sup>24</sup>

The most commonly charged “terrorism statutes” are those that criminalize offering support to a foreign terrorist organization, creating more options to pursue foreign-inspired terrorism under the terrorism label, without offering a comparable option for domestic terrorism.<sup>25</sup> But Norris argues Roof qualifies under the definition in § 2331, and therefore, federal authorities should feel free to refer to him as a terrorist in press releases, briefings, investigations, and when classifying the investigation for official purposes.<sup>26</sup> Since Norris’s concerns primarily involve the message that is sent to the public, these purposes are not insignificant.

A more tangible application of the terrorism definition comes in the form of sentencing. Norris recounts three ways Roof’s behavior may make him eligible for a stiffer, terrorism-related sentence, even without being charged under a federal crime of terrorism. The first is the terrorism sentencing enhancement, which may apply to sentences for any crime that was “intended to promote a federal crime of terrorism” (those being the federal crimes listed under 18 U.S.C.A. § 2332b(g)(5)).<sup>27</sup> The second is upward departure to the same degree as the enhancement, as recommended by the U.S. Sentencing Commission in notes accompanying the enhancement.<sup>28</sup> Both would result in large changes in sentencing. When applied, the enhancement increases a crime’s offense level by 12 to not less than 32, and increases criminal history level to VI.<sup>29</sup> As Norris points out, a 10 year sentence may turn into a life sentence under this enhancement;<sup>30</sup> others refer to one case where a sentence that would otherwise have been fewer than five years became 155 years

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[ate-islamic-terror-charleston-hate-crimes-and-terrorism-quod](#); Hennessy, *supra* note 1.

<sup>24</sup> See, e.g., MARK S. HAMM & RAMÓN SPAAJI, *THE AGE OF LONE WOLF TERRORISM* 35–58 (2017) (Chapter 3, discussing the prevalence of lone wolves in modern terrorism and the development of lone wolf attacks away from bombs and towards the use of firearms and motor vehicle attacks).

<sup>25</sup> See *infra* notes 56–59 and accompanying text.

<sup>26</sup> Norris, *supra* note 6, at 278.

<sup>27</sup> Norris, *supra* note 6, at 279–80 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2015)).

<sup>28</sup> Norris, *supra* note 6, at 281 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.2, n.4 (U.S. SENTENCING COMM’N 2015)).

<sup>29</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (U.S. SENTENCING COMM’N 2015).

<sup>30</sup> Norris, *supra* note 6, at 279.

based on the enhancement.<sup>31</sup> Finally, in addition to the two options to enhance sentences, committing an offense in order to “commit an act of terrorism” (likely interpreted as falling under 18 U.S.C.A. § 2331) is an aggravating factor to present to a jury in a death eligible case.

In the cases of defendants like Roof, who have successfully committed mass killings as part of a terrorist attack, this severity offers little practical effect, which Norris acknowledges. “[A] recommended sentence of 400 years instead of 200 years” would hardly affect a person’s life.<sup>32</sup> But he argues that it should be applied anyway based on the communicative purposes listed above.<sup>33</sup> Additionally, and for the same reasons, Norris argues both that a new terrorism statute should be written, criminalizing any murder committed “with the intent to advance, publicize, or express an ideology,”<sup>34</sup> and that the definition of terrorism should be simplified to reflect the same understanding of terrorists’ motivations.<sup>35</sup>

Overall, Norris’s argument comes down to a plea to simplify terrorism legislation so that it might more easily apply to domestic as well as international terrorists. This is reflected not only in his calls for a new statute and a new definition, but also in his discussion of the current definition, as discussed above. Although Norris maintains that hate crimes and terrorism are different (he states, the difference is planning and ideology),<sup>36</sup> he also repeatedly refers to hate crimes as domestic terrorism,<sup>37</sup> and his explanation as to why the terrorism label applies to Roof relies on this simplification as well.

In order to argue that prosecuting Roof for hate crimes is insufficient, Norris must show that Roof qualifies as a terrorist. First, he addresses the definition of terrorism offered by the U.S. code—that terrorism consists of otherwise criminal activities that are “dangerous to human life” and “appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>38</sup> He largely

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<sup>31</sup>WADIE SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 125 (2015).

<sup>32</sup>Norris, *supra* note 6, at 281.

<sup>33</sup>Norris, *supra* note 6, at 281.

<sup>34</sup>Norris, *supra* note 6, at 293.

<sup>35</sup>Norris, *supra* note 6, at 295.

<sup>36</sup>Norris, *supra* note 6, at 262.

<sup>37</sup>Norris, *supra* note 6, at 262, 272.

<sup>38</sup>Norris, *supra* note 6, at 273–74 (citing 18 U.S.C.A. § 2331). Norris specifically cites § 2331(5), which defines domestic terrorism. Both domestic and

dismisses the third option,<sup>39</sup> but states that Roof would qualify as a terrorist under both of the first two because “Roof’s attack was, without any doubt, intended to intimidate the African-American community.”<sup>40</sup> Norris’s basis for this statement is Roof’s own manifesto, wherein he stated that he wanted to “stimulate white supremacist action” in order to “start a race war.”<sup>41</sup>

But Norris reveals himself when he states “[a]ny 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.”<sup>42</sup> “It is so because we all know it is so” is not proof of intent. Later, while discussing whether or not Roof intended to influence government policy, Norris notes the possibility that Roof might have wanted to stimulate a war without influencing government policy, which he quickly dismisses because “such a ‘war’ could not take place without” policy changes.<sup>43</sup> He does not, however, consider the possibility that Roof might be trying to start a war that is simply a war—not a war of terrorism. This contradicts most social science research on terrorism, wherein the distinction between war and terrorism (or insurgency and terrorism) is one of the primary areas of about the definition of terrorism, with a general agreement that war, even asymmetrical guerilla or insurgent warfare, is not terrorism.<sup>44</sup>

Still, Norris is far from being the only scholar to reduce the meaning of terrorism to such a simplified form. Indeed, Shirin Sinnar does the same when exploring the legal differences between domestic and international terrorism, but comes to a sharply different conclusion as to the remedy.

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international terrorism are defined in § 2331, the only difference between them being whether the activity occurs primarily in the United States or transcends national boundaries. *Compare* 18 U.S.C.A. § 2331(1)(c) *with* 18 U.S.C.A. § 2331(5)(c).

<sup>39</sup>Norris, *supra* note 6, at 277.

<sup>40</sup>Norris, *supra* note 6, at 262. In particular, see the discussion of Roof’s intent and how he fits the definition of a terrorist. Norris, *supra* note 6, at 273–76.

<sup>41</sup>Norris, *supra* note 6, at 275–76.

<sup>42</sup>Norris, *supra* note 6, at 274.

<sup>43</sup>Norris, *supra* note 6, at 276.

<sup>44</sup>See BRUCE HOFFMAN, *INSIDE TERRORISM* 35–36 (2006); Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 *POL. PSYCHOL.* 405, 406 (2000) (“Terrorism is preeminently political and symbolic, whereas guerrilla warfare is a military activity”); Alex Schmid, *Terrorism — The Definitional Problem*, 36 *CASE W. RES. J. INT’L L.* 375, 381–84 (2004).

**III. SEPARATE AND UNEQUAL: THE LAW OF “DOMESTIC” AND “INTERNATIONAL” TERRORISM<sup>45</sup>**

In “Separate and Unequal,” Shirin Sinnar gives a more detailed introduction to the practical differences in investigations into domestic and international terrorism. First, she paints a picture of the divide, covering surveillance, prosecution, and sentencing.<sup>46</sup> Next, rather than focusing on the need for expressive punishment, she turns to the legal reasoning behind these divisions and suggests that it is faulty.<sup>47</sup> Finally she suggests her solution—to curtail some of the invasions of liberty that are allowed in the international sphere, rather than creating new and broader inroads into the domestic realm.<sup>48</sup>

Sinnar’s description of the many and varied ways the “domestic” versus “international” divide influences an investigation and prosecution brings new light to what has been a murky and hidden aspect of this highly publicized criminal law. She also acknowledges the lack of a terrorism statute to address much of the domestic terrorism we see today,<sup>49</sup> although like Norris, Sinnar collapses the definition of terrorism to “political violence”, thereby avoiding the need to clarify which domestic actions she would include under the heading.<sup>50</sup> But Sinnar also highlights additional areas where the distinction creates a difference.

The division is also seen in the amount and lack of oversight of surveillance, where the Foreign Intelligence Surveillance Act [FISA] allows the use of FISA orders to eavesdrop instead of requiring Title III warrants. This allows for longer surveillance without the need for reapplication, more secrecy surrounding the surveillance, and almost no opportunity to appeal its legality (or, therefore, suppress evidence therefrom).<sup>51</sup> Additionally, FISA orders are not the only surveillance method particularly allowed in international cases. Sinnar notes that Section 2015 of the USA PATRIOT Act allows access to business records, phone records, tax returns, and “tangible things,” while National Security Letters allow the FBI to obtain “records from electronic communications providers, consumer reporting agencies,

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<sup>45</sup>Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333 (2019).

<sup>46</sup>Sinnar, *supra* note 45, at 1343–66.

<sup>47</sup>Sinnar, *supra* note 45, at 1367–94.

<sup>48</sup>Sinnar, *supra* note 45, at 1394–1404.

<sup>49</sup>Sinnar, *supra* note 45, at 1337, 1352.

<sup>50</sup>Sinnar, *supra* note 45, at 1343.

<sup>51</sup>Sinnar, *supra* note 45, at 1344–46.

and financial institutions without judicial approval.”<sup>52</sup> These orders are sent out via boilerplate language, at the rate of “tens of thousands . . . a year.”<sup>53</sup> While they are available for domestic cases, in domestic cases they are used with less secrecy and higher legal standards.<sup>54</sup> Finally, FBI informants operate with less oversight in international terrorism investigations and of course, informants may well create terror plots or an international (and federal) nexus over the course of a sting.<sup>55</sup>

In the area of prosecution, while it is true that an international nexus may lead to the availability of statutes that are not available for domestic prosecutions,<sup>56</sup> a more extreme difference comes in the availability of material support statutes. Material support prosecutions have been central to federal terrorism prosecutions since 2001.<sup>57</sup> Two material support statutes, 18 U.S.C.A. §§ 2339A and 2339B, criminalize providing “material support” to terrorism and to Foreign Terrorist Organizations, respectively. They are a vital tool for prosecutors because they enable preventive action—arrests may occur well before any violent act has been committed, or even solely on the basis of speech supporting terrorism, or, in connection with conspiracy, “terrorism” arrests may be even further removed from violence.<sup>58</sup> While 2339A (criminalizing knowingly offering material support that will be used to commit a federal crime of terrorism) can be used against domestic terrorists, it is used rarely even in the international context,<sup>59</sup> and is based on the same federal crimes of

<sup>52</sup>Sinnar, *supra* note 45, at 1349.

<sup>53</sup>Sinnar, *supra* note 45, at 1349.

<sup>54</sup>Sinnar, *supra* note 45, at 1349.

<sup>55</sup>Sinnar, *supra* note 45, at 1349, 1350, 1356.

<sup>56</sup>Such as 18 U.S.C.A. § 2332b, which allows a prosecution for “Acts of terrorism transcending national boundaries” for crimes as simple as serious assault or property damage, when it involves “conduct transcending national boundaries.” Sinnar, *supra* note 45, at 1353.

<sup>57</sup>Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 19–20 (2005); *Domestic Terrorism Prosecutions Outnumber International*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Sept. 21, 2017), <http://trac.syr.edu/tracreports/crim/481/>.

<sup>58</sup>Sinnar, *supra* note 45, at 1355–56.

<sup>59</sup>A report by the Center on National Security at Fordham Law School, for instance, showed that over ninety ISIS-related cases contained charges under 18 U.S.C.A. § 2339b, while fewer than twenty contained charges under § 2339A. *Statistical Analysis: Isis Cases in the United States, 3/1/2014 — 5/8/2017*, CTR. ON NAT’L SEC. AT FORDHAM LAW 3 (Sept. 13, 2017), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/591095c89de4bb0a23961069/1494259145920/ISIS+Case+Update+5-8-2017.pdf>.

terrorism that largely self-limit to international activity.<sup>60</sup> However, 18 U.S.C.A. § 2339B is truly the prosecutors' darling, and by its own terms it is limited to *foreign* organizations, pre-designated by the Secretary of State.<sup>61</sup> This means that while "international" terrorists could be arrested for conspiring to translate texts for al Qaeda,<sup>62</sup> domestic terrorists may be prosecuted under terrorism statutes only if some actual act of violence is planned. This lopsidedness returns in the terrorism sentencing enhancement, which Sinnar addresses next, noting that the enhancement has been applied in domestic cases but is only when actual violence is planned, as it is also based on the listed federal crimes of terrorism.<sup>63</sup>

Having discussed the practical ramifications of the divide, Sinnar turns to the legal reasoning behind it, asserting that the concerns resulting in protection of domestic speech and activity apply equally as strongly in the realm of international activities. She begins with the First Amendment implications of banning material support (including some support that might be considered political speech) of domestic organizations. She finds the argument that it is less offensive to the First Amendment to restrict the speech of foreign organizations than domestic unconvincing, arguing that speech involving international organizations is also a "meaningful" area of domestic political argument.<sup>64</sup> She dismisses the risk of government targeting political adversaries with the claim that this abuse is already possible, and arguably present, in the international arena "foreign designations equally tempt leaders to target U.S. communities for disfavored ideas or because of racial or ethnic status."<sup>65</sup> She also addresses the possibility that material support statutes are a necessary last resort in the international domain (in contrast to domestically, where the United States maintains normal policing powers), but determines that U.S. powers overseas are strong enough that this should not be a concern.<sup>66</sup>

Similarly, in the realm of Fourth Amendment protections (and FISA), Sinnar argues that the government has no greater interest in flexibility in foreign investigations than in domestic. The reach of FISA broadened after 2001, undermining this division, the challenges of international surveillance (cited as one way in which the FISA court has distinguished foreign from domestic investigations)

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<sup>60</sup>Sinnar, *supra* note 45, at 1357.

<sup>61</sup>Sinnar, *supra* note 45, at 1355.

<sup>62</sup>Sinnar, *supra* note 45, at 1355–56.

<sup>63</sup>Sinnar, *supra* note 45, at 1360.

<sup>64</sup>Sinnar, *supra* note 45, at 1369.

<sup>65</sup>Sinnar, *supra* note 45, at 1370.

<sup>66</sup>Sinnar, *supra* note 45, at 1371–73.

are now similar in domestic investigations. Judges have no less understanding of foreign groups than they do of domestic groups (and therefore need not be more deferential). “[V]iolence by [domestic] groups may threaten society as much as, or more than, the displeasure of foreign states.” And the broad reach of FISA—to individuals whose international connections are limited to a few websites—destroys the logical consistency of any argument that domestic and foreign investigations substantially differ.<sup>67</sup>

She treats federalism concerns similarly, arguing both that Constitutional law could accept a domestic terror statute (basing jurisdiction either on the scale of the harm, the use of interstate commerce, or both), and that those principles that weigh against such an expansion of federal power (such as maintaining greater democratic accountability and a lack of institutional competence) would apply equally to international terrorism.<sup>68</sup> Here, again, the prevalence of the “new” terrorism becomes relevant, as the decentralized nature of modern terrorism (largely driven by the plots of individuals rather than massive organizational planning) has brought a greater resemblance between domestic and international-inspired terrorist attacks.<sup>69</sup>

The change in contemporary terror tactics then returns in Sinnar’s analysis of the comparative scale of the threat posed by international versus domestic terrorism. While she acknowledges that this comparison is difficult to make, as it is always difficult to assess the level of dangerousness of any terrorist organization,<sup>70</sup> she presents reason to believe domestic and international terrorists may well pose comparable threats. For support she relies both on the known efforts of domestic groups to obtain weapons of mass destruction and the nature of modern terrorism, that seems to rely more heavily on unaffiliated attacks using firearms and vehicular homicide.<sup>71</sup>

To Sinnar, the problem with these disparities is not only that it is logically inconsistent, but that it is so easy to replace “international” with “Muslim.” Terrorism may be deemed international because it is “motivated by a ‘transnational ideology,’ ”<sup>72</sup> and “the court might interpret a person inspired by ISIS to be acting ‘for or on behalf of’ the group, even if she had no contact with the group.”<sup>73</sup> This leads to clearly disproportional protections between purely domestic citizens

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<sup>67</sup>Sinnar, *supra* note 45, at 1376–77.

<sup>68</sup>Sinnar, *supra* note 45, at 1378–86.

<sup>69</sup>Sinnar, *supra* note 45, at 1384.

<sup>70</sup>Sinnar, *supra* note 45, at 1387–88.

<sup>71</sup>Sinnar, *supra* note 45, at 1390–91.

<sup>72</sup>Sinnar, *supra* note 45, at 1347.

<sup>73</sup>Sinnar, *supra* note 45, at 1348.

influenced by an extremist (Islamist) ideology as opposed to purely domestic citizens influenced by extremist (white supremacist) ideology, even if that domestic, white supremacist ideology also has roots in a global white supremacist movement.<sup>74</sup> It also lends itself to the types of social abuses and ramifications that Norris describes,<sup>75</sup> and Sinnar similarly explores both the influence of racism in the creation of this division, and its effects in reinforcing that racism.<sup>76</sup>

But while Sinnar sees many of the same problems Norris does, her conclusion is strikingly different. Focusing on these criticisms and her arguments that the interests protecting domestic political activity from interference are also reflected in the international sphere, Sinnar argues that these interests mandate the government return these protections to U.S. citizens and others implicated in international terrorism cases.<sup>77</sup> She notes that these developments regarding foreign terrorist organizations have already received a good deal of scholarly criticism for many of the same reasons that she offered,<sup>78</sup> and acknowledges the concern that such an expansion in the domestic realm would have serious ramifications for disfavored political groups.<sup>79</sup> She also notes that non-criminal responses to terrorism might be more effective.<sup>80</sup>

So, if the desire is to undo disproportionality in terrorism investigations and prosecutions and creating a domestic terrorism statute or list of domestic terrorist organizations is not a good solution, she suggests fixing international terrorism investigations and prosecutions instead. Specifically, she suggests increasing oversight and accountability, including of foreign intelligence gathering, requiring a greater international connection before an investigation is offered FISA authority, and eliminating 18 U.S.C.A. § 2339B (criminalizing material support to a foreign terrorist organization) or limiting its application so that it no longer can be used to prosecute speech.<sup>81</sup>

Overall, Sinnar offers an important analysis of the legal framework for terrorism and its implications. Readers may still argue about whether she adequately responds to the argument that a different and specific threat to democracy is posed by government surveillance of domestic groups, and that this threat might justify offering

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<sup>74</sup>Sinnar, *supra* note 45, at 1337.

<sup>75</sup>See generally *supra* notes 10–14 and accompanying text.

<sup>76</sup>Sinnar, *supra* note 45, at 1361–66, 1395–97.

<sup>77</sup>Sinnar, *supra* note 45, 1394–1404.

<sup>78</sup>These criticisms are summarized by Sinnar, *supra* note 45, at 1400.

<sup>79</sup>Sinnar, *supra* note 45, at 1401.

<sup>80</sup>Sinnar, *supra* note 45, at 1402.

<sup>81</sup>Sinnar, *supra* note 45, at 1403–04.

added protections to domestic groups,<sup>82</sup> thereby necessitating this division. And it is easy to imagine the cynical response many might offer to her solution, perhaps best encapsulated by Norris's statement—"Realistically . . . the government will continue," so it should at least be consistent.<sup>83</sup> In turn, Sinnar's work is an important counterpoint to Norris's, highlighting the extent of the invasion that the government's current surveillance authorities are in terrorism cases, and reminding us that increasing that power is not necessarily desirable. Her scholarship is an irreplaceable addition to the understanding of this discrepancy so many have complained about and the complexity of resolving it. Both articles should be read and considered by those who are interested in moving this issue forward.

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<sup>82</sup>See generally *supra* notes 63–65 and accompanying text.

<sup>83</sup>See Sinnar, *supra* note 45, at 506 (referring to government's insistence on using the term "terrorism").

















